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BY

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OF THE CALIFORNIA BAR

IN FOUR VOLUMES

VOL. III.

SAN FRANCISCO:

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SUTHERLAND'S
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CHAPTER XCI.

BAILEES.

§ 3148. Bailees, who are.—The term "bailee" is not used in the limited sense "to keep, to transfer, or to deliver," as in section 71 of the act of 1850, concerning crimes and punishments.[1] A constructive delivery and acceptance is sufficient to constitute a bailment.[2] When a redemptioner pays an excess of money to the sheriff, the sheriff is bailee of the redemptioner as to the excess, who may recover it back on demand, it not having been paid over to the redemptionee.[3]

§ 3149. Bailor, liability of.—A man may steal his own property, if by taking it his intent be to charge the bailee with the property, and thus impose a loss on him.[4] Where property is not put in a bailee's charge by the owner, but comes into his possession through the owner's neglect, and where he may not know to whom it belongs or by whom it was left, he should not be responsible for delivering it to the wrong person, if he has exercised all the care that could be reasonably expected of him under the circumstances.[5] A depositary with whom goods have been stored by one confessedly acting as an agent must deliver them to the principal on his demand, notwithstanding the agent forbids him to do so.[6]

§ 3150. What property may be pledged.—Personal property may be pledged, mortgaged, hypothecated, or placed in trust upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case.[7] One personal obligation cannot be pledged to secure another personal obligation of the same person.[8] Under the law of Louisiana, there are two kinds

1 People v. Poggi, 19 Cal. 600; overruling People v. Cohen, 8 Cal. 42.

2 Sherman v. Hicks (N. Mex.), 94 Pac. 959.

3 McMillan v. Vischer, 14 Cal. 232.

4 People v. Stone, 16 Cal. 369.

5 Morris v. Third Ave. R. R. Co., 1 Daly, 202.

6 Ball v. Liney, 44 Barb. 505.

7 Hyatt v. Argenti, 3 Cal. 151. For the provisions of the California Civil Code on the contract of pledge, see §§ 2986-3011, inclusive.

8 International Trust Co. v. Cattle Co., 3 Wyo. 803, 31 Pac. 408, 19 L. R. A. 640.

of pledges, the pawn and the antichresis. A thing is said to be pawned when a movable is given as a security; the antichresis consists of movable objects.[9] But property pledged to the keeper of a brothel to secure payment for wine, etc., consumed in a debauch in said brothel, cannot be recovered of the pledgee by the pledgor.[10]

§ 3151. Pledgee's responsibility.—A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody or care of the goods pledged, and he is held responsible for ordinary negligence.[11] A horseshoer must use ordinary care in unhitching a horse left to be shod.[12] Fraudulently converting pledged property is embezzlement, and may be committed without parting with the possession of the property.[13]

§ 3152. Power to sell pledge.—A party depositing securities for securing the payment of debt, or advances made thereon, may agree that they shall be sold at the option or pleasure of the creditor.[14] A sale made under such authority is good without notice to the plaintiff of the time and place of such sale or previous demand of payment; but if no such agreement be made, the sale can be made only on notice to the pledgor.[15] And if not otherwise agreed, the sale must be at public auction.[16] In California, the pledgee is not authorized to sell the pledge without calling on the pledgor to redeem, and giving him reasonable notice of his intention to sell.[17] And where, without calling on the pledgor to redeem, the pledgee sold the pledge (a chose in action), it was a conversion of the pledge, and plaintiff might recover its value at the time of its conversion in excess of the

9 Livingston v. Story, 11 Pet. 351, 9 L. Ed. 746.

10 Taylor v. Chester, L. R., 4 Q. B. 309.

11 St. Losky v. Davidson, 6 Cal. 643; Murphy v. Bartsch, 2 Idaho, 636, 23 Pac. 82.

12 Rimmer v. Wilson, 42 Colo. 180, 93 Pac. 1110.

13 People v. McLean, 135 Cal. 306, 67 Pac. 770; Flohr v. Territory, 14 Okla. 477, 78 Pac. 565.

14 Hyatt v. Argenti, 3 Cal. 151.

15 Hart v. Barton, 7 J. J. Marsh. 322; Stearns v. Marsh, 4 Denio, 227, 47 Am. Dec. 248, 2 Kent Com. 749; De Lisle v. Priestman, 1 Brown (Pa.), 176; Hart v. Ten Eyck, 2 Johns. Ch. 62.

16 Castello v. City Bank, 1 N. Y. Leg. Obs. 25; Jones v. Thurmond's Heirs, 5 Tex. 318; Rankin v. McCullough, 12 Barb. 103; Morgan v. Dod, 3 Colo. 551; McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381.

17 Gay v. Moss, 34 Cal. 125.

demand secured by the pledge.[18] The notice of the sale of the pledge should apprise the pledgor of the time and place of sale; as the object is not that the notice should operate as a demand, but that the pledgor should be enabled to bid at the sale, or procure a good bid to be made, etc.[19]

§ 3153. **Demand.**—When a bailee disclaims his relation to the bailor, he cannot claim the right to require a demand for the money before interest is charged against him.[20]

§ 3154. **Lien on goods.**—A common carrier or innkeeper has a lien on the property for his reasonable and just charges therefor, but one who merely provides food, as an agistor or a livery-stable keeper, has, in general, no lien on the property, unless there is a special agreement to that effect.[21] But by section 3051 of the California Civil Code, as amended in 1907, every person who, while lawfully in possession of any article of personal property, renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safe-keeping, or carriage thereof, has a special lien thereon, dependent upon possession.[22] If the lien is not paid off in twenty days the holder may, upon ten days' notice, sell the property at public auction.[23]

§ 3155. **Note as security.**—When a promissory note is assigned as collateral security for a debt, and no special contract is made, the contract rights, duties, and liabilities are the same as in the case of the assignment of a note for value, except in one respect, which is that the assignee undertakes to pay to the assignor the overplus that he may receive on the collateral after the satisfaction of the principal debt.[24]

§ 3156. **Redemption of mining stocks pledged.**—The pledgee of mining stocks, upon the redemption of the pledge, is not obliged

18 Gay v. Moss, 34 Cal. 125. See Cal. Civ. Code, § 3001 et seq.

19 See Brown v. Ward, 3 Duer, 660; Castello v. City Bank, 1 N. Y. Leg. Obs. 25; Willoughby v. Comstock, 3 Hill, 389; Tucker v. Wilson, 1 P. Wms. 261; Lewis v. Graham, 4 Abb. Pr. 106. See Cal. Civ. Code, § 3001 et seq.

20 Dickinson v. Owen, 11 Cal. 71.

21 Lewis v. Tyler, 23 Cal. 364. As to agistor's lien under California code, see Lowe v. Woods, 100 Cal. 408, 38 Am. St. Rep. 301, 34 Pac. 959.

22 Cal. Civ. Code, § 3051, Stats. 1907, p. 85; Idaho Rev. Codes, § 3445, as amended 1899, p. 181; Williamson v. Moore, 10 Idaho, 749, 80 Pac. 227.

23 Cal. Civ. Code, § 3052.

24 Donohue v. Gamble, 38 Cal. 354, 99 Am. Dec. 399.

to return the identical certificates pledged, but may return similar certificates. Nor does the fact that the pledgee has sold the particular certificates pledged render him liable for a conversion, provided he restores similar certificates to the pledgor, on redemption, and has at all times been ready to do so.[25]

§ 3157. **Title to pledged property.**—A pledge does not vest the title in the pledgee. He has only a special property in or lien on the chattel pledged; and if the pledge is not redeemed by the time limited, it still retains the character of a pledge.[26] The bailee cannot dispute the title of his bailor, nor show who the real owner of the property is.[27]

§ 3158. **Use of property.**—An attaching creditor of the bailee, levying on the money in the hands of a stockholder with whom it had been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question, and could be distinguished.[28] The owner of a horse, which he has let to go a specified journey within a given time, cannot recover for the loss of the horse, if it dies from the effects, where it has only been driven in the manner agreed upon.[29]

§ 3159. **Property of plaintiff.**—Though it is usual to aver that the goods were the property of the plaintiff, we do not deem such an averment necessary. He could sue in his own name, if he were but the agent of the owner.[30]

§ 3160. **Money deposited for use of plaintiff.**—*Assumpsit* for money deposited with the defendant for the use of the plaintiff will not lie where the money was deposited by way of pledge as security for the performance of a special contract in writing, which is still open and unexecuted in part, and not rescinded by mutual consent; but, in such case, it is necessary to declare specially upon the written contract.[31]

25 Thompson v. Toland, 48 Cal. 99.

26 Heyland v. Badger, 35 Cal. 404; Cross v. Eureka etc. Canal Co., 73 Cal. 302, 2 Am. St. Rep. 808, 14 Pac. 885.

27 Davis v. Donohoe-Kelly etc. Co., 152 Cal. 282, 92 Pac. 639.

28 Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787.

29 Ruggles v. Fay, 31 Mich. 141. As to liability of hirer of thing to owner, see Devoin v. Lumber Co., 64 Wis. 616, 25 N. W. 552, 54 Am. Rep. 649; Malone v. Robinson, 77 Ga. 719.

30 N. Y. Code Commissioners; Cal. Code Civ. Proc., § 510.

31 Barrere v. Somps, 113 Cal. 97, 45 Pac. 177.

§ 3161. Innkeepers' liability at common law—Boarding-house keeper.—To hold a party liable at common law for the loss of goods at his inn, it must appear not only that he kept an inn and that the goods were lost there, but that he was acting in the capacity of innkeeper when the goods were received, and that the owner was his guest.[32] A boarding- and lodging-house keeper is liable for the loss of his guest's goods occasioned through the negligence of his own servants acting within the scope of their employment.[33] An innkeeper is liable for all loss or damage to the goods of his guests occurring while they are in his possession, except when such loss or damage is occasioned by the act of God or the public enemy, or through the fault of the owner.[34] In absence of an express contract to the contrary, a guest cannot enforce absolute liability upon the innkeeper for money left in his possession, unless the relation of innkeeper and guest existed at the time, or within a reasonable time preceding the loss.[35] Innkeepers are liable for the goods of a guest which are brought by him within the inn,[36] whether at the time of his arrival or subsequently.[37] Innkeepers are liable as insurers of their guests' property.[38] But not when the guest, after being duly warned, neglects any necessary precaution.[39] An innkeeper is only liable as a bailee for the horse of a person not his guest, but lodging elsewhere.[40]

32 Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762. For liability under the California statutes, see Civ. Code, §§ 1859, 1860.

33 Smith v. Read, 52 How. Pr. 14.

34 Hulett v. Swift, 42 Barb. 230; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. 742, 8 L. R. A. 97, 19 Am. St. Rep. 686; O'Brien v. Vaill, 22 Fla. 627, 1 Am. St. Rep. 219, 1 South. 137.

35 Clark v. Ball, 34 Colo. 223, 114 Am. St. Rep. 154, 82 Pac. 529, 2 L. R. A. (N. S.) 100.

36 Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590.

37 Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657. As to the extent of innkeeper's liability for articles of jewelry in usual wear, and for money, see Gile v. Libby, 36 Barb. 70; Wilkins v. Earle, 19 Abb. Pr. 190. See, also, Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Fay v. Pacific Imp. Co., 93 Cal. 253, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188.

38 Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; affirming S. C., 42 Barb. 230; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657.

39 Wilson v. Halpin, 1 Daly, 496, 30 How. Pr. 124. As to the effect of omission of guests to disclose value of package committed or offered to be committed to innkeeper's charge, see Wilkins v. Earle, 19 Abb. Pr. 190; Bendeston v. French, 44 Barb. 31.

40 Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409; affirming 36 Barb. 452; Healy v. Gray, 68 Me. 489, 28 Am. Rep. 80. Contra: Russell v. Fagan, 7 Houst. (Del.) 389, 8 Atl. 258.

§ 3162. **Delivery not necessary.**—A delivery of the goods to the innkeeper is not necessary to charge him with them. The innkeeper is bound to pay for them in any event, if stolen or carried away, even though the person who took them away is unknown.[41]

§ 3163. **Warehouseman's liability—Railroad.**—A warehouseman who received grain of another for the purpose of storage is only bound to ordinary care in its preservation.[42] When goods arrive at the point of destination, and are placed in the warehouse of the company, its liability as warehouseman commences, and from that time it is bound to use only ordinary care and diligence in safely keeping and delivering the goods.[43] The failure of a bonded warehouseman to deliver, upon demand of the owners, goods deposited with him, upon which the duties have been paid, casts upon him the burden of accounting for them.[44] A warehouseman is estopped to deny the receipt and possession of the goods represented therein.[45] In an action against a railroad company for loss of goods as common carriers, where the proofs render it uncertain whether the goods are lost while being transported, or after being deposited in the warehouse, and there is no proof of want of ordinary care, a judgment for the plaintiff will be reversed.[46] To charge the railroad corporation as warehouseman, the plaintiff must show a want of ordinary care on its part in the custody of the goods.[47] A warehouseman is liable for the full value where it has been marked upon the article by the bailor, and even though the receipt provides non-liability for more than twenty-five dollars.[48]

§ 3164. **Property sold.**—After sale of personalty, and before delivery, the seller has the rights and duties of a depositary for hire,[49] and is bound to keep the property with ordinary care,

41 Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590.

42 Myers v. Walker, 31 Ill. 353.

43 Jackson v. Sacramento V. R. R. Co., 23 Cal. 268. See, also, Collins v. Burns, 63 N. Y. 1; Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631; Turrentine v. Wilmington etc. R. R. Co., 100 N. C. 375, 6 Am. St. Rep. 602, 6 S. E. 116.

44 Schwerin v. McKie, 51 N. Y. 180, 10 Am. Rep. 581.

45 Riley v. Loma Vista Ranch Co., 1 Cal. App. 488, 82 Pac. 686.

46 Jackson v. Sacramento V. R. R. Co., 23 Cal. 268.

47 Id. See, also, Willett v. Rich, 142 Mass. 356, 56 Am. Dec. 684, 7 N. E. 776.

48 Gannon v. Seehorn, 44 Wash. 87, 86 Pac. 1116.

49 Idaho Rev. Codes, § 3331.

being responsible for its loss through negligence.[50] And if property is purchased and received upon agreement that it will be received back, and the money be refunded, such property immediately revests in the seller when the purchaser refuses to accept the same, and the purchaser thereafter holds it as a bailee.

§ 3165. **Insurance.**—Where a warehouseman agrees to insure goods deposited with him, and does so, and subsequently the goods are destroyed by fire, and he agrees with the owner to prosecute suits against the insurance company in his own name, and does so, but the suit is defeated owing to the terms of a receipt given to the owner, at his request, by the warehouseman, the warehouseman is not liable.[51]

§ 3166. **Parties.**—Warehousemen occupying a private "bonded warehouse," who hold goods of a merchant subject to the lien of government for unpaid duties, under the acts of Congress of 1854 and 1862, are liable to the owner in an action for a loss of them, without joining as a defendant the revenue officer in whose custody the statute declares such goods to be. The custody intended by the statute is a guard or watch, and not legal possession for all purposes.[52]

§ 3167. **Removal of goods.**—Where the bailors agreed that the goods should be stored in a certain warehouse at their risk and expense, their removal by an agent of the bailees, though without their knowledge, charged them for the safe-keeping of their goods after their removal, and they were responsible for any damage to said goods caused by their removal to an insecure or improper place of storage.[53]

§ 3168. **Waiver of lien.**—When a warehouseman who has goods in charge, states to one who is about to take possession of the same, by a legal process, that he has no charges on the goods, this is a waiver of the warehouseman's lien for charges, if any be had.[54]

50 Strong v. Morgan, 8 Idaho, 269, 67 Pac. 1123.

51 Cole v. Favorite, 69 Ill. 457.

52 Waldron v. Romaine, 22 N. Y. 370; Cartwright v. Wilmerding, 24 N. Y. 536; Brissac v. Lawrence, 2 Blatchf. 121, Fed. Cas. No. 1888; Schwerin v. McKie, 5 Rob. (N. Y.) 404.

53 St. Losky v. Davidson, 6 Cal. 643.

54 Blackman v. Pierce, 23 Cal. 508.

§ 3169. **Wharfingers.**—Where grain was delivered to wharfingers with instructions to ship to a certain party when certain rates could be had, but before shipment they were instructed not to ship to such party, but to another, and they neglected the second instruction, but acted on the first, whereby the price of the grain was lost to the owner on account of the insolvency of the consignee, it was held that the wharfingers were liable.[55]

§ 3170. **Pasturing stock.**—Where defendant, an agistor of cattle, placed plaintiff's horse in a field, knowing that a bull kept on adjoining land had several times been found in the field in which the horse was placed, and that there was no sufficient fence to keep it out, and there were several heifers in the field with the horse, and the horse was gored and killed by the bull, in an action for breach of contract, in not taking reasonable care of the horse, it was held that a knowledge of the mischievous nature of the bull was not essential to the liability of defendant, and a verdict against him would not be disturbed for want of such knowledge.[56] If horses being boarded by a liveryman are burned in a fire, and the burning was not due to negligence of such liveryman, he is not liable for their loss.[57]

§ 3171. **Animals in pasture.**—A pasture in which a bailee for hire of horses put them, and from which they escaped, is in law not inclosed at all, it not being wholly inclosed by a good and sufficient fence.[58] Before selling an animal to pay off a lien for its keep, the owner, if known, must be notified, or the sale will be invalid, even though the owner have actual notice thereof.[59]

§ 3172. **Escrow papers.**—One attempting to cancel a deed held in escrow, on grounds of fraud, must offer to return the consideration already received.[60]

55 Howell v. Morlan, 78 Ill. 162. As to liability of wharfingers, generally, see Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990; Union Ice Co. v. Crowell, 55 Fed. 87; Willey v. Allegheny City, 118 Pa. St. 490, 4 Am. St. Rep. 608, 12 Atl. 453.

56 Smith v. Cook, L. R., 1 Q. B. Div. 79. That an agistor is not an insurer of the property, see Gibbs v. Coykendall, 39 Hun, 140.

57 Weaver v. Montana Stables, 46 Wash. 65, 89 Pac. 154.

58 Shropshire v. Sidebottom, 30 Mont. 406, 76 Pac. 941.

59 Bailey v. O'Fallon, 30 Colo. 419, 70 Pac. 755.

60 Rubie etc. Co. v. Princess Alice Gold Min. Co., 31 Colo. 158, 71 Pac. 1121.

§ 3173. **Estoppel—Hirer of chattels.**—A bailee or agent cannot dispute the original title of the bailor or principal, from whom he has received property.[61] A claim by a bailee, in his answer, of the ownership of goods intrusted to his keeping, and a denial of any title in his bailor, obviates the necessity of proving a demand for the goods before bringing suit, and waives the omission of an allegation of such demand.[62] To the general rule that a bailee will not be allowed to set up title in a third party, in an action brought by the bailor, there is an exception in the cases where the bailor's possession was obtained by fraud.[63] A hirer of chattels, in the absence of a special agreement, is not bound to make good their loss by fire, while in his possession, without his fault.[64] He is bound to use only ordinary care, and, on failure to return a lost article, the burden is on him to show the use of such care.[65] The lessor of sheep may replevy same, if sold by the lessee to a third person.[66]

§ 3174. **Liability of bailees.**—Although bailees without reward are liable only for gross negligence, the question of gross negligence depends in part upon the nature of the thing bailed. The test is to consider whether they have omitted that care which bailees without hire or mandatories of ordinary prudence usually take of property of the nature of that in question.[67] And liability depends upon the abuse of the thing hired, or such negligence in its use as brings responsibility upon the hirer.[68] A bailee of mining stock is not liable for a sale of the bailor's stock, if he at all times holds and keeps for the bailor an equal number of shares of equal value, and replaces them whenever called upon. If the bailee of personal property sell it in violation of his authority, the owner may, as a general rule, ratify the sale and demand the proceeds.[69]

61 Vosburg v. Huntington, 15 Abb. Pr. 154; Davis v. Donohoe-Kelly, 152 Cal. 282, 92 Pac. 639. Compare Lund v. Seaman's Sav. Bank, 37 Barb. 129.

62 Daggett v. Gray, 110 Cal. 169, 42 Pac. 568.

63 Hayden v. Davis, 9 Cal. 573. As to the liability of a transferee of property bailed, see Robinson v. Haas, 40 Cal. 474.

64 Story on Bailment, § 414; Hyland v. Paul, 33 Barb. 241.

65 Shropshire v. Sidebottom, 30 Mont. 406, 76 Pac. 941; Mont. Rev. Code, § 5158; Alden v. Grande R. Lumber Co., 46 Or. 593, 81 Pac. 385; Rimmer v. Wilson, 42 Colo. 180, 93 Pac. 1110.

66 Turnbow v. Beckstead, 25 Utah, 468, 71 Pac. 1062.

67 Tracy v. Wood, 3 Mason, 132, Fed. Cas. No. 14130.

68 See Jones on Bailments, 120; Reeves v. The Constitution, Gilp. 579, Fed. Cas. No. 11659.

69 Atkins v. Gamble, 42 Cal. 86, 10 Am. Dec. 282.

§ 3175. **Several defenses.**—In an action to recover securities pledged with defendants, the defendants in their answer may deny knowledge, etc., sufficient to form a belief whether the securities belonged to plaintiff; and also aver that the securities were delivered to them by plaintiff as collateral to debts yet unpaid.[70]

§ 3176. **Negligence and delay.**—Boxes of poultry packed in ice were delivered by the plaintiff to a carrier by steamboat, and his clerk signed a receipt for them, stating their contents. The boat was delayed by fog, no attention was paid to the poultry, and it was spoiled. Plaintiffs had long sent poultry by defendant's boat, who, when delayed, had often forwarded the same by rail. It was held that defendants were liable.[71] A common carrier is not only responsible for negligence, but is an insurer against loss not occasioned by the act of God, the public enemies, or the fault of the party suffering the loss. When loss occurs, the burden of proof is upon the carrier to show that it resulted from one or the other of these excepted cases.[72] An injury to a passenger without his fault is *prima facie* proof of negligence on the part of the carrier.[73]

§ 3177. **Effect of special contract.**—A common carrier may, by special contract, restrict or modify his common-law liability as an insurer of goods received for transportation.[74] Or the carrier may contract that he shall have the benefit of any insurance effected by or on account of the owner.[75] The validity of an express contract between the owner of goods and a carrier, limiting the general responsibility of the latter, is undoubted.[76] The limitation may be to points on the carrier's own line of road.[77]

§ 3178. **Effect of special contract—Express company.**—A receipt given by an express company, and limiting their liability at

70 Townsend v. Platt, 3 Abb. Pr. 325.

71 Peck v. Weeks, 34 Conn. 145.

72 Bohannan v. Hammond, 42 Cal. 227.

73 Yeomans v. Contra Costa S. N. Co., 44 Cal. 72.

74 Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173; Meyer v. Harnden's Express Co., 24 How. Pr. 290.

75 Mercantile Mut. Ins. Co. v. Calebs, 20 N. Y. 173.

76 New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465; Merchants D. T. Co. v. Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, and note, 6 S. W. 881; Falkenau v. Fargo, 55 N. Y. 642, 44 How. Pr. 325.

77 Taffe v. Oregon R. R. Co., 41 Or.

the time of the delivery of them for carriage, is not a defense in an action for the loss of such goods, unless knowledge of the contents of the receipt is brought home to the plaintiff.[78] The Adams Express Company gave receipts for goods, "value under fifty dollars, unless otherwise herein stated." It was held that this did not exempt them from liability beyond that amount for goods lost by their want of ordinary care.[79] A parcel worth six hundred and seventy-five dollars was lost in transportation by the Adams Express Company. Their agent had given a printed receipt containing a stipulation that in no event "shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured" by the company, "and so specified in this receipt." The value of the parcel was not made known to the company, and it was not specially insured. It was held that the company was not liable for more than fifty dollars, with interest.[80] It seems to be the prevailing rule that although common carriers may limit their responsibility by an express contract, they cannot do so by a mere notice, even when the notice is brought to the knowledge of the person with whom they deal, unless it is also clearly and unequivocally assented to by them.[81] But they may qualify their liability by general notice, as to the manner of delivery, or that information shall be given of the value of any article if it exceeds a certain sum, and that an additional price must be paid therefor.[82] If the defense is the operation of a peril of a class excepted, the answer should specify what the particular peril was, so that the plaintiff may meet it.[83] Where the complaint is *ex contractu,* and does not allege prepayment, an allegation that the plaintiff had notice of the condition on which the defendant received them, and delivered them with knowledge of it, is enough.[84]

64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187.

78 Belger v. Dinsmore, 51 Barb. 69.

79 Orndorff v. Adams Express Co., 3 Bush. 194, 96 Am. Dec. 207.

80 Brehme v. Dinsmore, 25 Md. 328.

81 See Rawson v. Pennsylvania R. R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Buckland v. Adams Express Co., 97 Mass. 125, 93 Am. Dec 68; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. Ed. 465; Cal. Civ. Code, § 2174.

82 See 2 Greenl. Ev., § 215; Orange County Bank v. Brown, 9 Wend. 115; Hopkins v. Westcott, 6 Blatchf. 64, Fed. Cas. No. 6692; Gorham Mfg. Co. v. Fargo, 45 How. Pr. 90; Cal. Civ. Code, § 2176.

83 Woodworth v. McBride, 4 Wend. 227.

84 Wyld v. Pickford, 8 Mees. & W. 443.

§ 3179. **Title to goods.**—The master of a vessel is entitled to prove that the goods which he failed to deliver at a certain place, according to agreement, belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of such goods by fraud.[85]

BAILEES—FORMS OF COMPLAINTS.

§ 3180. **Against a receiptor.**

Form No. 835.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the defendant received from the plaintiff certain goods, and defendant thereupon gave to the plaintiff a receipt for the same, of which the following is a copy: [Copy receipt.]

II. That on the . . . day of . . ., 19. . , the plaintiff demanded of the defendant that he deliver said goods, but he refused to do so, to the plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3181. **For injury to pledge.**

Form No. 836.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the plaintiff delivered to the defendant [describe articles], the property of this plaintiff, of the value of . . . dollars, as a pledge to the defendant to secure the sum of . . . dollars, theretofore loaned by the defendant to the plaintiff, which articles the defendant received for that purpose, and agreed with the plaintiff to take good care of the same until they should be redeemed by the plaintiff.

II. That the defendant so negligently conducted in respect to said articles, and so carelessly used the same, that they became, by reason of his negligence and carelessness, greatly damaged [state injury], and were rendered of small value to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

85 Hayden v. Davis, 9 Cal. 573.

§ 3182. For loss of pledge.

Form No. 837.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff delivered to the defendant [describe articles], the property of this plaintiff, of the value of . . . dollars, by way of pledge to the defendant, to secure the sum of . . . dollars theretofore loaned by the defendant to the plaintiff, which articles the defendant received for that purpose, and agreed with the plaintiff to take good care of the same until they should be redeemed by the plaintiff.

II. That the defendant has failed to fufill said agreement on his part; and, on the contrary, so negligently and carelessly kept said articles, that while they were in his possession for the purposes aforesaid, they were through his negligence lost, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3183. For goods taken from plaintiff's bailee.

Form No. 838.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the plaintiff was, and still is, the owner of [describe goods], of the value of . . . dollars; which goods were then in the possession of one . . ., to whom the plaintiff had leased the same for a certain term [or, with whom the plaintiff had deposited the same for storage, etc.].

II. That on the . . . day of . . ., 19.., at . . ., the defendant wrongfully took said goods and chattels from the possession of said . . ., and still unjustly detains the same, to plaintiff's damage in the sum of . . . dollars.

III. [That heretofore, to-wit, on the . . . day of . . ., 19.., said term expired, and that plaintiff thereupon became entitled to the immediate and exclusive possession of said goods.]

Wherefore, plaintiff demands judgment against defendant for the recovery of the possession of said goods and chattels, or for the sum of . . . dollars, the value thereof, in case a delivery cannot be had; together with . . . dollars damages, and for the costs of this action.

§ 3184. For not taking care of and returning goods.

Form No. 839.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff delivered to the defendant [describe the articles], of the value of . . . dollars, to be by the defendant safely and securely kept for the plaintiff [for a compensation], and to be returned and redelivered to the plaintiff on request, which the defendant then and there promised and undertook to do.

II. That the plaintiff performed all the conditions thereof on his part, and on the . . . day of . . . , 19.., requested the defendant to redeliver said goods.

III. That the defendant did not take due care of and safely keep the said goods for the plaintiff, nor did he, when so requested, or afterwards, or at all, redeliver the same to the plaintiff; but on the contrary, the defendant so negligently and carelessly conducted himself with respect to the said goods, and took so little care thereof, that by and through the carelessness, negligence, and improper conduct of the defendant and his servants, the goods were wholly lost to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3185. Against hirer of chattels, for not taking proper care of them.

Form No. 840.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant hired and received of the plaintiff certain furniture [briefly designate the same], of the value of . . . dollars, for the period of . . . then next ensuing, at the sum of . . . dollars per month.

II. That the defendant did not take proper care of the said furniture, or use the same in a reasonable or proper manner during the said time, but took so little care thereof that said furniture became injured and deteriorated in value, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3186. For injury to horse, resulting from immoderate driving.

Form No. 841.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant hired and received from the plaintiff a horse to drive, which was of the value of . . . dollars.

II. That the defendant drove the horse so hard, and so neglected the care of him, that the said horse afterwards, and because of said immoderate driving and want of proper and reasonable care, on the . . . day of . . ., 19. . , died [or otherwise state the injury], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3187. For driving horse on a different journey from that agreed.

Form No. 842.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant hired and received from the plaintiff a horse and carriage, of the value of . . . dollars, the property of the plaintiff, to drive from . . . to . . ., and not elsewhere.

II. That the defendant, in violation of the agreement, performed a different journey than that aforesaid, and drove said horse and carriage from . . . to . . .

III. That he did not take proper care of said horse and carriage, but so negligently drove and managed the same that the carriage was broken, to the damage of plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3188. Against innkeeper, for loss of baggage.

Form No. 843.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was the keeper of a common inn in the city of . . ., known as "the . . . Hotel."

II. That on the . . . day of . . ., 19. . , this plaintiff was received by the defendant into the said inn as a traveler, together with his baggage, consisting of . . ., of the value of . . . dollars, [here describe articles], the property of the plaintiff.

III. That the defendant and his servants so negligently and carelessly conducted themselves and misbehaved in regard to the same, that while he so remained at said inn his said trunk was taken away from the room of the plaintiff, by some person or persons to the plaintiff unknown; and thereby the same was wholly lost to the plaintiff to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 3189. For loss of pocket-book.

Form No. 844.

[Title.]

The plaintiff complains, and alleges:

I. That the defendant, at the time hereinafter stated, was a common innkeeper at . . .

II. That on the . . . day of . . ., 19. . , he received and entertained this plaintiff as a guest at his inn for hire.

III. That while the plaintiff was then and there his guest, the defendant undertook, for compensation paid him by the plaintiff, to keep safely in one of his sleeping-rooms of his said hotel or inn the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person, and that the plaintiff thereupon put into his said sleeping-room in said hotel or inn his clothing, his pocket-book containing money, and such other property as is usually carried upon the person, of the value of . . . dollars, and left the same in the possession and charge of the defendant, both as innkeeper and as special bailee as aforesaid.

IV. That while this plaintiff was sleeping his pocket-book and money were, by the negligence, carelessness, and dishonesty and improper management of the defendant and his servants, lost and stolen.

V. That the amount of the said money belonging to the plaintiff so lost and stolen, while the same was under the charge of the defendant, was . . . dollars in gold coin of the United States, and that the plaintiff is by profession [state business], and that said

sum was such as he might reasonably and properly carry with him with reference to his circumstances and business.

[DEMAND OF JUDGMENT.]

§ 3190. For loss of goods by theft.

Form No. 845.

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [Same as in form No. 843.]

III. That while plaintiff was such guest, said trunk was broken open and said articles stolen by some person to plaintiff unknown, whereby the same became lost, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3191. For refusing to receive guest.

Form No. 846.

[TITLE.]

The plaintiff complains, and alleges:

I. [As in form No. 843.]

II. That on the said date the plaintiff, who was then traveling from . . . to . . ., came to said inn and demanded of defendant that he be received and lodged as a guest during the night and day next ensuing.

III. That plaintiff was ready and willing and tendered defendant his reasonable charges for such lodging.

IV. That defendant had ample room and accommodation to receive and lodge plaintiff during such time, but refused to receive him, whereby [allege special damage], to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3192. Against warehouseman, for injury to goods by neglect to obey instructions.

Form No. 847.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, in consideration of the sum of . . . dollars, then and there paid to him by plaintiff, agreed to store and keep safely in his warehouse at . . ., the following goods, the property of the plaintiff,

of the value of . . . dollars, consisting of [here designate goods], for the term of . . . weeks from said date, and then safely to deliver said goods to plaintiff at his request, and then and there received said goods for such purpose.

II. That at the time of the delivery of said goods to defendant the plaintiff informed him that it was necessary to the preservation of said goods that they should be handled with care.

III. That the defendant negligently allowed the same to be handled without care, and roughly moved and broken, so that the same, through the negligence of the defendant and his servants, became entirely ruined, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3193. For refusal to deliver goods.

Form No. 848.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant, in consideration of the payment to him of . . . dollars [or . . . cents per ton per month], agreed to keep in his warehouse [. . . tons of wheat], and to deliver the same to plaintiff on payment of the said sum.

II. That thereupon the plaintiff deposited with the defendant the said [. . . tons of wheat].

III. That on the . . . day of . . ., 19. . , the plaintiff requested the defendant to deliver the said goods, and tendered him . . . dollars [or, the full amount of storage due thereon], but the defendant refused to deliver the same, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

FORMS OF ANSWERS.

§ 3194. Denial of ownership and possession.

Form No. 849.

[TITLE.]

The defendant answers to the complaint, and alleges:

That at the time of the grievance alleged the defendant was not the owner, and had not the possession or control of the prem-

ises in which said hole or hatchway was, [or, that the said horse and carriage alleged to have been injured were not the property of the plaintiff].

§ 3195. Plaintiff's own negligence.

Form No. 850.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the defendant and his servants used due care and diligence about the construction of the said building [or, in repairing said street, and replacing the pavement thereof; or, in guarding the said excavation with proper bulwarks, and in putting up lights during the night-time; or otherwise, according to the allegations in the complaint], and that said injury was not caused by any negligence on the part of the defendant or his servants, but was owing to the negligence and fault of the plaintiff himself.

§ 3196. Denial of possession of vicious dog.

Form No. 851.

[TITLE.]

The defendant answers to the complaint, and alleges:

That he does not own the said dog, and never did; and that he was not the possessor of the said dog at the time of the grievances alleged, nor at any other time, before or since said alleged grievances.

§ 3197. Denial of scienter.

Form No. 852.

[TITLE.]

The defendant answers to the complaint, and alleges:

That at the time of the grievances alleged the defendant did not know, and had no reason to believe, that said dog was accustomed to bite mankind, or was of a mischievous nature [or otherwise, according to the allegations of the complaint.]

§ 3198. Denial of bailment.

Form No. 853.

[TITLE.]

The defendants answer to the complaint, and allege:

I. That said goods described in the complaint were not the property of the plaintiff, and were not deposited with the defendants by him or his agents.

II. That the same was the property of one A. B., to whom the possession of them belonged when this action was brought.

§ 3199. Denial of bailment.

Form No. 854.

I. The defendant denies that said [subject of bailment] was the property of [alleged bailor], or that it was deposited with the defendant by him or his agents.

II. That the same was the property of one M. N., to whom the possession of it belonged when this action was brought.

III. That before the commencement of this action the defendant had, on the demand of said M. N., the true owner, delivered the same to him.

§ 3200. Denial of delivery of goods.

Form No. 855.

The defendant denies that the plaintiff ever delivered to him the goods mentioned in said complaint, or that he received the same.

§ 3201. Denial of loss.

Form No. 856.

The defendants deny that the said goods were lost to said . . . through any negligence or misbehavior of the defendants, and deny that they have any knowledge or information sufficient to form a belief whether the said goods were ever lost to said . . .

§ 3202. That the value of the goods lost was agreed on.

Form No. 857.

I. The defendant alleges that at the time of the delivery of said property by the plaintiff to the defendant a written contract was entered into between the parties, by which it was mutually agreed, as a part of the contract of carriage, that the true value of said property was . . . dollars [or, did not exceed the sum of . . . dollars, and that the liability of defendant in case of loss or injury should not exceed that sum; or set forth copy of contract].

II. That previous to the commencement of this action the defendant duly tendered to the plaintiff the said sum of . . . dollars, but that plaintiff refused to accept the same, and the defendant has kept the said tender good, and now brings the said sum into court for the use of the said plaintiff, and in continuance of said tender.

§ 3203. That the damage was by plaintiff's fault.

Form No. 858.

I. The defendant alleges that the goods mentioned in the complaint, called . . ., were a corrosive and destructive substance, rotting casks and cask-hoops, and other substances in contact with it, which the plaintiffs knew, but which the defendant did not know, and could not reasonably be expected to know.

II. That the plaintiffs did not inform the defendant of the destructive nature of the goods, and negligently delivered the same to the defendant in bulk, and thereby induced the defendant to believe that the same might be placed in contact with casks, cask-hoops, and other substances, safely; and he in consequence stowed the same among . . ., whereby the injury complained of was caused, and not otherwise.

§ 3204. That the goods were lost by a risk for which defendants were not liable.

Form No. 859.

I. The defendants allege that the merchandise mentioned in the complaint was delivered by the plaintiffs to the defendants, and by them received on board the steamer Lexington, under and in pursuance of a special contract made between them for the transportation of the same from New York to Stonington, of which the following is a copy: [Copy of the contract.]

II. That while the merchandise was well and properly stowed on board the steamboat, and being carried pursuant to the contract, and without any carelessness or misconduct of defendants or their servants, or any defect in the boat or its equipments, the boat, by mere casualty and accident, took fire, and was consumed, with its cargo, including the merchandise of the plaintiffs; and thereby, by accident and casualty of fire, and not by any negligence, misconduct, or default of the defendants, the merchandise was not delivered at Stonington, and became lost to the plaintiffs.

§ 3205. That the contract was special.

Form No. 860.

That the goods mentioned in the complaint were delivered by the plaintiffs to, and received by, the defendants, upon a special contract between them, whereby it was provided that [here set forth matter relied on, with averments bringing the goods within it].

§ 3206. That bailment is held as a pledge.

Form No. 861.

I. The defendant alleges that on or about the . . . day of . . . , 19.. , the defendant loaned to the plaintiff the sum of . . . dollars, which loan is still due and unpaid, and that the said [property bailed], was thereafter [or, at the time of said loan], delivered by the plaintiff to the defendant as security for the repayment of said loan, and is still held by the defendant for that purpose.

CHAPTER XCII.

COMMON CARRIERS.

§ 3207. Liability of common carrier of goods—Degree of care.—Under the general railroad law, all railroads are compelled to act as common carriers for the conveyance of all passengers and property which may come to their road for that purpose.[1] As common carriers, they are bound to safely transport and deliver goods to the point of their destination, unless the same are lost by the act of God or the public enemy. In such case, the burden of proving that they are thus lost rests upon the company.[2] But the breach of a contract to navigate on a river is excused if caused by the river's freezing, so as to make navigation impossible, this being an act of God. That the contractor, at the time of making the contract, had reasons, which were equally obvious to the other party, for expecting such an event, does not alter the case.[3] A railroad company must provide all reasonable precaution to protect property of others, and it must also be properly used, and the company is liable for carelessness. It is also bound to exercise a degree of care proportionate to the danger.[4]

§ 3208. Degree of care toward passengers.—A carrier of persons without reward must use ordinary care and diligence for their safe carriage.[5] A carrier of persons for reward is not an insurer,[6] but is bound to use the utmost care and diligence for their safe carriage; must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.[7] The carrier of a passenger is liable for the slightest

1 Contra Costa R. R. Co. v. Moss, 23 Cal. 323. That a general truckman is a common carrier, see Architectural Iron Co. v. Hurlburt, 15 Misc. 93, 36 N. Y. Supp. 808, 71 N. Y. St. Rep. 830.

2 Jackson v. Sacramento Valley R. R. Co., 23 Cal. 268; Bohannan v. Hammond, 42 Cal. 227; Bush v. Barrett, 96 Cal. 202, 31 Pac. 2. As to the obligations of carriers of property, see Civ. Code, § 2114, and following.

3 Worth v. Edmonds, 52 Barb. 40.

4 Gerke v. California Steam Nav. Co., 9 Cal. 251, 70 Am. Dec. 650. See Little Miami R. R. Co. v. Washburn, 22 Ohio St. 332.

5 Cal. Civ. Code, § 2096.

6 Taillon v. Mears, 29 Mont. 161, 74 Pac. 421; Foster v. Seattle El. Co., 35 Wash. 177, 76 Pac. 995.

7 Cal. Civ. Code, § 2100. See, also, Cal. Civ. Code, §§ 2102-2104; Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Tread-

negligence.[8] A carrier is not bound to do everything that can be done to insure the safety of its passengers, but need exercise only the highest degree of care consistent with the practical conduct of its business.[9] Care which would involve a burden amounting to a practical prohibition of its business need not be exercised.[10] It is no defense to an action for injury to a passenger, that the carrier did as other carriers have customarily done.[11]

§ 3209. **Injury remotely attributable—Insurer.**—A common carrier is absolutely liable for injury remotely attributable to his own default, though inevitable accident be the immediate cause.[12] It would seem that the common carrier is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising—the acts of God and the public enemy alone excepted.[13]

§ 3210. **Letters.**—A common carrier of letters inclosed in envelopes is not liable for any loss beyond that of an ordinary letter, unless informed of the value of the same at the time he received the same.[14] A contractor for carrying the mail is liable for the negligence of the carrier.[15]

§ 3211. **Liability of inland carriers for loss.**—In California, unless the consignor accompanies the freight and retains the exclusive control of it, the carrier is liable from the time he

well v. Whittier, 80 Cal. 583, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498; Osgood v. Los Angeles Tr. Co., 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169. As to the care and diligence required, directions, conflict of orders, stowage, deviations, etc., delivery of freight, obligations when freight not delivered, and how exonerated from liability, see Civ. Code, §§ 2114-2121.

8 Sambuck v. Southern Pacific Co., 138 Cal. xix, 71 Pac. 174.

9 Johnson v. Seattle El. Co., 35 Wash. 382, 77 Pac. 677; Denham v. Washington Water Power Co., 38 Wash. 354, 80 Pac. 546.

10 Foster v. Seattle El. Co., 35 Wash. 177, 76 Pac. 995.

11 Williams v. Spokane Falls & N. Ry. Co., 39 Wash. 77, 80 Pac. 1100.

12 Michaels v. New York Cent. R. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 425; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292. See Black v. Chicago etc. R. R. Co., 30 Neb. 197, 46 N. W. 428; Bills v. New York etc. R. R. Co., 84 N. Y. 5.

13 Hooper v. Wells, Fargo & Co., 27 Cal. 10, 85 Am. Dec. 211. See Grace v. Adams, 100 Mass. 506, 97 Am. Dec. 117, 1 Am. Rep. 131; Bank of Kentucky v. Adams Express Co., 93 U. S. 186, 23 L. Ed. 872; Bohannan v. Hammond, 42 Cal. 227.

14 Hayes v. Wells, Fargo & Co., 23 Cal. 185, 83 Am. Dec. 89. See Cal. Civ. Code, §§ 2161, 2162, 2167.

15 Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

accepts it until he is relieved from liability, pursuant to the provisions of the statute, for loss or injury from any cause whatever, except—1. An inherent defect, vice, or weakness, or a spontaneous action of the property itself; 2. The act of a public enemy of the United States, or of this state; 3. The act of the law; or, 4. Any irresistible superhuman cause; and the carrier is liable, even in cases coming within the above exceptions, if his want of ordinary care exposes the property to the cause of the loss.[16] A carrier is liable for delay, only when it is caused by his want of ordinary care and diligence.[17]

§ 3212. **Liability as ordinary bailees.**—Where carriers make it the duty of their agents by general regulation to take charge of property inadvertently left in their cars, and provide at their depot a place for its safe-keeping, they must in taking charge of the property be looked upon as in the light of bailees for hire, who are bound to exercise ordinary care and diligence.[18] A railroad company having notified a consignee upon arrival of goods, is liable only as a warehouseman for such goods burned four days after such arrival and notice.[19]

§ 3213. **Liability, how terminated.**—The liability of a carrier ceases, and he becomes an ordinary bailee, on refusal of the consignee to receive the goods,[20] or by delivering to an agent expressly or impliedly authorized to receive goods.[21] Such delivery to agent must be regularly made, and in due course of business.[22] But though liable as insurer until actual delivery,[23] he may be discharged by neglect of owner of goods to take them in due season.[24]

16 See Civ. Code, §§ 2194, 2195.

17 Civ. Code, § 2196; Palmer v. Atchison etc. R. R. Co., 101 Cal. 187, 35 Pac. 630.

18 Angell on Carriers, §§ 75, 112, 131, 302; Edwards on Bailments, 35, 36; Powell v. Myers, 26 Wend. 591; Tower v. Utica etc. R. R. Co., 7 Hill, 47, 42 Am. Dec. 36; Morris v. Third Ave. R. R. Co., 1 Daly, 202. See the case of O'Bannon v. Southern Express Co., 51 Ala. 481.

19 Denver etc. Ry. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76, 69 Pac. 578.

20 Hathorn v. Ely, 28 N. Y. 78; Johnson v. New York Cent. R. R. Co., 33 N. Y. 610, 88 Am. Dec. 416.

21 Platt v. Wells, 26 How. Pr. 442; Hotchkiss v. Artisans' Bank, 42 Barb. 517.

22 Cronkite v. Wells, 32 N. Y. 247.

23 Fisher v. Northern Pacific Ry., 49 Wash. 258, 126 Am. St. Rep. 867, 94 Pac. 1073.

24 Roth v. Buffalo etc. R. R. Co., 34 N. Y. 548, 99 Am. Dec. 736; Gilhooly v. New York etc. S. N. Co., 1 Daly, 197. See, also, Civ. Code, § 3155.

§ 3214. **Liability for live-stock.**—Whether in the conveyance of live-stock the duties and liabilities of the common law attach to the carrier has been questioned by the Oregon court.[25] In Michigan, the carriers of live-stock are not regarded as common carriers, unless they have, by special contract, expressly assumed the responsibilities of such.[26] Where the defendants, as carriers, transporting live-stock, met with an accident for which they were not liable under their contract, by which the animals were killed, it was held that they were not liable for not delivering the carcasses, where they had offered to carry the carcasses through, if the owner, who was present, would take charge of them, and the offer was declined.[27] If a carrier undertakes to unload live-stock with or without notice to the shipper, it is liable for negligence therein.[28] The complaint in an action for violation of a special contract of shipment must set out the contract *verbatim* or in substance, and declare upon it. It should show both the rights of the shipper and the duties of the carrier.[29] Plaintiff having sued on defendant's liability as a common carrier, he cannot recover on its liability as a warehouseman, or upon a valid contract limiting liability in place of the common-law liability sued on.[30]

If the carrier's answer admits receipt of live-stock and agreement to transport them to a certain point, nonsuit cannot be had on the ground that the complaint does not allege a consideration. Proof of depreciation in price may be shown upon an allegation that plaintiff was informed that the price had depreciated during the time of the contract for shipment.[31] A complaint which alleges a violation of the federal statute,[32] in reference to the unloading and resting of live-stock, alleges negligence *per se*.[33]

§ 3215. **Presumption as to liability.**—The presumption is that the responsibility of a party as carrier continues until the entire

25 Honeyman v. Oregon etc. R. R. Co., 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628.

26 Lake Shore etc. R. R. Co. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275. Carrying live-stock, and liability as to, see Huston v. Wabash Ry. Co., 63 Mo. App. 671; Holloway v. Wabash Ry. Co., 62 Mo. App. 53; Kincaid v. Kansas City etc. Ry. Co., 62 Mo. App. 365.

27 Lee v. Marsh, 43 Barb. 102, 28 How. Pr. 275.

28 Normile v. Oregon Ry. etc. Co., 41 Or. 177, 69 Pac. 928.

29 Nelson v. Great Northern Ry. Co., 28 Mont. 297, 72 Pac. 642.

30 Normile v. Oregon Ry. etc. Co., 41 Or. 177, 69 Pac. 928.

31 Russell v. Chicago etc. Ry. Co., 37 Mont. 1, 94 Pac. 488.

32 U. S. Rev. Stats., § 4386.

33 Reynolds v. Great Northern Ry., 40 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161.

transit is complete;[34] and further, until actual delivery to the party to whom the goods are addressed, or to his agent,[35] or to the carriers next in order on a connected route.[36] In the absence of an express contract, the obligation of a carrier of goods is to carry them according to the usual route for the conveyance of such articles by him for the public, and to deliver them within a reasonable time.[37] There is no presumption arising from the purchase of a ticket, that the ordinary duties imposed by law upon a carrier are modified in the ticket.[38] The presumption of law is against a common carrier, except it be made to appear that the injury complained of could not have happened by the intervention of human means.[39] In case of a collision, the presumption is that negligence of the carrier caused it, though the collision be with a car of another company.[40] Evidence that the injury was connected with the operation of the railroad makes out a *prima facie* case of negligence which the carrier must overcome.[41] But if an act of the passenger is the proximate cause, the burden is on the plaintiff to prove actionable negligence on the part of the defendant.[42]

§ 3216. **Connected routes.**—Each company concurring in the carriage of goods on a connected route is liable, even though part of the joint route be out of the state.[43] The above rule is partially relaxed to the effect that each company is only liable for carriage of the goods in the condition in which it receives them.[44] A contract to furnish a shipper with cars belonging to another line is

34 Ladue v. Griffith, 25 N. Y. 364, 82 Am. Dec. 360.

35 Fenner v. Buffalo etc. R. R. Co., 46 Barb. 103.

36 McDonald v. Western R. R. Corporation, 34 N. Y. 497.

37 Hales v. London etc. R. R. Co., 4 B. & S. 66.

38 McCollum v. Southern Pacific Co., 31 Utah 494, 88 Pac. 663.

39 Agnew v. Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87. For full and definite statement as to positions which may be considered as settled with reference to responsibility of railroad companies as common carriers, see Bissell v. New York Cent. R. R. Co., 25 N. Y. 442, 455, 456, 82 Am. Dec. 369. See, also, Alabama etc. R. R. Co. v. Thomas, 89 Ala. 294, 18 Am. St. Rep. 119, 7 South. 762; Geismer v. Lake Shore etc. Ry. Co., 102 N. Y. 563, 55 Am. Rep. 837, 7 N. E. 828.

40 Osgood v. Los Angeles Tr. Co., 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169; Denver etc. Ry. Co. v. Fotheringham, 17 Colo. App. 410, 68 Pac. 978.

41 Williams v. Spokane Falls etc. Ry. Co., 39 Wash. 77, 80 Pac. 1100.

42 Taillon v. Mears, 29 Mont. 161, 74 Pac. 421; Allen v. Northern Pacific Ry. Co., 35 Wash. 221, 101 Am. St. Rep. 1001, 77 Pac. 204.

43 Burtis v. Buffalo etc. R. R. Co., 24 N. Y. 269; Simmons v. Law, 8 Bosw. 213; McDonald v. Western R. R. Corporation, 34 N. Y. 497; Wyman v. Chicago etc. Ry. Co., 4 Mo. App. 35.

44 Smith v. New York Cent. R. h. Co., 43 Barb. 225.

not *ultra vires*.[45] A railroad company which for a consideration receives the cars of a connecting company into its custody and control, and draws them, with their contents, over its own road, is liable as a common carrier for injuries to such cars during their transit over such road.[46] When a railroad company contracts to forward goods from Cincinnati to Philadelphia, it is an entire contract, and the company is liable for any damage on the whole route.[47] In Oregon, it was held that the carrier was not liable for losses on lines of connecting carriers. In this case, shipment was to New York, with a stipulation exempting the original carrier from liability other than on its own lines.[48] In case of a passenger-ticket over several lines, for an entire price, the contract is entire, and the company selling the ticket may be held solely liable, or the traveler may look to the real principals, and subject all who are interested in the joint contract.[49]

If a common carrier accepts freight for a place beyond his usual route, he must deliver it at the end of his route to some other competent carrier to the place of address, and his liability then ceases;[50] and he is not liable for the default of the connecting carrier unless otherwise specially stipulated.[51] The consignor makes each successive carrier his forwarding agent, and each must in turn accept the freight.[52] But if a carrier contracts to transfer goods to a point beyond its own line, it is liable for any injury to the goods, whether on its own or other lines.[53]

45 Nichols v. Oregon etc. R. R. Co., 24 Utah, 83, 91 Am. St. Rep. 778, 66 Pac. 768.

46 Vermont etc. R. R. Co. v. Fitchburg R. R. Co., 14 Allen, (96 Mass.) 462, 92 Am. Dec. 785. As to how far liability may be qualified, see Cincinnati etc. R. R. Co. v. Pontius & Richmond, 19 Ohio St. 221, 2 Am. Rep. 391.

47 Fatman & Co. v. Cincinnati etc. R. R. Co., 2 Disn. 248; Gaines v. Union Trans. etc. Co., 28 Ohio St. 418; Field v. Chicago etc. R. R. Co., 71 Ill. 458; Wabash etc. R. R. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; Baltimore etc. R. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617; Pereira v. Central Pacific R. R. Co., 66 Cal. 92, 4 Pac. 988. But see Kerrigan v. Southern Pacific R. R. Co., 81 Cal. 248, 22 Pac. 677; Palmer v. Atchison etc. R. R. Co., 101 Cal. 187, 35 Pac. 630; Cal. Civ. Code, § 2201; Savannah etc. R. R. Co. v. Harris, 26 Fla. 148, 23 Am. St. Rep. 551, 7 South. 544.

48 Taffe v. Oregon R. R. Co., 41 Or. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187.

49 Check v. L. M. R. Co., 2 Disn. 237; Baltimore etc. R. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617.

50 Cal. Civ. Code, § 2201; St. Louis etc. R. R. Co. v. McGivney, 19 Okla. 361, 91 Pac. 693.

51 Fairfield v. Pacific Coast S. S. Co., 3 Cal. App. 106, 84 Pac. 438.

52 Andrus v. Columbia etc. S. Co., 47 Wash. 333, 92 Pac. 128.

53 Allen v. Canadian Pacific Ry. Co., 42 Wash. 64, 84 Pac. 620.

§ 3217. **Carriage of perishable property.**—When two kinds of property, one perishable and the other not, are delivered to a common carrier at the same time, by different owners, for transportation, if the carrier cannot carry all the property, he may give preference to the perishable; and if either must wait, it should be the latter or non-perishable.[54]

§ 3218. **Notice to owner restricting liability.**—Mere notice to restrict the liability of carriers is not sufficient to bind the owner of goods carried,[55] if only given, without his knowledge or assent, to one who was directed by him to deliver the same to the carrier.[56] And while common carriers may limit their liability by special contract, they cannot, for reasons of public policy, relieve themselves from liability for the actual value of the goods shipped, provided they have notice of such value, when loss or injury is occasioned by the negligence of themselves or their employees.[57] A requirement that notice of loss be given within a certain reasonable time is valid.[58]

§ 3219. **Treatment of passengers.**—If a railroad company holds itself out as a common carrier to a point beyond the termination of its road, it is deemed a common carrier for the whole distance, and if it professes to contract, and does contract, with and carry persons the entire distance, it must treat all alike, and contract with and carry all who apply. This principle applies to the carriage of goods as well as passengers.[59] If the ticket is in the form of coupons, each coupon is to be regarded as a distinct ticket for each road, sold by the first company as agent for the other companies.[60]

54 Marshall v. New York etc. R. R. Co., 45 Barb. 502; Tierney v. Railroad Co., 10 Hun, 569, 76 N. Y. 305.

55 McGregor v. Oregon R. R. Co., 50 Or. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668.

56 Fillebrown v. Grand Trunk Ry. Co., 55 Me. 462, 92 Am. Dec. 606; Cincinnati etc. R. R. Co. v. Pontius & Richmond, 19 Ohio St. 221, 2 Am. Rep. 391. See, also, Civ. Code, §§ 2174, 2175, 2176; Brown v. Adams Express Co., 15 W. Va. 812; Erie etc. Trans. Co. v. Dater, 91 Ill. 195, 33 Am. Rep. 51.

57 Overland Mail etc. Co. v. Carroll, 1 West Coast Rep. 281; Witting v. St. Louis etc. Ry. Co., 101 Mo. 631, 20 Am. St. Rep. 636, 14 S. W. 743, 10 L. R. A. 602. As to effect of concurrent want of due care on part of owner, see Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330.

58 St. Louis etc. R. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470.

59 Wheeler v. San Francisco etc. R. R. Co., 31 Cal. 46, 89 Am. Dec. 147; Barney v. Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115; Lake Erie etc. R. R. Co. v. Acres, 108 Ind. 548, 9 N. E. 453.

60 McCollum v. Southern Pacific Co., 31 Utah, 494, 88 Pac. 663.

§ 3220. **Liability for baggage.**—The liability of a carrier for baggage received with a passenger is the same as that of a carrier of property;[61] but such liability may be limited in amount, if the limitation is reasonable; and the signature of the passenger to a ticket sold at a reduced rate is conclusive evidence of his acquiescence in the terms of the limited liability.[62]

§ 3221. **Pleading injury.**—The complaint for damages from wrongful ejectment must contain a statement of the facts constituting the cause of action, in ordinary and concise language, it being sufficient to allege in general terms that the injury was occasioned by the negligence of the servants of the carrier in charge of the train.[63]

§ 3222. **When not liable.**—A carrier is not liable for the loss of money of one passenger contained in a valise which another passenger, with the knowledge of the first, delivers as his own baggage, and the carrier receives it as such.[64] Carriers cannot be held liable for the breaking of very brittle articles in a package for want of specially careful handling, if they are not warned of the contents of the package.[65]

§ 3223. **Carriage without compensation.**—A common carrier is not liable for the loss of goods where he is to receive no compensation for the carriage, and where he has exercised ordinary diligence in respect to the same. His liability in such a case is only that of a bailee without hire.[66] The rule seems to be different in Minnesota. A complaint which alleges a delivery of goods to a common carrier, and acceptance by him to be conveyed by him without reward, the loss of the goods occasioned by the gross negligence of the defendant, together with the value of the goods and the amount of the loss of the bailor, states a ground of action. All bailments, with or without compensation to the bailee, are contracts founded on a sufficient consideration.[67]

61 Mont. Rev. Code, § 5344.

62 Rose v. Northern Pacific Ry., 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 767.

63 Lindsay v. Oregon Short Line, 13 Idaho, 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184.

64 Dunlap v. International Steamboat Co., 98 Mass. 371.

65 American Express Co. v. Perkins, 42 Ill. 458.

66 Fay v. Str. New World, 1 Cal. 348; Melbourne v. Louisville etc. R. R. Co., 88 Ala. 443, 6 South. 762.

67 McCauley v. Davidson, 10 Minn. 418; Hayward v. Grant, 13 Minn. 165, 97 Am. Dec. 228.

§ 3224. **Essential averments—Delivery.**—Where the complaint contains averments against the defendants as common carriers, and the action was for damages done to merchandise in its transportation, it was held that it was indispensable for the plaintiff to prove that defendants were common carriers, and that the goods were delivered to, and received by them as such, for the purpose of being transported for hire.[68] Delivery to carrier in good order must be shown to maintain an action for full value. The burden of proof then shifts.[69] But such delivery must be to him or his authorized agent.[70] The mere setting out of a flat car on the siding, without notice to the consignee, does not constitute a delivery.[71]

The complaint must aver that the defendant is a common carrier.[72] But all corporations operating railroads in Indiana are made common carriers by provision of statute. So an averment that a corporation is engaged in operating a line of railroad is equivalent to an averment that it is a common carrier.[73] In an action by the consignor against the common carrier for damages for the non-delivery of the goods to the consignee at the place stipulated in the contract, the complaint is held bad on demurrer if it does not allege that the plaintiff was the owner of such goods, or that such goods were not elsewhere delivered to and accepted by the consignee than the place named in the contract.[74]

The liability of a common carrier for the non-delivery of goods intrusted to him for carriage may be enforced by an action in either of the forms formerly known as *assumpsit* or tort, at the option of the pleader.[75] The suit may be framed either *ex contractu*, upon the breach of the engagement to carry and deliver, or *ex delicto*, upon the violation of the public duty.[76] Where the summons was in the form of an action for money on a contract, and the complaint alleged that the defendant's business was to carry goods for hire, the delivery of goods to the defendant, payment of charges, the undertaking of the defendant to deliver,

68 Ringgold v. Haven, 1 Cal. 116.

69 Smith v. New York Cent. R. R. Co., 43 Barb. 225.

70 Ball v. New Jersey Steamboat Co., 1 Daly, 491.

71 Normile v. Northern Pacific Ry. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

72 Louisville etc. R. R. Co. v. Gerson, 102 Ala. 409, 14 South. 873.

73 Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586.

74 Pennsylvania Co. v. Holderman, 69 Ind. 18.

75 Catlin v. Adirondack Co., 11 Abb. N. C. 377; reversing 20 Hun, 19.

76 Baltimore etc. R. R. Co. v. Pumphrey, 59 Md. 390.

and the loss of the goods, of the amount claimed, with interest, it was held that the action was upon contract.[77] On the other hand, in an action upon tort the essential allegations of the complaint are that the defendant was a common carrier, the custom appertaining thereto, and his duty as such, the loss of goods through the defendant's negligence or conversion, and the damages sustained by the plaintiff by reason of the loss of his goods.[78] It need not be alleged that a compensation was paid or agreed to be paid for carrying the goods.[79] Where the defendant, whether regarded as a common carrier or a warehouseman, is liable for misdelivery of the goods, a plaintiff who has counted upon the liability of the defendant as a common carrier may recover against such carrier as a warehouseman.[80] Under a complaint charging the defendant as a common carrier, no recovery can be had upon proof of a liability as a private carrier only.[81]

§ 3225. **Act of God.**—The expression, "act of God," as used in the law of carriers, includes those losses and injuries which are occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight.[82] Those acts are to be regarded in a legal sense as the acts of God which do not happen through human agency, such as storms, lightnings, and tempests.[83] The elements are the means through which God acts, and damages by the elements are damages by the act of God.

§ 3226. **Date—Amount.**—In an action to recover the value of a draft lost by a carrier, a complaint which does not state the

77 Catlin v. Adirondack Co., 11 Abb. N. C. 377; reversing 20 Hun, 19.

78 Id. See Rideout v. Milwaukee etc. Ry. Co., 81 Wis. 237, 51 N. W. 439.

79 Hall v. Cheney, 36 N. H. 26. See Wiggin v. Boston etc. R. R. Co., 120 Mass. 201; Davis v. Jacksonville S. E. Line, 126 Mo. 69, 28 S. W. 965.

80 Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

81 Honeyman v. Oregon etc. R. R. Co., 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628.

82 McArthur v. Sears, 21 Wend. 190; Merritt v. Earle, 31 Barb. 38; Trent Navigation, Proprietors of, v. Wood, 3 Esp. 127, 1 T. R. 27, 1 Harp. 468; McHenry v. Philadelphia etc. R. R. Co., 4 Harr. (Del.) 448; Siordet v. Hall, 4 Bing. 607; New Brunswick etc. Co. v. Tiers, 4 Zabr. 697, 64 Am. Dec. 394; Edwards on Bailments, 454; Angell on Carriers, § 156; Michaels v. New York Cent. R. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Shear v. Wright, 60 Mich. 159, 26 N. W. 871; Slater v. South Carolina Ry. Co., 29 S. C. 96, 6 S. E. 936; Norris v. Savannah etc. Ry. Co., 23 Fla. 182, 11 Am. St. Rep. 355, 1 South. 475; Piedmont etc. Ry. Co. v. McKenzie, 75 Md. 458, 24 Atl. 157.

83 Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115. See Fay v. Pacific

date of the draft which was lost by the common carrier, the amount for which it was drawn, the time when it was payable, or to whom payable, is insufficient.[84]

§ 3227. **Liability.**—The law adjudges a common carrier responsible for loss of goods, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies.[85] In a suit on the common-law liability, a special contract merely constitutes a defense in so far as the exemptions from liability created by it are valid.[86]

§ 3228. **Rule of damages.**—In an action against carriers, the rule of damages is the value of the goods at the port of delivery, and not the invoice price, or the value at the port of shipment.[87] A common carrier for hire is liable for punitive damages for a gross, willful, and tortious breach of the duty enjoined upon him by law. A principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, but is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal.[88]

§ 3229. **Acceptance of goods.**—To charge a carrier, there must be an acceptance of the goods, either in a special manner, as by "checking," or according to the usage of their business.[89]

§ 3230. **Baggage, what is, and liability for.**—The baggage of a passenger intrusted to one whose business it is to transport persons and their baggage, and with whom the owner has embarked,

Imp. Co., 93 Cal. 255, 27 Am. St. Rep. 198, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188; Ryan v. Rogers, 96 Cal. 349, 31 Pac. 244.

84 Zeigler v. Wells Fargo & Co., 23 Cal. 179, 83 Am. Dec. 87.

85 Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Cal. Civ. Code, §§ 2194, 2195; Palmer v. Atchison etc. R. R. Co., 101 Cal. 187, 35 Pac. 630; Evansville etc. R. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296.

86 Nelson v. Great Northern Ry. Co., 28 Mont. 297, 72 Pac. 642.

87 Ringgold v. Haven, 1 Cal. 108. See, also, Denver etc. R. R. Co. v. Frame, 6 Colo. 382; Echols v. Louisville etc. R. R. Co., 90 Ala. 366, 7 South. 655.

88 Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657.

89 Story on Bailments, § 533; Angell on Carriers, § 140; Selway v. Holloway, 1 Ld. Raym. 46; Cobbau v. Downe, 5 Esp. 41; Tower v. Utica etc. R. R. Co., 7 Hill, 47, 42 Am. Dec. 36; Boehm v. Combe, 2 Mau. & Sel. 172; Ball v. New Jersey Steamboat Co., 1 Daly, 491; East Line etc. R. R. Co. v. Hall, 64 Tex. 616.

is under the same protection as the goods are which are intrusted to a common carrier of goods.[90] The jury are to determine what constitutes baggage under the circumstances. A sum of money reasonably necessary to defray the expenses of the journey is properly baggage; this depends upon the length of the journey, and to some extent the wealth of the traveler, and it includes such an allowance for accident or sickness, and for sojourning by the way, as a reasonable, prudent man would consider it necessary to make. It should be limited to money for traveling expenses, properly so called. And the carrier is responsible for the loss of money in a passenger's trunk to the extent of reasonable traveling expenses.[91] But not for jewelry belonging to a third person,[92] nor merchandise nor articles intended for business, such as a butcher's tools.[93] The Civil Code of California (§ 2181), declares that luggage may consist of any articles intended for the personal use and convenience of the passenger according to his habits, for his immediate use or for the ultimate purpose of the journey.

§ 3231. **Baggage, retaining custody of.**—The carrier of passengers by steamboat is not exonerated from responsibility for the personal baggage of a passenger by the fact that the passenger deposits it in the stateroom occupied by him, of which he has the key, and from which it is stolen.[94] So a mere supervision of one's baggage will not relieve from responsibility.[95]

§ 3232. **Money stolen.**—The owners of a steamboat are not liable for money stolen from the pockets of a passenger, it not being proved it was stolen by persons employed on board.[96]

90 Oakes v. Northern Pacific R. R. Co., 20 Or. 392, 23 Am. St. Rep. 126, 26 Pac. 230, 12 L. R. A. 318; Shaw v. Northern etc. R. R. Co., 40 Minn. 144, 41 N. W. 584; Isaacson v. New York etc. R. R. Co., 94 N. Y. 278, 46 Am. Rep. 142. As to the duty of carriers by water with respect to baggage of passengers, see Merrill v. Grinnell, 30 N. Y. 594; Chamberlain v. Western Transp. Co., 45 Barb. 218; Mudgett v. Bay State Steamboat Co., 1 Daly, 151; Glasco v. New York Cent. R. R. Co., 36 Barb. 557; Gilhooly v. New York etc. S. N. Co., 1 Daly, 197. See Cal. Civ. Code, §§ 2180-2183.

91 Merrill v. Grinnell, 30 N. Y. 594.

92 Richards v. Wescott, 7 Bosw. 6. As to what shall be included in the term "baggage," see Metz v. California etc. R. R. Co., 85 Cal. 329, 20 Am. St. Rep. 228, 24 Pac. 610, 9 L. R. A. 431.

93 Choctaw etc. R. Co. v. Zwirtz, 13 Okla. 411, 73 Pac. 941.

94 Hollister v. Nowlen, 19 Wend. 236, 32 Am. Dec. 455; Burgess v. Clements, 4 Man. & Sel. 310; Tower v. Utica etc. R. R. Co., 7 Hill, 47, 42 Am. Dec. 36; Mudgett v. Bay State Steamboat Co., 1 Daly, 151.

95 Longchamp v. Fish, 2 Bos. & P. 416.

96 Abbott v. Bradstreet, 55 Me. 530.

§ 3233. **Allegation of route.**—It is not deemed necessary to state the whole route of the defendants. That they were carriers between . . . and . . . is sufficient.[97]

§ 3234. **Vehicle.**—A common carrier is absolutely bound, irrespective of negligence, to provide roadworthy vehicles.[98]

§ 3235. **Steam-tugs.**—The towing a vessel out to sea by a steamer is the transportation of property, so as to bring the case within the law of common carriers. And the fact that the owner of the ship lost while being towed out to sea was the agent of the owners of the steam-tug does not relieve the latter from the obligations under which they contract with others.[99] Where defendants undertook to tow plaintiff's schooner and a Spanish bark from New Orleans to the Gulf of Mexico, in consequence of the bad steering of the bark by its own men, it broke loose from the tow-boat and damaged the schooner; it was held that defendants were liable as carriers.[100]

§ 3236. **Damage to cargo.**—In a case of damage to cargo, where the libel alleges the fault of the master to be—1. That he falsely represented his vessel to be tight, staunch, and seaworthy; and 2. That the danger resulted from the master's carelessness, negligence, and improper conduct,—the libelant cannot claim another specific ground of complaint not set up in the libel, e. g. that the damage was caused by the fault of the master in not putting into some other port to repair his vessel, and take measures to preserve his cargo.[101]

§ 3237. **Notice in writing.**—If the carrier have notice, by writing on the article or package, of the need of peculiar care, he is bound to comply with such directions.[102]

97 See Clark v. Faxton, 21 Wend. 153; Davis v. Jacksonville S. E. Line, 126 Mo. 69, 28 S. W. 965; Fort Worth etc. Railway Co. v. McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 414.

98 Alden v. New York Cent. R. R. Co., 26 N. Y. 102, 82 Am. Dec. 401; St. Louis etc. R. R. Co. v. Valirius, 56 Ind. 511; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Cal. Civ. Code, §§ 2184, 2185.

99 White v. Tug Mary Ann, 6 Cal. 462, 65 Am. Dec. 523. But see Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 435.

100 Clapp v. Stanton, 20 La. Ann. 495, 96 Am. Dec. 417.

101 Soule v. Rodocanachi, 1 Newb. 504, Fed. Cas. No. 13178.

102 See Baxter v. Leland, 1 Abb. Adm. 348, Fed. Cas. No. 1124; Hast-

§ 3238. **Mixing goods.**—Where defendant, without notifying the consignees, unloading coal upon the bare ground, and so carelessly that different sorts were mixed together with the soil, the defendant's liability did not cease until he had unloaded the coal with due care, and put it in a reasonably safe place.[103]

§ 3239. **Breach of contract to deliver.**—A common carrier becomes charged on his contract immediately upon his failure to carry and deliver as agreed.[104] The fact that the consignee's business address was stated in the bill of lading does not oblige the shipper to depart from his known and usual place of delivery, and deliver a cargo at a pier more contiguous to the consignee's place of business.[105] Delivery of goods by a carrier to a wrong person by mistake, or by gross imposition, will not discharge his responsibility to the owner for the value of the goods.[106] Where the complaint in an action to recover damages for the alleged failure of a railroad company to transport and deliver within a reasonable time is in the usual form employed in common-law actions *ex contractu*, it is not subject to a general demurrer on the ground that the complaint should have specified what was a reasonable time for the transportation of the goods; and in the absence of a special demurrer directed to that point, the general allegation of a failure to transport and deliver within a reasonable time is sufficient.[107] But non-delivery by a carrier is excused when the consignor exercises his right of stoppage *in transitu*.[108] So, if the goods be misdirected, and solely for this reason are delivered to the wrong person by the carrier, it is not liable.[109] So, if the carrier delivers the goods to a wrong

ings v. Pepper, 11 Pick. 41; Sager v. Portsmouth etc. R. R. Co., 31 Me. 228, 1 Am. Rep. 659.

103 Rice v. Boston etc. R. R. Co., 98 Mass. 212. See Chicago etc. R. R. Co. v. Scott, 42 Ill. 132.

104 Jones v. Wells Fargo & Co., 28 Cal. 259.

105 Rowland v. Miln, 2 Hilt. 150; Ostrander v. Brown, 15 Johns. 39, 8 Am. Dec. 211; Gibson v. Culver, 17 Wend. 305, 31 Am. Dec. 297; Western Trans. Co. v. Hawley, 1 Daly, 327. See Cal. Civ. Code, §§ 2118, 2119.

106 Adams v. Blankenstein, 2 Cal. 413, 56 Am. Dec. 350; Sword v. Young, 89 Tenn. 126, 14 S. W. 481, 604; McCullock v. McDonald, 91 Ind. 240; Southern Ex. Co. v. Van Meter, 17 Fla. 783; 35 Am. Rep. 107.

107 Palmer v. Atchison etc. R. R. Co., 101 Cal. 187, 35 Pac. 630.

108 Newhall v. Central Pacific R. R. Co., 51 Cal. 345, 21 Am. Rep. 713. See Brasher v. Denver etc. R. R. Co., 12 Colo. 384, 21 Pac. 44.

109 Lake Shore etc. R. R. Co. v. Hodapp, 83 Pa. St. 22.

person on written authority from the consignee, the consignor cannot hold the carrier liable therefor.[110]

§ 3240. Allegation of demand.—Where a demand is necessary to perfect plaintiff's title, it must be averred.[111]

§ 3241. Common carriers and forwarders.—Railroad companies, as common carriers, may make valid contracts to carry passengers or freight beyond the limit of their own roads, either by land or water, and in this way become liable for the acts and neglects of other carriers which are in no sense under their control.[112] The liabilities of common carriers and forwarders, independent of any express stipulations in the contract, are entirely different.[113] Where the defendants, being both carriers and forwarders, took goods in pursuance of a previous oral agreement to carry, and gave a receipt for the goods, expressing that they were received "to be forwarded," it was held that they were liable as carriers.[114] An agreement "to forward" goods may, in some circumstances, comprehend a stipulation to carry and deliver them beyond the defendant's own line.[115] A petition alleging that the defendant was a common carrier engaged in shipping cattle to and from points in Texas, and, by means of connecting lines, to Chicago, and that defendant accepted cattle from plaintiff for shipment to Cairo, and thence to Chicago, for a certain compensation, in the absence of special exceptions, sufficiently charges a contract of through shipment.[116]

§ 3242. Special contract—Limiting liability.—A carrier may contract against loss from fire not caused by his own negligence.[117] A carrier cannot be exonerated from gross negli-

110 Dobbin v. Railroad Co., 56 Mich. 522, 23 N. W. 204.

111 Bristol v. Rensselaer etc. R. R. Co., 9 Barb. 158.

112 Wheeler v. San Francisco etc. R. R. Co., 31 Cal. 46, 89 Am. Dec. 147.

113 Hooper v. Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211. See Harris v. Howe, 74 Tex. 534, 15 Am. St. Rep. 862, 12 S. W. 224, 5 L. R. A 777; Harris v. Grand Trunk R. R. Co., 15 R. I. 371, 5 Atl. 305; Myrick v. Michigan etc. R. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 Sup. Ct. 425.

114 Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75. See McCotter v. Hooker, 8 N. Y. 497.

115 Davis v. Jacksonville S. E. Line, 126 Mo. 69, 28 S. W. 965. But compare Dunbar v. Port Royal etc. Ry Co., 36 S. C. 110, 31 Am. St. Rep. 860, 15 S. E. 357.

116 Fort Worth etc. Ry. Co. v. McAnulty, 7 Tex. App. 321, 26 S. W. 414.

117 St. Louis etc. R. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470; Van Schaak v. Northern Transp. Co., 3

gence,[118] and a contract which attempts such exoneration is void.[119] By a contract for carriage of live-stock, the owner took the risks of a damage "in unloading, conveyance, and otherwise, whether arising from negligence or otherwise." The bottom of the car dropped out. It was held that if the car was unfit the carrier was liable.[120] Restrictions on the common-law liability of a common carrier, inserted for his benefit in a receipt drawn by himself, and signed by him alone, for goods intrusted to him in such capacity, are construed most strongly against the common carrier. The words, "not to be responsible except as forwarder," in a common carrier's receipt, do not exempt him from liability for loss of goods occasioned by the carelessness or negligence of the employees of a steamboat, owned and controlled by other parties than the carrier, but ordinarily used by him in his business of carrier as a means of conveyance.[121] The shipper may ignore the special contract, and sue in tort on the common-law liability. The special contract then merely constitutes a defense in so much as the exemptions therein are valid.[122] A provision that the rules, regulations, and conditions prescribed by a carrier of live-stock, as evidenced by its published tariffs, classifications, and circulars, is binding on the shipper, and his signature to the contract is conclusive evidence of his knowledge and assent to such rules, is a void contract;[123] as is also a contract attempting to relieve the carrier for violation of its duties as to the resting of stock, prescribed by statute.[124] When a special contract is made with a carrier, he becomes as to that transaction an ordinary bailee and a private carrier for hire.[125] The common carrier's liability for loss occasioned by negligence in the agents he employs will not be restricted, unless the intention to thus exonerate him is expressed

Biss. 394, Fed. Cas. No. 16876; Louisville etc. R. R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162.

118 Cal. Civ. Code, § 2175.

119 Donlon Bros. v. Southern Pacific Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811.

120 Hawkins v. Great West. R. R. Co., 17 Mich. 57, 97 Am. Dec. 179.

121 Hooper v. Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211.

122 Nelson v. Great Northern Ry., 28 Mont. 297, 72 Pac. 642.

123 Houtz v. Union Pacific Ry., 33 Utah, 175, 93 Pac. 439, 17 L. R. A. (N. S.) 628.

124 Reynolds v. Great Northern Ry., 40 Wash. 163, 111 Am. St. Rep. 883, 82 Pac. 161.

125 Dorr v. New Jersey S. N. Co., 11 N. Y. 490, 62 Am. Dec. 125; Moriarty v. Harnden's Express Co., 1 Daly, 227; Dunbar v. Port Royal etc. R. R. Co., 36 S. C. 110, 31 Am. St. Rep. 860, 15 S. E. 357.

in the instrument in plain and unequivocal terms.[126] If there be a special contract varying the liability of the carrier, the action is properly brought on the special contract, and not on the general liability.[127] Thus, if an owner of goods when he delivers them to a common carrier for shipment receives and accepts a bill of lading therefor containing a stipulation against the carrier's liability for loss by fire, and the goods are so destroyed, an action against the carrier for their loss is properly instituted on the contract, and not on the common-law liability.[128] And it is held that the burden of proof in such an action would be on the owner to establish negligence.[129] It is, however, held that the existence of a special contract for the shipment of goods, with certain stipulations therein exempting the carrier from liability, is no obstacle to the maintenance of an action of tort based on his legal duty and a breach thereof by negligence.[130] Tort is the natural and habitual foundation of the action for the breach of the ordinary contract of carriage, and the complaint or declaration will be so construed, unless the facts of the case clearly show that the plaintiff has elected to sue on the contract.[131]

§ 3243. Telegrams—Measure of damages.—The difference between the price at which property would have been sold and at which it was actually sold is not the true measure of damages,

126 Hooper v. Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Nicholas v. New York etc. R. R. Co., 89 N. Y. 370. As to the power of common carrier of goods to limit his responsibility by special contract, see Price v. Hartshorn, 44 Barb. 655; Lee v. Marsh, 43 Barb. 102, 28 How. Pr. 275; Meyer v. Harnden's Express Co., 24 How. Pr. 290; Heineman v. Grand Trunk R. R. Co., 31 How. Pr. 430; Moriarty v. Harnden's Express Co., 1 Daly, 227. See, also, Cal. Civ. Code, §§ 2174-2176. As to carriage of live-stock, see St. Louis etc. R. R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; Illinois Cent. R. R. Co. v. Scruggs, 69 Miss. 418, 13 South. 698.

127 Boaz v. Cent. R. R. Co., 87 Ga. 463, 13 S. E. 711.

128 Indianapolis etc. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138.

129 Id.; Witting v. St. Louis etc. Ry. Co., 101 Mo. 631, 20 Am. St. Rep. 636, 14 S. W. 743, 10 L. R. A. 602; Platt v. Richmond etc. R. R. Co., 108 N. Y. 358, 15 N. E. 393; National Line S. S. Co. v. Smart, 107 Pa. St. 492; St. Louis etc. R. R. Co. v. Weakly, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134. That the opposite view is maintained in some of the states, see Hull v. Chicago etc. Ry. Co., 41 Minn. 510, 16 Am. St. Rep. 722, 43 N. W. 391, 5 L. R. A. 587; Western Railway v. Harwell, 91 Ala. 340, 8 South. 649; Louisville etc. Ry. Co. v. Bigger, 66 Miss. 319, 6 South. 234; Chicago etc. R. R. Co. v. Manning, 23 Neb. 552, 37 N. W 462.

130 Nicoll v. East Tennessee etc. Ry. Co., 89 Ga. 260, 15 S. E. 309.

131 Whittenton Mfg. Co. v. Memphis etc. Packet Co., 21 Fed. 896.

unless the price at which it was sold was the highest price that could with reasonable diligence have been obtained.[132]

A stipulation limiting the company's liability in cases where the telegram is not repeated is no defense, where the telegram was not sent at all.[133] In some states, such a contract is deemed void, as unreasonable and contrary to public policy.[134] Four hundred dollars is not excessive damages allowed to one left four hundred miles from home without money, suffering cold, hunger, and mental worry and distress.[135] Such damage may be recovered as reasonably arises from the breach of contract, or such as may reasonably be supposed to have been contemplated by the parties, and an elusive code dispatch gives no notice, in itself, of special importance.[136]

§ 3244. **Telegraph Companies — Complaints.**—A declaration against a telegraph company for refusing to transmit a message should allege that such refusal was willful or wrongful, or contain an allegation of facts showing such willfulness or wrongfulness.[137] And if such declaration contains no allegation to the effect that the defendant owned or operated any telegraph line, or that such line extended to the point to which the plaintiff desired the message sent, or that it was engaged in the business of sending such telegraphic messages for reward, or holds itself out to the public as so doing, or that it has any facilities for sending such messages, it is not sufficient to show any liability on the part of the defendant.[138] But the statement of a cause of action, instituted before a justice of the peace for negligence in the transmission of a telegram, was held sufficient, although it did not set forth the language of the telegram, nor point out wherein the mistake complained of consisted further than by stating that the meaning of the telegram had been negligently altered.[139] Where a complaint states that a copy of a telegraph message is attached, which copy has the message written upon a blank printed form containing certain conditions, such blank, with

132 Brooks v. Western Union Tel. Co., 26 Utah, 147, 72 Pac. 499.

133 Id.

134 Blackwell v. Western Union Tel. Co., 17 Okla. 376, 89 Pac. 235.

135 Barnes v. Western Union Tel. Co., 27 Nev. 438, 103 Am. St. Rep. 776, 76 Pac. 931, 65 L. R. A. 666.

136 Western Union Tel. Co. v. Pratt, 18 Okla. 274, 89 Pac. 237.

137 South Florida Tel. Co. v. Maloney, 34 Fla. 338, 16 South. 280.

138 Id. See Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583.

139 Lee v. Western Union Tel. Co., 51 Mo. App. 375.

the message and conditions thereon, forms a part of the complaint.[140]

§ 3245. **Liability of telegraph companies.**—By merely accepting a message for transmission, the telegraph company does not agree to deliver it in person, but only to make such a delivery as will be good in law.[141] If a message is sufficient to put the telegraph company on inquiry as to its importance, a recovery may be had for damages occasioned by failure to transmit it.[142]

§ 3246. **Allegation of speculative damages.**—Damages must be measured by the loss sustained, and where that loss cannot be ascertained, damages cannot be recovered. Hence a complaint in an action against a telegraph company alleging that through the gross neglect of the defendant in wrongfully addressing a telegram, causing a delay in its delivery, the plaintiff was prevented from receiving an appointment as deputy city assessor, at a specified monthly salary, which he would have received if the message had been promptly delivered, and that he had sustained damage to the amount of five months' salary, for which judgment is prayed, is subject to a general demurrer upon the ground that the damages are too speculative and uncertain to be recovered.[143]

§ 3247. **Who may sue.**—The law as regards the proper parties to sue, as between consignor and consignee on a contract of carriage, is thus summarized by Mr. Angell: First, where the entire property is in the consignor, he is the proper party to sue; second, where the entire property is in the consignee, the latter sues; third, where both are interested, one as a general, the other as a special owner, then either may sue.[144] A suit may be main-

140 Sherrill v. Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94.

141 Norman v. Western Union Tel. Co., 31 Wash. 577, 72 Pac. 474.

142 Brooks v. Western Union Tel. Co., 26 Utah, 147, 72 Pac. 499.

143 Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75. But compare Western Union Tel. Co. v. Fenton, 52 Ind. 1. As to damages recoverable for failure to send or deliver a telegram correctly and promptly, see, generally, Brown v. Western Union Tel. Co., 6 Utah, 219, 21 Pac. 988; Mackey v. Western Union Tel. Co., 16 Nev. 222; Russell v. Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408; West v. Western Union Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Western Union Tel. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 916.

144 Angell on Carriers, § 495. See Wetzel v. Power, 5 Mont. 214, 2 Pac.

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tained against a common carrier in the name of any person having either a general or a special property in the goods involved, and an action properly brought by such person will be a bar to any subsequent suit against the carrier by another party having either a general or a special property in the same goods for the same damages.[145] The party with whom the contract of shipment is made may, *prima facie*, recover for its breach, irrespective of the question of title to the goods.[146] The person to whom a telegram is directed can maintain an action for whatever legal damage results to him from the negligence of the company in its transmission or delivery, where the message shows that he is interested in it, or that it is for his benefit, or that damage will result to him from such negligence.[147] The party to be in fact accommodated, benefited, or served holds the beneficial interest in the contract, and when that one sustains damage from its breach a right of action arises in his favor;[148] and it is wholly immaterial by whom the compensation for sending the message was paid.[149] But when the plaintiff was no party to the contract under which the message was sent, and the company was not informed, either by the terms of the message or otherwise, that the contract was for his benefit, he cannot recover.[150] The loss of a bargain, from which profits would have resulted, cannot be visited in damages upon the carrier, unless informed of the purpose or importance of the message.[151] One who fails to secure certain employment because she was not called to answer a long-distance telephone

338; O'Neill v. New York etc. R. R. Co., 60 N. Y. 138; Ober v. Indianapolis etc. R. R. Co., 13 Mo. App. 81; Dyer v. Great Northern Ry. Co., 51 Minn. 345, 38 Am. St. Rep. 506, 53 N. W. 714.

145 Illinois etc. R. R. Co. v. Miller, 32 Ill. App. 259; Denver etc. R. R. Co. v. Frame, 6 Colo. 382; Wolfe v. Missouri etc. Ry. Co., 97 Mo. 473, 10 Am. St. Rep. 331, 11 S. W. 49, 3 L. R. A. 536.

146 Davis v. Jacksonville etc. Line, 126 Mo. 69, 28 S. W. 965. See, also, to same effect, Cantwell v. Pacific Express Co., 58 Ark. 487, 25 S. W. 503.

147 International etc. Tel. Co. v. Saunders, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; Western Union Tel. Co. v. Hope, 11 Ill. App. 289; De Rutte v. New York etc. Tel. Co., 1 Daly, 547; Frazier v. Western Union Tel. Co., 45 Or. 414, 78 Pac. 330, 67 L. R. A. 319.

148 Western Union Tel. Co. v. Adams, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857, 6 L. R. A. 844; Sherrill v. Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Baldwin v. Western Union Tel. Co., 93 Ga. 692, 44 Am. St. Rep. 194, 21 S. E. 212.

149 Western Union Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336.

150 Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; Western Union Tel. Co. v. Fore (Tex. App.), 26 S. W. 783.

151 Cannon v. Western Union Tel. Co., 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731. Compare Baldwin v.

call has an action for damages against the telephone company; for "telephone" is included within the term "telegraph," being an apparatus for transmission of messages by electric signals.[152]

§ 3248. **Elevators.**—The owner of a passenger elevator owes a duty to persons invited to ride therein analogous to a common carrier, and is bound to exercise the highest degree of care in the operation of the elevator consistent with practical conditions, to prevent injuries.[153] One in a strange building, walking into a dark place, without determining what was there, is guilty of contributory negligence sufficient to defeat a recovery, on account of his fall into an elevator-shaft.[154]

§ 3249. **Sunday contract.**—In Massachusetts, a contract made in violation of Sunday is void, and no subsequent ratification will sustain an action upon it.[155] But the rule laid down in New York does not exempt the carrier from his liability for the loss upon a contract, under the Sunday laws of New York, because it is made on Sunday. To render it invalid, it is necessary that the contract should require the work or labor agreed for to be performed on Sunday. To entitle the plaintiff to recover against the carrier, it is immaterial whether the contract is good or bad. The liability of the carrier is imposed by law, and does not rest on his contract.[156] The making of a contract on Sunday is not labor within the prohibition of Sunday laws, nor was it prohibited by common law.[157] And a valid contract may be made on that day for the performance of labor, provided the labor is not to be performed on Sunday.[158] A contract made on Sunday, for the transmission and delivery of a telegram from one

Western Union Tel. Co., 93 Ga. 692, 44 Am. St. Rep. 194, 21 S. E. 212.

152 McLeod v. Pacific Tel. Co. (Or.), 94 Pac. 568.

153 Edwards v. Burke, 36 Wash. 107, 78 Pac. 610.

154 Massey v. Seller, 45 Or. 267, 77 Pac. 397.

155 Day v. McAllister, 15 Gray, 433. That the indorser of a note is estopped, in an action thereon, to deny the validity of a note because it was executed by the maker on Sunday, see Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

156 Edwards on Bailments, 466; Allen v. Sewall, 2 Wend. 327; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455, 1 Chit. 1; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292. See Costello v. Ten Eyck, 86 Mich. 348, 24 Am. St. Rep. 128, 49 N. E. 152.

157 Horacek v. Keebler, 5 Neb. 355.

158 Johnson v. Brown, 13 Kan. 529; Bloom v. Richards, 2 Ohio St. 387.

brother to another, announcing the death of their father, is not void.[159]

§ 3250. **Negligence a question of law, when.**—If the facts in relation to loss, by fire at a depot, of goods intrusted to the carrier for shipment, are undisputed, the question of negligence is one of law for the court.[160] Also, whether a reasonable time has elapsed in which the consignee could have removed the goods is a question of law, unless there is a conflict of testimony, or the facts are doubtful or complicated, when it should be submitted to a jury.[161]

§ 3251. **Variance.**—A variance between a complaint to enforce the common-law liability of a carrier for the loss of goods and evidence showing a special contract between plaintiff and the carrier is sufficient to justify nonsuit.[162] That part of the goods did not belong to plaintiff must be specially pleaded to be admissible in evidence.

FORMS—CARRIERS.

§ 3252. **Complaint for refusing to transport cattle.**

Form No. 862.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned the defendant was, and still is, a railroad corporation organized under the laws of the state of . . ., and owning and operating a line of railroad between . . . and . . ., and holding out to the public and causing to be known that it was and is a common carrier of freight, stock, and cattle from said . . . to said . . ., and had suitable and proper appliances for loading and receiving stock and cattle at said station.

II. That on the . . . day of . . ., 19.., the plaintiff entered into an agreement with the defendant, by the terms of which said

159 Ala. Code, § 1749; Western Union Tel. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23, 9 South. 414.

160 Brounton v. Southern Pacific Co., 2 Cal. App. 173, 83 Pac. 265.

161 McGregor v. Oregon R. R. Co., 50 Or. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668.

162 Brounton v. Southern Pacific Co., 2 Cal. App. 173, 83 Pac. 265.

defendant agreed to receive upon its cars at said station of . . ., on the 16th day of August, 19.., . . . head of fat cattle, the property of the plaintiff, of the value of . . . dollars, and to transport said cattle upon its cars to the said city of . . ., and deliver the same to the plaintiff at the Union Stock Yards in said city of . . ., at 8 o'clock A. M., on the . . . day of . . ., 19.., all of which agreements were made by the defendant in consideration of the promise of the plaintiff then and there made to pay to the said defendant, upon the delivery of said cattle in . . ., the sum of . . . dollars, for the carriage and delivery thereof.

III. That relying upon the said representations and promises of the defendant, the plaintiff on the . . . day of . . ., 19.., delivered the said cattle at the stock-yards of defendant at said station of . . . in full time to ship the same upon said day, but that the defendant then and there refused to receive said cattle or to transport the same to said city of . . .

IV. That by reason of said refusal on the part of said defendant to receive said cattle upon its cars at the said station of . . . the plaintiff was compelled to drive said cattle to the station of . . ., being another station upon the line of said defendant railway, at an expense of . . . dollars, and that said cattle could not be shipped at said last-named station on the 16th day of August aforesaid, because of the time necessarily spent in driving the same to said station, but were received by defendant on the . . . day of . . ., 19.., and were transported by defendant to said city of . . ., where they arrived and were delivered to plaintiff on the . . . day of . . ., 19.., instead of on the morning of the . . . day of . . ., 19..

V. That the object and purpose of the plaintiff in shipping said cattle to the said city of . . . was to make sale thereof upon the market, which object and purpose were well known to the defendant when it made the contract with the plaintiff hereinbefore set forth, and that the market price of cattle upon the market at said city of . . . was . . . dollars per hundredweight upon the . . . day of . . ., 19.., and was only . . . dollars per hundredweight upon the . . . day of . . ., 19.., whereby the plaintiff was obliged to and did sell said cattle for said decreased price, and was thus damaged by the said refusal of defendant to receive said cattle at . . ., and the consequent delay in the delivery thereof at . . ., in the further sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3253. Complaint against common carrier, for breach of duty.

Form No. 863.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was a common carrier of goods for hire, between the places hereinafter named.

II. That on the . . . day of . . ., 19. . , at . . ., one A. B. delivered to the defendant certain goods, the property of the plaintiff, to-wit, [designate the goods], of the value of . . . dollars, and the defendant, as such carrier, received the same, to be by him safely carried to . . ., and there delivered to . . . for a reasonable reward to be paid by . . . therefor.

III. That the defendant did not safely carry and deliver said goods; but, on the contrary, so negligently conducted, and so misbehaved in regard to the same as such carrier, that the same were wholly destroyed and lost to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3254. Complaint against common carrier for loss of goods.

Form No. 864.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was a common carrier of goods, for hire, between the places hereinafter mentioned.

II. That on the . . . day of . . ., 19. . , at . . ., in consideration of the sum of . . . , then paid [or as the case may be] to him by the plaintiff, the defendant agreed safely to carry to . . . , and there deliver to . . . , or order [or otherwise, according to the fact], certain goods, the property of the plaintiff, of the value of . . . dollars, consisting of [here describe the goods], which the plaintiff then and there delivered to the defendant, who received the same upon the agreement and for the purposes before mentioned.

III. That the defendant did not safely carry and deliver the said goods pursuant to said agreement; but, on the contrary, the defendant so negligently conducted and so misbehaved in regard

to the same, in his calling as carrier, that they were wholly lost to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3255. Complaint for loss of baggage.

Form No. 865.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a common carrier of passengers and their baggage, by [stage coach], from . . . to . . ., for hire.

II. That on that day he received into his [coach] the plaintiff, with his baggage, to-wit, [designate baggage], of the value of . . . dollars, to be carried from said . . . to . . ., for . . . dollars, then paid to the defendant [or for him].

III. That the defendant did not use proper care therein; but, by the negligence and improper conduct of him and his servants, said baggage was wholly lost, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3256. Complaint against carrier by water, for negligence in loading cargo.

Form No. 866.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff, at the request of the defendant, caused to be delivered to him [designate the goods], the property of the plaintiff, of the value of . . . dollars, to be by the defendant safely and securely loaded on board a certain vessel at . . ., for the plaintiff, for a reasonable compensation to be paid said defendant therefor; and the defendant then received the goods for that purpose.

II. That the defendant afterwards, by himself and his servants, conducted so carelessly and improperly the loading of the said goods on board the said vessel, that by their negligence and improper conduct the goods were broken and injured, and a part thereof wholly destroyed, to the damage of plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT]

§ 3257. Complaint against carrier for not regarding notice to keep dry.

Form No. 867.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., at the port of . . ., the defendant was master and commander of a certain vessel known as the . . ., then lying at said port, and the plaintiff caused to be shipped on board said vessel certain [describe the goods], the property of the plaintiff, of the value of . . . dollars, which said goods were then in good order and condition; in consideration whereof, and of the sum of . . . dollars, then and there paid by the plaintiff to the defendant, the defendant then and there promised carefully and safely to carry and transport said goods to . . ., and there safely to deliver them to . . ., dangers of the seas only excepted, and then and there received said goods for that purpose.

II. That the plaintiff then and there caused due notice to be given to the defendant that it was necessary to the preservation of said goods that they should be kept dry.

III. That the defendant failed to take care of or safely to carry said goods; but, on the contrary, not regarding his said promise, so negligently and carelessly carried the same that they became wet, and thereby entirely destroyed [or otherwise state injury according to facts]; which injury was not occasioned by reason of any danger of the seas, but wholly through the negligence of the defendant and his servants, by reason whereof the plaintiff was injured to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3258. Complaint for loss in unloading.

Form No. 868.

[TITLE.]

The plaintiff complains, and alleges:

I. [As in form No. 867.]

II. [As in form No. 867.]

III. That said vessel afterwards safely arrived at . . ., and no [excepted perils] prevented the safe carriage or delivery of the goods.

IV. That the defendant did not deliver the said goods to the plaintiff; and for want of due care in the defendant and his

servants in unloading and delivering said goods from said vessel, they were broken and injured, and were wholly lost to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3259. Complaint against common carrier, for failure to deliver at time agreed.

Form No. 869.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation duly organized under and pursuant to the laws of this state, and at the times hereinafter mentioned was a common carrier of goods, for hire, between . . . and . . .

II. That on the . . . day of . . ., 19.., at . . ., the plaintiff delivered to the defendant [describe goods], of the value of . . . dollars, the property of the plaintiff, which the defendant, in consideration of a reasonable compensation to be paid it by the plaintiff, agreed safely to carry to . . ., and there deliver to the plaintiff, on or before the . . . day of . . .

III. That the defendant did not fulfill its agreement safely to carry the same, and to deliver them in . . . on said day; but, on the contrary, although the period between the said [day when received by defendant] and said [day when they should have been delivered] was a reasonable time for carrying the same from . . . to . . ., yet the defendant so negligently and carelessly conducted, and so misbehaved in regard to the same, in its calling as common carrier, that it failed to deliver the same in . . . until the . . . day of . . ., 19..

IV. That the market value of said goods in [place of delivery] on the [day agreed] was . . . dollars, but on the [day of actual delivery] was only . . . dollars; and that by reason of the premises the plaintiff was damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3260. Allegation of through contract over connecting lines.

Form No. 870.

That defendant was during said time a common carrier of cattle, for hire, being engaged in the business of transporting cat-

tle to and from different points in California where its railroad runs, and also by means of connecting lines to points in other states, and especially to the said place of Chicago; that on the said last-named day plaintiff delivered to defendant, as a common carrier as aforesaid, at a certain station on its said road, to-wit, . . ., and defendant then and there received from plaintiff . . . of fine fat beef cattle, of the value of . . . dollars per head, and defendant thereupon agreed that it would safely, securely, and expeditiously, within a reasonable time thereafter, carry and convey from said station at . . . [to a certain other station, to-wit, . . . and from thence] to said place of Chicago, and from said last-named place to be safely delivered to G. & Co., the agents of plaintiff, all for certain reasonable hire and reward to said defendant in that behalf paid by plaintiff.

§ 3261. Complaint against carrier on special contract for loss of goods.

Form No. 871.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation created by and under the laws of this state, and at the times hereinafter mentioned, being such corporation, was a common carrier of goods for hire between . . . and . . .

II. That on the . . . day of . . ., 19.., at . . ., the plaintiff delivered to the defendant, being such corporation, certain goods, the property of the plaintiff, to-wit, [describe the goods], of the value of . . . dollars, and in consideration of the sum of . . . dollars paid defendant by the plaintiff, the defendant then and there entered into an agreement with the plaintiff in writing, subscribed by the defendant thereunto lawfully authorized by its agent, of which agreement the following is a copy: [Copy agreement.]

III. That the defendant did not safely carry and deliver said goods pursuant to its said agreement; but so negligently and carelessly conducted and misbehaved in regard to the same, that the said goods were wholly lost to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3262. Complaint against telegraph company for failure to transmit message as directed.

Form No. 872.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation organized and doing business under the laws of the state, and is, and at all times hereinafter mentioned was, engaged in the business of telegraphing for hire.

II. That on the . . . day of . . . , 19 . . , the plaintiff presented to the defendant, at its office in . . . , the following message, to-wit:

"John Doe, San Francisco. Buy one hundred tons of wheat. James Roe" [the plaintiff].

Which message defendant received and promised to forward by telegraph to said John Doe in San Francisco. That in consideration thereof the plaintiff paid the defendant . . . dollars.

III. That on account of the negligence of the defendant said message was not transmitted as written by plaintiff, but was sent and delivered to said John Doe so as to read as follows:

"John Doe, San Francisco. Buy five hundred tons of wheat. James Roe."

IV. That said John Doe, in pursuance of said message so delivered to him, bought five hundred tons of wheat for the account of the plaintiff; that immediately on learning the error in said telegram plaintiff notified defendant of the same, and that through said error four hundred tons of wheat had been bought more than was directed to be bought by the original message written by the plaintiff, and plaintiff asked instructions from defendant relative to the disposition of said four hundred tons; the defendant refused to take any notice thereof or give any instructions concerning said wheat, and the plaintiff thereupon sold the same at San Francisco, on the . . . day of . . . , 19. . , at the highest market rate.

V. That the price paid by said plaintiff for said wheat was . . . dollars, and plaintiff was compelled to pay the further sum of . . . dollars commissions on said purchase; that plaintiff sold said wheat for . . . dollars, and was compelled to pay . . . dollars commissions on said sale.

[DEMAND OF JUDGMENT.]

§ 3263. Denial of being a common carrier.

Form No. 873.

[TITLE.]

The defendant answers to the complaint:

That he is not now, and was not at the time mentioned in the complaint, or at any time, a common carrier.

§ 3264. Denial of employment.

Form No. 874.

[TITLE.]

The defendant answers to the complaint:

That he did not undertake nor agree to carry the said goods to . . ., nor to deliver them there to . . ., and that said . . . never paid him, nor agreed to pay him, any reward for such service.

§ 3265. Denial of receipt of goods.

Form No. 875.

[TITLE.]

The defendant answers to the complaint:

That said . . . never delivered to him the said goods mentioned in said complaint, and that he never received the same, or any of them.

§ 3266. Denial of loss.

Form No. 876.

[TITLE.]

The defendant answers to the complaint:

That he denies, on his information and belief, that said goods were lost to the said . . ., and denies that he was negligent in and about the transporting, storing, or unloading of the same.

§ 3267. That the contract was special.

Form No. 877.

[TITLE.]

The defendant answers to the complaint:

That the goods mentioned in the complaint were delivered by the plaintiffs to, and received by, the defendants, upon a special contract between them, whereby it was provided that [state terms of contract].

§ 3268. Damage by plaintiff's fault.

Form No. 878.

[TITLE.]

The defendant answers to the complaint:

I. That the goods mentioned in the complaint were a dangerous and explosive substance known as nitro-glycerine, which the plaintiff then well knew, but which the defendant did not know, and could not reasonably be expected to know.

II. That the plaintiffs did not inform the defendant of the destructive nature of the goods, and negligently delivered the same to the defendant in bulk, and thereby induced the defendant to believe that the same might be placed in with other goods, casks, and boxes, without danger or injury.

III. [State special contract, if any, which was thereby violated.]

§ 3269. Counterclaim against carrier for negligence.

Form No. 879.

The defendant, further answering, and by way of counterclaim herein, alleges: That the transportation of the goods mentioned in the complaint was conducted so badly and negligently, and with so little care, that by the mere carelessness, negligence, and improper conduct of the said plaintiff and his servants in that behalf, a part of the said goods, of the value of at least . . . dollars, were wholly lost to the defendant; and a part thereof of the value of . . . dollars, were damaged in the sum of . . . dollars; which said loss and damages, amounting to the sum of . . . dollars, the defendant claims the right to counterclaim and set off against the plaintiff's demand to the extent thereof; and the defendant demands judgment against said plaintiff for the said sum of . . . dollars, or so much thereof as he may be entitled to over and above the plaintiff's claim.

CHAPTER XCIII.

ASSIGNEES AND DEVISEES.

§ 3270. What choses in action are assignable.—The provisions of the codes of the various states requiring that "every action must be prosecuted in the name of the real party in interest,"[1] except as otherwise provided, the immediate effect of which is to permit the assignee of a thing in action to sue in his own name, raises the important question, What things in action are assignable? At common law, with the exception of actions on negotiable paper, the rule was well settled that "in general, the action upon a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract was vested."[2]

In equity a different rule prevailed, which permitted the assignee to sue in his own name. The effect of the provisions of the codes cited above is to extend this equity doctrine to all cases of assignment, but not to render assignable any claims or demands which before its enactment were unassignable.[3] The only change made by the code is to transfer with the beneficial interest the right of action also in those cases where before the court would recognize and protect the rights of the assignee. No new right of action is created; no authority is given to assign a right of action not before assignable.[3]

In the determination of this question, therefore, recourse must be had to the settled doctrines of the law as they existed, independent of any changes of procedure made by the code. As a general proposition, all choses in action which survive and pass to the personal representatives of a decedent are assignable, and this includes not only causes of action which arise from contract, but in many cases those which have their origin in torts done to personal or real property. A bank depositor may assign his claim based upon the personal obligation of the banker to repay the deposit.[4] In general, all causes of action arising from the breach

1 See Cal. Code Civ. Proc., § 367.
2 1 Chit. Pl. 2.
3 Hodgman v. Western R. Co., 7 How. Pr. 492.
4 Johnson v. Shuey, 40 Wash. 22, 82 Pac. 123.

of contract survive, and are consequently assignable, except those which are purely personal in their nature, and the fulfillment of which requires the continuance of the relation between the original contracting parties. As illustrations of such personal contracts which are not subject to assignment, are contracts providing for apprenticeship,[5] contracts for marriage,[6] and contracts stipulating for the performance of services by an attorney or medical practitioner,[7] or any professional services,[8] even the services of a real estate broker.[9]

The maxim of the common law is, *Actio personalis moritur cum persona.* This principle was not originally applied to causes of action growing out of the breach of a contract. They were parcel of the personal estate, in reference to which the administrator or executor represents the person of the deceased, and is in law his assignee. But as to this class of rights of action late cases have somewhat qualified the rule, and it is now well settled that an executor or administrator cannot maintain an action upon an express or implied promise to the deceased, where the damages consist entirely of the personal sufferings of the deceased, whether mental or corporeal. Actions for the breach of a promise of marriage, for unskillfulness of medical practitioners contrary to their implied undertaking, the imprisonment of a party on account of the neglect of his attorney to perform his professional engagements, fall under this head, being considered as virtually actions for injuries to the person. If it be true that the executors and administrators are the testator's assignees, it is fair to assume that they take whatever of a personal nature the deceased had which was capable of assignment; and thus the power to assign and to transmit to the personal representatives are convertible propositions. Any interest to which the personal representatives of a decedent would not succeed is not the subject of assignment *inter vivos.*[10]

5 Hall v. Gardner, 1 Mass. 172; Davis v. Coburn, 8 Mass. 299; Cochran's Exr. v. Davis, 5 Litt. 118.

6 Stebbins v. Palmer, 1 Pick. 71, 11 Am. Dec. 146; Smith v. Sherman, 4 Cush. 408; Lattimore v. Simmons, 13 Serg. & R. 183; Chamberlain v. Williamson, 2 Mau. & Sel. 408, 1 Chit. Pl. 51; Meech v. Stoner, 19 N. Y. 29; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250.

7 Hilton v. Crooker, 30 Neb. 707, 47 N. W. 3.

8 Deaton v. Lawson, 40 Wash. 486, 111 Am. St. Rep. 922, 82 Pac. 879, 2 L. R. A. (N. S.) 392.

9 Sumner v. Nevin, 4 Cal. App. 347, 87 Pac. 1105.

10 Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551.

So when an artist or an author contracts to paint a picture or write a book, he cannot assign such contract so far as to authorize its performance by another.[11] A contract with a county to do its printing is not assignable without the consent of the county commissioners, the making of such contract being influenced by considerations of skill and ability possessed by the printer.[12] The law will not, as a general rule, permit a person to assign his obligations to another.[13] But many causes of action have been held assignable, although upon a casual examination they might appear to fall within the class of personal contracts which are not subject to transfer. Thus a contract of guaranty;[14] the right of a borrower to recover back the excessive interest upon a usurious loan;[15] a contract for the hiring of the services of state prison convicts;[16] a contract with the authorities of a city corporation for cleaning the streets during a certain time and at a stipulated price;[17] and the right of a widow to her dower before admeasurement, may all be assigned.[18] An attorney's lien for services is assignable.[19] So of a perfected mechanic's lien;[20] of a right to make and vend a certain article in a prescribed territory;[21] of a claim for damages for injury to a trademark;[22] of a perfected boat lien.[23] Generally, moneys due, or to become due, and every demand connected with a right of property, real or personal, are assignable.[24] But the mere right of a laborer or materialman to assert and create a lien under the mechanics' lien law is a personal right, and cannot be assigned.[25]

11 La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

12 Campbell v. Board of Commrs., 64 Kan. 376, 67 Pac. 866.

13 Rappleye v. Racine Seeder Co., 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139.

14 Small v. Sloan, 1 Bosw. 352.

15 Wheelock v. Lee, 64 N. Y. 242.

16 Horner v. Wood, 23 N. Y. 350.

17 Devlin v. Mayor, 63 N. Y. 8.

18 Strong v. Clem, 12 Ind. 37, 74 Am. Dec. 200; Pope v. Mead, 99 N. Y. 201, 1 N. E. 671.

19 Sibley v. Pine County, 31 Minn. 201.

20 McDonald v. Kelly, 14 R. I. 335; Kinney v. Duluth Ore Co., 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528.

21 Spence v. Smith, 101 N. C. 234, 7 S. E. 712.

22 Julian v. Hoosier Drill Co., 78 Ind. 408.

23 The Victorian, No. 2, 26 Or. 194, 46 Am. St. Rep. 616, 41 Pac. 1103.

24 See Truax v. Slater, 86 N. Y. 630; Stott v. Franey, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271; Brown v. School District, 48 Kan. 709, 29 Pac. 1069; Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154; Bacon v. Bonham, 33 N. J. Eq. 614; Kerr v. Moore, 54 Miss. 286.

25 Mills v. La Verne Land Co., 97 Cal. 254, 33 Am. St. Rep. 168, 32 Pac. 169.

If the service to be rendered is not necessarily personal, and such as can only, and with due regard to the interests of the parties and the rights of the adverse party, be rendered by the original contractor, and the latter has not disqualified himself from performance, the contract is assignable. It is now to be regarded as settled law that the unearned fees of a public officer may not be assigned.[26]

§ 3271. Order versus assignment.—An order requesting payment to another, and relating to the whole amount of the funds in the hands of the debtor, is an equitable assignment of the claim;[27] but where the order directs the payment of a certain amount from certain proceeds, it is a mere order, not an equitable assignment, and is revocable by the drawer before acceptance.[28] A writing requesting a third person to pay a certain sum each month for the board of certain horses is a mere order, and not binding upon such third person until accepted in writing.[29]

§ 3272. Assignment of claims arising from torts.—In determining what causes of action arising from torts are assignable, the same criterion has been adopted as in the case of contracts. If the claim is one which would survive to the personal representative of the decedent, it is assignable, otherwise not. As a general rule, causes of action arising from torts were not assignable at common law; and the same rule prevailed in equity as to merely personal injuries, such as libel, slander, and the like, where the effect of the injury did not tend to diminish the value of the estate. Such personal injuries died with the person, and were incapable of assignment.[30] Statutes have been passed in most of the states which increase the number of causes of action which survive, so as to include all injuries to property by which its value has been diminished.[31] As illustrations of such causes of action which survive, and are consequently assignable, may be

26 Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 19 Am. St. Rep. 507, 25 N. E. 855, 9 L. R. A. 706; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Field v. Chipley, 79 Ky. 260, 42 Am. Rep. 215.

27 Brady v. Ranch Min. Co., 7 Cal. App. 182, 94 Pac. 85.

28 Harlan v. Gladding, McBean & Co., 7 Cal. App. 49, 93 Pac. 400.

29 Frederick v. Spokane Grain Co., 47 Wash. 85, 91 Pac. 570.

30 People v. Tioga, 19 Wend. 73; Comegys v. Vasse, 1 Pet. 209, 7 L. Ed. 108; Averill v. Longfellow, 66 Me. 237; Renfro v. Prior, 25 Mo. App. 402; Norfolk etc. R. R. Co. v. Read, 87 Va. 185, 12 S. E. 395.

31 Hoyt v. Thompson, 5 N. Y. 320; Haight v. Hayt, 19 N. Y. 464;

mentioned claims arising from the negligent use of real or personal property;[32] or for the conversion of the latter;[33] or for injuries to the same;[34] or for fraudulently inducing one to enter into the marriage relation;[35] or for fraud or deceit in contracts relating to the sale of real or personal property.[36] Where an action is brought and attachment issued against property of defendant, and defendant sets up by cross-complaint a claim for damages from the wrongful issuance of such attachment, and assigns for a consideration any judgment that he may recover, such assignment is valid, and not within the statute of frauds.[37]

But causes of action which relate purely to the person, and are founded on injuries done to the body or character, do not survive, and, as a consequence, are not assignable. As illustrations of this class, are claims for malicious prosecution;[38] or for injuries to the person, caused by the neglect of a common carrier;[39] or for the purchase price of land sold.[40] Nor will a verdict rendered in such an action change the nature of the de-

Byxbie v. Wood, 24 N. Y. 607; McMahon v. Allen, 35 N. Y. 403; Graves v. Spier, 58 Barb. 349; Butler v. New York etc. R. R. Co., 22 Barb. 110; Weire v. City of Davenport, 11 Iowa, 49, 77 Am. Dec. 132; Tyson v. McGuineas, 25 Wis. 656; Smith v. Harris, 43 Mo. 562.

32 Fried v. New York Cent. R. R. Co., 25 How. Pr. 285; Waldron v. Willard, 17 N. Y. 466; Merrill v. Grinnell, 30 N. Y. 594; Merrick v. Brainard, 38 Barb. 574; Stanton v. Leland, 4 E. D. Smith, 88; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Dininny v. Fay, 38 Barb. 18; Ayrault v. Pacific Bank, 6 Robt. 337.

33 Lazard v. Wheeler, 22 Cal. 139; Tyson v. McGuineas, 25 Wis. 656; Smith v. Kennett, 18 Mo. 154; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; Richtmeyer v. Remsen, 38 N. Y. 206.

34 Rutherford v. Aiken, 3 N. Y. Sup. Ct. 60; More v. Massini, 32 Cal. 590; Haight v. Green, 19 Cal. 113; Weire v. City of Davenport, 11 Iowa, 49, 77 Am. Dec. 132; McArthur v. Green Bay etc. Co., 34 Wis. 139; Butler v. New York etc. R. R. Co., 22 Barb. 110; East Tennessee etc. R. R. Co. v. Henderson, 69 Tenn. (Lea) 1; Chouteau v. Boughton, 100 Mo. 406, 13 S. W. 877; Shaw v. Colwell Lead Co., 20 Blatchf. 417, 11 Fed. 711.

35 Higgins v. Breen, 9 Mo. 497.

36 Haight v. Hayt, 19 N. Y. 464; Byxbie v. Wood, 24 N. Y. 607; Graves v. Spier, 58 Barb. 349; Johnston v. Bennett, 5 Abb. Pr. (N. S.) 331; Woodbury v. Deloss, 65 Barb. 501; Grocers' Nat. Bank v. Clark, 48 Barb. 26. But see, contra, Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551.

37 McCornick v. Friedman, 9 Idaho, 754, 76 Pac. 762.

38 Noonan v. Orton, 34 Wis. 259, 17 Am. Rep. 441; Lawrence v. Martin, 22 Cal. 173.

39 Hodgman v. Western R. R. Co., 7 How. Pr. 492; Purple v. Hudson River R. R. Co., 4 Duer, 74. This rule has been changed in several of the states by special statutes, which give a right of action under such circumstances to the personal representatives of the deceased.

40 Baum v. Grisby, 21 Cal. 172, 81 Am. Dec. 153; Lewis v. Covillaud, 21 Cal. 78; Williams v. Young, 21 Cal.

mand so as to render it assignable, although after judgment the same may be assigned as a contract of record.[41] If, however, after judgment has been entered upon the verdict, and a motion for a new trial has been made, the party in the mean time die, judgment will be entered *nunc pro tunc* as of the time of the verdict, so as to prevent the action from abating.[42]

§ 3273. **Form of assignment.**—No formality in the manner of assignment is necessary to invest the assignee with the right to bring suit in his own name. An assignment of a debt may be by parol, and may be inferred from the acts and conduct of the party.[43] No particular amount need be specified, if it is ascertainable in the method provided by the statute.[44] Any act amounting to a rightful appropriation of a debt, or whereby one person's interest in a chose in action passes to another, constitutes an assignment.[45]

So where an order is given for a valuable consideration, and for the whole amount of a demand against the drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn. And an order drawn by a creditor on his debtor for a portion of his demand constitutes an assignment of the debt *pro tanto*.[46] An instrument reciting, "For value received we hereby sell and assign N. and B. $552 of any money due or to become due," on account of a certain contract, and containing a request to pay N. and B. such sum out of any moneys due or to become due on account of aforesaid, and to charge the same to the drawer's account, was not an assignment of the fund, but was an order or bill of exchange

227; Law v. Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 56; Elder v. Jones, 85 Ill. 384.

41 Lawrence v. Martin, 22 Cal. 173; Crouch v. Gridley, 6 Hill, 250; In re Charles, 14 East, 197; Kellogg v. Schuyler, 2 Denio, 73.

42 Ryghtmyre v. Durham, 12 Wend. 245; Turner v. Booker, 2 Dana, 334; Collins v. Prentice, 15 Conn. 423; Dial v. Holter, 6 Ohio St. 228.

43 Forsyth v. Ryan, 17 Colo. App. 511, 68 Pac. 1055.

44 Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 Pac. 820; Cal. Civ. Code, § 1610 et seq.

45 Wiggins v. McDonald, 18 Cal. 126. See Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; Bushnell v. Bushnell, 92 Ind. 503.

46 Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Walker v. Mauro, 18 Mo. 564; McEwen v. Johnson, 7 Cal. 258; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. That an assignment of a part of a chose in action, for valuable consideration, is good in equity, see Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Fordyce v. Nelson, 91 Ind. 447; James v. City of Newton, 142 Mass. 368, 56 Am. Rep. 692, 8 N. E. 122.

within the Washington statute,[46a] requiring an acceptance in writing, in order to create a liability against the drawee.[47] And an ordinary bank-check for a part only of the sum on deposit does not operate at the time of delivery as an equitable assignment *pro tanto* of the sum on deposit.[48] An order upon a specified fund operates as an equitable assignment of a part of the fund, entitling the payee thereof to payment in full out of the fund, to the exclusion of the general creditors of the drawee of the order.[49] The delivery of drafts to a bank for collection, with an agreement between the parties that when collected the proceeds be paid to a person named, constitutes an assignment of such proceeds to such person.[50] An order by a municipal contractor, filed by the payee with the proper accounting officer of the city, constitutes an equitable assignment of so much of the moneys owing the contractor as will equal the amount of the order.[51] Upon the same principle, the assignment by a creditor to his debtor of part of his demand constitutes a payment thereof *pro tanto*.[52] So, also, the indorsement of a bill of lading, *prima facie*, vests the property in the goods in the indorsee.[53] The indorsement of a note secured by mortgage operates as an equitable assignment of the mortgage.[53a] An assignment by an employee of his wages to be earned, in consideration of the assignee furnishing him necessaries required during the employment, is not valid, because the term of the employment and the amount covered by the assignment are indefinite.[54]

An instrument in writing, whether the same be a contract, bond, or judgment, may be assigned by a writing on a separate piece of paper, or even by parol,[55] and an instrument under seal may be

46a Sess. Laws 1899, § 132.

47 Nelson v. Nelson, Bennett Co., 31 Wash. 116, 71 Pac. 749.

48 Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93.

49 Willard v. Bullen, 41 Or. 25, 67 Pac. 924, 68 Pac. 422.

50 Zilke v. Woodley, 36 Wash. 84, 78 Pac. 299.

51 Dickerson v. City of Spokane, 26 Wash. 292, 66 Pac. 381.

52 McPike v. McPherson, 41 Mo. 521.

53 Lineker v. Aveshford, 1 Cal. 76; Harris v. De Wolf, 4 Pet. 147, 7 L. Ed. 811; Balderston v. Manro, 2 Cranch C. C. 623, Fed. Cas. No. 793.

53a Connecticut etc. Insurance Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655. See York v. Conde, 61 Hun, 26, 15 N. Y. Supp. 380; Switzer v. Noffsinger, 82 Va. 518.

54 Colorado Fuel etc. Co. v. Kidwell, 20 Colo. App. 8, 76 Pac. 922.

55 Hooker v. Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Jones v. Witter, 13 Mass. 304; Briggs v. Dorr, 19 Johns. 95; Dunn v. Snell, 15 Mass. 481; McClain v. Weidemeyer, 25 Mo. 364; Thornton v. Crowther, 24 Mo. 164; Hancock v. Ritchie, 11 Ind. 48;

transferred by a writing not sealed.[56] The mere signing an assignment, without delivery, is sufficient to constitute the assignee the real party in interest, so as to authorize him to sue in his own name.[57] A negotiable promissory note or bill of exchange must be assigned by indorsement, in order to preserve its negotiability; but an assignee by delivery may sue thereon in his own name, subject to all the equities existing in favor of the drawer.[58]

§ 3274. **Allegation of assignment.**—Where the plaintiff is an assignee, the complaint must allege the fact of the assignment.[59] Such allegation must be a positive averment of a transfer, so as to show title in the plaintiff.[60] It is not enough merely to allege that "the said plaintiff is now the sole owner of the demand." Such an allegation is not an averment of an issuable fact, but of a mere conclusion of law, and its denial would raise no issue.[61] An allegation that A. duly assigned and transferred all his interest in the contract to the plaintiff B., and that the plaintiff C. became interested by a sale and assignment to him of a part of B.'s interest, has been held sufficient.[62] So, also, has an averment in an action on a non-negotiable note, that the same was duly indorsed to plaintiff, and that he is the lawful owner and holder of the same, been held sufficient to admit

Andrews v. McDaniel, 68 N. C. 385; White v. Phelps, 14 Minn. 27, 100 Am. Dec. 190; Weinwick v. Bender, 33 Mo. 80; Pearson v. Cummings, 28 Iowa, 344; Williams v. Norton, 3 Kan. 295; Carpenter v. Miles, 17 B. Mon. 598; Conyngham v. Smith, 16 Iowa, 471; Barthol v. Blakin, 34 Iowa, 452; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790; Green v. Marble, 37 Iowa, 95; Williams v. Ingersoll, 89 N. Y. 508; Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285.

56 Moore v. Waddle, 34 Cal. 145.

57 Ritter v. Stevenson, 7 Cal. 388.

58 Andrews v. McDaniel, 68 N. C. 385; Mandeville v. Riddle, 1 Cranch, 290, 2 L. Ed. 112; White v. Brown, 14 How. Pr. 282; Billings v. Jane, 11 Barb. 620; Gould v. Ellery, 39 Barb. 163; Farrington v. Park Bank, 39 Barb. 645; Brown v. Richardson, 1 Bosw. 402; Houghton v. Dodge, 5 Bosw. 326; Sexton v. Fleet, 2 Hilt. 485; Fairbanks v. Sargent, 104 N. Y. 108, 58 Am. Rep. 490; Rayburn v. Hurd, 20 Or. 229, 25 Pac. 635.

59 Prindle v. Caruthers, 15 N. Y. 426; White v. Brown, 14 How. Pr. 282; Adams v. Holley, 12 How. Pr. 330.

60 Stearns v. Martin, 4 Cal. 227.

61 Thomas v. Desmond, 12 How. Pr. 321; Russell v. Clapp, 7 Barb. 482; Bentley v. Jones, 4 How. Pr. 202; McMurray v. Gifford, 5 How. Pr. 14; Parker v. Totten, 10 How. Pr. 233; Poorman v. Mills, 35 Cal. 121, 95 Am. Dec. 90. See Sellers v. First Presbyterian Church, 91 Wis. 328, 64 N. W. 1031.

62 Horner v. Wood, 15 Barb. 372; Fowler v. New York Indem. Ins. Co., 23 Barb. 151.

evidence of the assignment.[63] The complaint should plead the assignment although the action be instituted in a justice's court.[64] In Indiana, where an instrument not assignable is assigned and sued on by the assignee, if the assignor is made a party, it is immaterial, and it need not be alleged how the assignment was made.[65]

§ 3275. **Consideration.**—Defendant in an action on contract cannot object that one of the plaintiffs assigned to another plaintiff without consideration an interest in the contract obligation.[66] If an assignment of wages is made for security, proof of the amount due from assignor to assignee is essential to recover from the employer.[67]

§ 3276. **Averment of consideration.**—In an action by the assignee of a debt, it is immaterial to defendant whether there was any consideration for the assignment or not.[68] A promissory note imports a consideration, and none need be pleaded in an action by an assignee.[69] And a party seeking to avoid it for want of consideration has the burden of showing such fact.[70] In an action on notes alleged by plaintiff to have been assigned to him by the executor of the payee, it was not necessary for the complaint to allege that the executor had authority from the probate court to make the assignment, the allegation of assignment implying a valid assignment.[71] In an action on an account assigned to plaintiff in writing, in which the execution of the assignment is admitted by the pleading, it is not error for the court to refuse to admit the defendant to introduce evidence tending to show that such assignment is only colorable, and that the plaintiff is not the real party in interest, where no such defense is pleaded.[72] A complaint in an action against a city on a written order given

63 Brown v. Richardson, 20 N. Y. 472.

64 Balden v. Thomasen, 17 Mont. 487, 43 Pac. 627.

65 Buntin v. Weddle, 20 Ind. 449.

66 Rutan v. Huck, 30 Utah, 217, 83 Pac. 833.

67 Chicago etc. Ry. v. Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587.

68 Forsyth v. Ryan, 17 Colo. App. 511, 68 Pac. 1055.

69 Winters v. Rush, 34 Cal. 136; Martin v. Kanouse, 2 Abb. Pr. 331; Horner v. Wood, 15 Barb. 372.

70 Driscoll v. Driscoll, 143 Cal. 528, 77 Pac. 471; Colo. Fuel etc. Co. v. Kidwell, 20 Colo. App. 8, 76 Pac. 922.

71 Keen v. Brooks, 19 Colo. App. 165, 73 Pac. 1092.

72 Lesh v. Meyer, 63 Kan. 524, 66 Pac. 245.

by a municipal contractor, which recites that it was given in payment of labor performed for the latter, is not defective in not alleging a consideration for such order.[73]

Even for a sealed contract, an averment of assignment imports that it was made by a sealed instrument, from which a consideration is to be inferred, and consequently none need be stated.[74] Nor can the defendant aver or prove that the assignment was only intended as collateral security for the payment of a debt, if the assignment is absolute on its face.[75] In Kentucky, it is not necessary in a suit by an assignee of a chose in action, against the assignor, to aver a valuable consideration. It is sufficient to set out the assignment.[76]

§ 3277. Assignments of accounts.—The assignee may sue in his own name on an account assigned to him.[77] But where there is no final settlement of partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portions of this amount, no action can be maintained therefor in *assumpsit*, nor can an individual partner assign his claim against the partnership so that the assignee may sue.[78] The assignee of an account and a note given in part payment of it, where the assignment of the two claims was contemporaneous, may sue in his own name.[79] An assignment of an account by indorsing on it the word "Assigned" is sufficient, and it may be amended on the trial by writing above it, "For value received, I hereby assign the within account."[80] The complaint in an action on an assigned account need not allege that the assignment is in writing, even in case proof of written assignment should be necessary upon the trial.[81] And in an action upon an assignment of an account

73 Dickerson v. City of Spokane, 26 Wash. 292, 66 Pac. 381.

74 Moore v. Waddle, 34 Cal. 145; Fowler v. New York Indem. Ins. Co., 23 Barb. 143; Clark v. Downing, 1 E. D. Smith, 406; Burtnett v. Gwynne, 2 Abb. Pr. 79; Vogel v. Babcock, 1 Abb. Pr. 176; Martin v. Kanouse, 2 Abb. Pr. 330; Richardson v. Mead, 27 Barb. 178.

75 Wetmore v. San Francisco, 44 Cal. 294.

76 Holt v. Thompson, 1 Duval (Ky.) 301. See, also, Dawson v. Pogue, 18 Or. 94, 22 Pac. 637, 6 L. R. A. 176; Gregoire v. Rourke, 28 Or. 275, 42 Pac. 996.

77 Carpenter v. Johnson, 1 Nev. 331.

78 Bullard v. Kinney, 10 Cal. 63.

79 Armstrong v. Cushney, 43 Barb. 340.

80 Ryan v. Maddux, 6 Cal. 247.

81 Rice v. Yakima etc. Ry. Co., 4 Wash. 724, 31 Pac. 23.

for a sum due, and for a further sum to be earned in the future, the complaint is not demurrable on the ground that it is founded on a claim not in existence at the time of the assignment, as it states a cause of action for the sum which was due at that time.[82] The complaint in an action on an assigned claim for services, which the defendants employed the assignors to perform, and for which they promised to pay them a specified sum, does not state a cause of action, if it fails to allege that such services were performed.[83]

§ 3278. Assignments of bonds, notes, etc.—An assignee of bonds, notes, etc., may maintain an action thereon in his own name.[84] The assignment of a note to the maker is a payment of the same; and the same is true of a joint and several note, assigned to one of the makers.[85] Payment by the maker of a non-negotiable note of the sum due upon an attachment against the payee, without notice of an assignment, will bar a suit by the assignee.[86] Although a bill or note payable to order can only be made negotiable by an indorsement by the payee, still a transfer by delivery is sufficient to entitle the holder to sue thereon in his own name, the same as in assignments of other choses in action.[87]

A right of action to have a transfer of certain bonds by the directors of a bank to its president set aside is personal to the bank, and not assignable.[88]

An assignment of a chose in action absolute in its terms, so that by virtue thereof the whole apparent legal title passes to the assignee, constitutes the assignee the real party in interest for the purposes of an action, although the assignment was solely for the purpose of bringing a suit, and the assignee was to pay to the assignor everything realized from the suit after deducting expenses.[89] It is enough for the defendant to know that

82 Rice v. Yakima etc. Ry. Co., 4 Wash. 724, 31 Pac. 23.

83 Weiner v. Lee Shing, 12 Or. 276, 7 Pac. 111.

84 Mandeville v. Riddle, 1 Cranch, 290, 2 L. Ed. 112; Cottle v. Cole, 20 Iowa, 481.

85 Gordon v. Wansey, 21 Cal. 77.

86 Weinwick v. Bender, 33 Mo. 80.

87 Brown v. Richardson, 20 N. Y. 472, 1 Bosw. 402; Billings v. Jane, 11 Barb. 620; White v. Brown, 14 How. Pr. 282; Houghton v. Dodge, 5 Bosw. 326; Sexton v. Fleet, 2 Hilt. 485.

88 Smith v. Pacific Bank, 137 Cal. 363, 70 Pac. 184.

89 Wines v. Rio Grande etc. R. R. Co., 9 Utah, 228, 33 Pac. 1042. See Saulsbury v. Corwin, 40 Mo. App. 373; Young v. Hudson, 99 Mo. 102, 12 S. W. 632; Sheridan v. Mayor, 68 N. Y. 30; Greig v. Riordan, 99 Cal.

the plaintiff is the party in legal interest, and that a recovery by him will be full protection against another suit by the assignor.[90] And where an assignee to whom a claim has been assigned for the purpose of bringing suit has elected to sue but one of the joint makers, or but the municipal debtor, without suing the other joint debtors or the sureties, and has recovered judgment against one joint maker or the principal debtor, the other joint makers or the sureties can set up such judgment in bar of the assignor's suit against them.[91] Notice to the debtor by the assignee of a chose in action is not necessary to complete the assignment, in the absence of any controversy between different assignees or attaching creditors of the fund assigned.[92] So an assignee of a present existing cause of action may commence an action thereon on the same day that the assignment to him is made.[93] And the right of an assignee of a chose in action to maintain an action thereon in his own name before a justice of the peace is recognized.[94]

§ 3279. **Assignment by a corporation.**—In an action brought by the assignee of a corporation, it is not essential to particularly state the fact of incorporation. A statement of the name of the corporation, and of the making of the agreement between them, and of what the corporation did in fulfillment of its agreement, is sufficient.[95] And the complaint need not aver that the directors were authorized to make it.[96] But a complaint on an account assigned to the plaintiff by a certain company which fails to show that such company had any legal existence, or the nature thereof, is bad when specially demurred to upon that ground.[97]

The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may bring suit in his own name, and, though the assignment be indorsed to another, he may still maintain the action in his own

316, 33 Pac. 913; Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445.

90 Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777.

91 Anderson v. Yosemite Min. Co., 9 Utah, 420, 35 Pac. 502.

92 Jackson v. Hamm, 14 Colo. 58, 23 Pac. 88.

93 Fraser v. Oakdale Lumber etc. Co., 73 Cal. 188, 14 Pac. 829.

94 Layton v. Kirkendall, 20 Colo. 236, 38 Pac. 55.

95 Kennedy v. Cotton, 28 Barb. 59.

96 Nelson v. Eaton, 16 Abb. Pr. 113.

97 Herbst Imp. Co. v. Hogan, 16 Mont. 384, 41 Pac. 135.

name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment.[99]

§ 3280. **Assignment of debts.**—An order drawn by a creditor on his debtor is *prima facie* evidence of an assignment of the debt *pro tanto*, and the assignee may recover on the same.[100] And drawees with notice are liable to payees without an express promise to pay. An employer receiving notice of his employee's assignment of wages to be earned, and regularly paying the wages, after such notice, to the assignee, sufficiently accepted the assignment, so as to become bound to the assignee.[101] A partnership operating under a fictitious name cannot assign a claim for the mere purpose of bringing suit in that individual's name; but if such assignment is *bona fide*, such individual may sue on such claim.[102]

§ 3281. **Assignment of goods not in possession.**—Where the vendor of goods is not at the time of sale in possession, the transfer is an assignment, and an actual and continued change of possession is required equally as in cases of sale by one in possession. And where B., the vendee, assigned to C. a contract for the delivery of goods to arrive, and C., after the arrival of the goods, tendered payment for the same, it was held that A., the vendor, was not entitled to notice of the assignment, but that C. might enforce the contract against him.[103]

§ 3282. **Assignment of lease.**—An assignment of all right, title, and interest of the lessee conveys his right for compensation for new erections on the land under the covenants.[104] A lease, or an interest therein, or a right of entry for breach of one

99 Jackson v. Hamm, 14 Colo. 58, 23 Pac. 88.

100 McEwan v. Johnson, 7 Cal. 258; Wheatley v. Strobe, 12 Cal. 97, 73 Am. Dec. 522; Pope v. Huth, 14 Cal. 408; Hobart v. Tyrrell, 68 Cal. 12, 8 Pac. 525. See Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283; National Bank v. Herold, 74 Cal. 603, 5 Am. St. Rep. 476, 16 Pac. 507.

101 Colo. Fuel etc. Co. v. Kidwell, 20 Colo. App. 8, 76 Pac. 922.

102 Good v. Lipp, 41 Colo. 209, 91 Pac. 1104.

103 Morgan v. Lowe, 5 Cal. 326, 63 Am. Dec. 132.

104 Hunt v. Danforth, 2 Curtis C. C. 592, Fed. Cas. No. 6887.

of its conditions, may be assigned, so as to entitle the assignee to sue in his own name.[105] Also, the lessor may sell the property and assign to the purchaser all damages on account of the lessee's breach of the lease.[106]

§ 3283. **Assignment of mortgages.**—A mortgage, independent of the debt it is intended to secure, has no assignable quality.[107] The assignment of the debt, note, or bond secured by the mortgage, even without a formal transfer of the security, carries the mortgage with it.[108] In California, it has been held that the equitable lien which a vendor of real estate retains upon the property for the unpaid purchase money is not assignable.[109]

In an action by an assignee to foreclose a lien for materials furnished for and used in the construction of a building, it is not necessary to aver that the assignment was in writing. An allegation that the claim was assigned to the plaintiff is sufficient.[110]

§ 3284. **Assignment of insurance policy.**—An assignment of a policy of insurance on a stock of goods attaches, in equity, as a lien upon the amount due on the policy to the extent of the debt as soon as the loss occurs.[111]

§ 3285. **Assignments of judgments.**—A cause of action which does not survive to the personal representatives is not assignable. But if suit has been brought on such a cause of action, and judgment recovered, the judgment is considered as a contract, and is capable of assignment, even after the death of the judgment creditor. A verdict, however, on such a cause of action does not have the same effect.[112] If a judgment creditor assign the judgment, and the judgment debtor, without notice of the assignment,

105 Averill v. Taylor, 8 N. Y. 44; Van Rensselaer v. Ball, 19 N. Y. 100; Van Rensselaer v. Hays, 19 N. Y. 68, 75 Am. Dec. 278.

106 Pogue v. Ball, 4 Cal. App. 406, 88 Pac. 376.

107 Polhemus v. Trainer, 30 Cal. 685.

108 Hatch v. White, 2 Gall. 152, Fed. Cas. No. 6209; Willis v. Farley, 24 Cal. 490; Hurt v. Wilson, 38 Cal. 263. See Morrison v. Mendenhall, 18 Minn. 232; Strause v. Josephthal, 77 N. Y. 622.

109 Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Lewis v. Covillaud, 21 Cal. 178; Williams v. Young, 21 Cal. 227.

110 Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890.

111 Bibend v. Liverpool etc. Ins. Co., 30 Cal. 78; Pope v. Huth, 14 Cal. 403; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

112 Lawrence v. Martin, 22 Cal. 173.

afterwards pays the same voluntarily to the sheriff, by reason of service of garnishment process upon him, the assignee may still enforce the judgment.[113] In a suit to enforce a judgment lien on real estate brought by the assignees of the judgment, the judgment and the assignment must be set forth.[114] The assignment of a judgment may be by writing or by merely verbal transfer; [115] and the assignee of a judgment can maintain an action thereon in his own name.[116] So one to whom a judgment has been assigned for the benefit of himself and another may sue thereon in his own name.[117] And where the proceeds of the judgment assigned are to be paid to several persons, the assignee of the judgment may nevertheless bring an action thereon in his own name without joining with him the other parties interested.[118]

§ 3286. **Assignment of corporate stock.**—An assignment of shares of stock in a corporation under section 324 of the California Civil Code, by delivery of the certificates, without transfer on the books of the company, is invalid against subsequent purchasers on execution against the assignor, without notice of the assignment.[119] An assignment by a stockholder of his shares of stock in a corporation carries with it his proportionate share of the assets, including all undeclared dividends.[120]

§ 3287. **Assignment of expectancies.**—Under sections 700 and 1045 of the California Civil Code, providing that a mere possibility, such as the expectancy of property, and a mere possibility not coupled with an interest, cannot be transferred, a child cannot, prior to his parents' death, convey his expectancy as heir, but such an heir's conveyance may be enforced in equity as an agreement to convey by way of estoppel.[121] An assignment may be made of the rights and profits to be derived from a certain

113 Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655.

114 Brookshire v. Lomax, 20 Ind. 512.

115 Winberry v. Koonce, 83 N. C. 351; Steele v. Thompson, 62 Ala. 323.

116 Moore v. Nowell, 94 N. C. 265. That it is otherwise in Alabama, see Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809.

117 Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82.

118 Walburn v. Chenault, 43 Kan. 352, 23 Pac. 657.

119 Weston v. Bear River etc. Co., 5 Cal. 186, 63 Am. Dec. 117; Naglee v. Pacific Wharf Co., 20 Cal. 529; People v. Elmore, 35 Cal. 653; Parrott v. Byers, 40 Cal. 614.

120 Jermain v. Lake Shore etc. R. R. Co., 91 N. Y. 483.

121 In re Wickersham's Estate, 138 Cal. 335, 70 Pac. 1076; judgment modified on rehearing, 138 Cal. 355, 71 Pac. 437.

shipment of grain.[122] An assignment of wages to be earned in the future is not void, as unconstitutional or against public policy.[123]

§ 3288. **Priority of assignments.**—As between two assignments of the same claim, the assignee who first gives notice of his claim to the debtor has the prior right, though his assignment is subsequent in date.[124] An assignment for benefit of creditors must conform to the law in order to stand against an attachment, even though levied after assignment.[125]

§ 3289. **Effect of assignment.**—In addition to the provisions of the codes which require every action to be prosecuted in the name of the real party in interest.—the effect of which, as has been seen above, is to permit the assignee to bring the action in his own name,—there is another very important section which should be considered in this connection. The codes, with very little difference in the language, provide that "in the case of an assignment of a thing in action, the action of the assignee is without prejudice to any set-off or other defense existing at the time of or before notice of the assignment; but this section does not apply to negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration, before maturity."[126] An assignor of an instrument cannot make any agreement with the obligor thereunder which will affect rights of the assignee.[127]

This statutory provision is a substantial embodiment of the familiar rule which existed prior to the adoption of the codes, that the assignee of a thing in action, not negotiable, takes the same subject to all the defenses, legal or equitable, existing between the original parties.[128]

122 Bank of Yolo v. Bank of Woodland 3 Cal. App. 561, 86 Pac. 820.

123 Chicago etc. Ry. v. Provolt, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587.

124 Jack v. National Bank, 17 Okla. 430, 89 Pac. 219.

125 Bingham v. Ozmun, 19 Okla. 225, 92 Pac. 147.

126 See Cal. Code Civ. Proc., § 368.

127 Parkhurst v. Dickinson, 41 Wash. 420, 83 Pac. 895.

128 McCabe v. Gray, 20 Cal. 509; Northam v. Gordon, 23 Cal. 255; Truebody v. Jacobson, 2 Cal. 269; Olds v. Cummings, 31 Ill. 188; Fortier v. Darst, 31 Ill. 212; Shaw v. Shaw, 4 Cranch C. C. 715, Fed. Cas. No. 12724; Shirras v. Caig, 7 Cranch, 34, 3 L. Ed. 260; Kinsman v. Parkhurst, 18 How. 289, 15 L. Ed. 385; Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632; Littlefield v. Albany County Bank, 97 N. Y. 581; Davis v. Bech-

"An assignee of a chose in action not negotiable takes the thing assigned, subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and the notice."[129] An assignee of a cost-bill, on which an execution may be issued, takes it subject to any right of offset against the bill of costs existing at the time of the assignment.[130] An assignee of a claim is chargeable with any notice the original creditor possessed of fraudulent acts on the part of the debtor affecting the collection of the debt.[131] But in Oklahoma, fraud committed in the inception of a debt is personal between the contracting parties, and does not follow an assignment of the debt.[132] In California, a note may be claimed as a set-off though not due at the time the defendant received notice of the assignment of his notes to the plaintiff, if it became mature before the commencement of the action by the plaintiff.[133] Or, as the rule is stated by Johnson, J., "In the case of the assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, which would have been available to the defendant had the action been brought in the name of the assignor."[134]

This doctrine has been applied to assignments of bonds under the statutes of Virginia and Indiana;[135] in actions by the assignees of mortgages;[136] in an action on a non-negotiable warehouse-

stein, 69 N. Y. 440, 25 Am. Rep. 218; Rayburn v. Hurd, 20 Or. 229, 25 Pac. 635; Hamilton v. Grangers Life etc. Ins. Co., 65 Ga. 750; Calvin v. Sterritt, 41 Kan. 215, 21 Pac. 103; James v. Yaeger, 86 Cal. 184, 24 Pac. 1005.

129 Callanan v. Edwards, 32 N. Y. 486.

130 Northwestern etc. Hypotheek Bank v. Ranch, 8 Idaho, 50, 66 Pac. 807.

131 Fuller v. Horner, 69 Kan. 467, 77 Pac. 88.

132 Thwing v. Winkler, 13 Okla. 643, 75 Pac. 1126.

133 St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876. See Northampton Bank v. Balliet, 8 Watts & Serg. 311, 42 Am. Dec. 297.

134 Beckwith v. Union Bank, 9 N. Y. 211. See, to the same effect, Myers v. Davis, 22 N. Y. 489; Ingraham v. Disborough, 47 N. Y. 421; Andrews v. Gillespie, 47 N. Y. 487; Bush v. Lathrop, 22 N. Y. 535; Reeves v. Kimball, 40 N. Y. 299; Wood v. Perry, 1 Barb. 114; Ainslie v. Boynton, 2 Barb. 258; Commercial Bank v. Colt, 15 Barb. 506; Western Bank v. Sherwood, 29 Barb. 383; Blydenburgh v. Thayer, 3 Keyes, 293; Martin v. Kunzmuller, 37 N. Y. 396; Fuller v. Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Fera v. Wickham, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456.

135 Scott v. Shreeve, 12 Wheat. 605, 6 L. Ed. 744; Bell v. Nimmo, 5 McLean, 110, Fed. Cas. No. 1258.

136 Hubbard v. Turner, 2 McLean, 519, Fed. Cas. No. 6819; Western Bank v. Sherwood, 29 Barb. 383.

man's receipt;[137] in an action by the assignee of judgments and decrees;[138] in actions by the assignees for the benefit of creditors;[139] in actions by the assignee of negotiable paper after it has lost its negotiable character;[140] in actions by the assignee of the vendee, to compel the specific performance of a contract for the sale of lands;[141] and in actions by the assignee of a partner.[142]

When the assignee of a thing in action, which is subject to equities between the original parties, assigns it to a second assignee by a transfer which purports to convey a perfect title, for a good consideration, and without any notice on the part of the second assignee of any defect in the title, the question has often arisen, whether such second assignee is affected by the equities which existed between the original parties. These equities are often spoken of as latent, and several courts have adopted the rule that such latent equities cannot prevail against the title of the second assignee.[143] The effect of this rule is to extend to the assignment of ordinary choses in action the well-settled doctrines which apply to the assignment of negotiable instruments. The better doctrine, however, is, and the one which is settled by the weight of authority, that the right of the second assignee, under such circumstances, is subject to all the equities existing in favor of the original parties. The original assignee cannot convey a greater title or interest in the subject of assignment than he himself has.[144] Where, however, the owner by his own af-

137 Commercial Bank v. Colt, 15 Barb. 506.

138 Sampeyreac v. United States, 7 Pet. 222, 8 L. Ed. 665; Wells v. Clarkson, 2 Mont. 230, 379, 5 Mont. 343, 5 Pac. 894.

139 Marine Bank v. Jauncey, 1 Barb. 486; Maas v. Goodman, 2 Hilt. 275.

140 Gwathney v. McLane, 3 McLean, 371, Fed. Cas. No. 5882; Rounsavel v. Scholfield, 2 Cranch C. C. 139, Fed. Cas. No. 12085.

141 Reeves v. Kimball, 40 N. Y. 299.

142 Nicoll v. Mumford, 4 Johns. Ch. 522; Rodriguez v. Heffernan, 5 Johns. Ch. 417.

143 Livingston v. Dean, 2 Johns. Ch. 479; Murray v. Lylburn, 2 Johns. Ch. 441; Rodriguez v. Heffernan, 5 Johns. Ch. 417; Murray v. Ballou, 1 Johns. Ch. 566; Bebee v. Bank of New York, 1 Johns. 529, 3 Am. Dec. 353; James v. Morey, 2 Cow. 246, 14 Am. Dec. 475; Losey v. Simpson, 11 N. Y. Eq. 246; Bloomer v. Henderson, 8 Mich. 395, 77 Am. Dec. 453; Croft v. Bunster, 9 Wis. 503; Mott v. Clark, 9 Pa. St. 399, 49 Am. Dec. 566; Taylor v. Gitt 10 Pa. St. 428; Metzgar v. Metzgar, 1 Rawle, 227; McConnell v. Wenrich, 16 Pa. St. 365; Moore v. Holcombe, 3 Leigh, (Va.) 648, 24 Am. Dec. 683; Ohio L. Ins. Co. v. Ross, 2 Md. Ch. 25; Sleeper v. Chapman, 121 Mass. 404; Sumner v. Waugh, 56 Ill. 531; Winter v. Belmont M. Co., 53 Cal. 428.

144 Bush v. Lathrop, 22 N. Y. 535, Anderson v. Nicholas, 28 N. Y. 600

firmative act has conferred the apparent title and absolute ownership upon an assignee, upon the faith of which the chose in action has been purchased for value by a second assignee, the owner is precluded from asserting his real title as against such subsequent purchaser by the application of the doctrine of estoppel. This rule, although it has generally been applied to transfers of stock certificates, has been extended by some courts to assignments of various other kinds of choses in action.[145]

In order to give a debtor, when sued by the assignee, the right to set off a demand against the assignor, it is necessary that such demand should have been due and payable at the time of the assignment, and not have matured afterwards.[146]

In California, however, a demand which has accrued prior to notice of the assignment is allowed to be set off.[147] Negotiable paper, assigned after maturity, is subject to the same rules in regard to set-off as other choses in action not negotiable.[148] In order to entitle a defendant to set off a demand, it is necessary that the claim asserted against him should affect him in the same character as the demand attempted to be set off. Thus one sued as an individual cannot set off a demand due him as an executor.[149] When notice of the assignment is required to be given by the assignee to the debtor, an actual notice is not necessary. Any notice which would put a reasonable man on inquiry is sufficient.[150] One who sues as assignee cannot maintain his title by

Reeves v. Kimball, 40 N. Y. 299; Mason v. Lord, 40 N. Y. 476; Schafer v. Reilly, 50 N. Y. 61; Reid v. Sprague, 72 N. Y. 457; McNeil v. Tenth Nat. Bank, 55 Barb. 59; Williams v. Thorn, 11 Paige, 459; Bradley v. Root, 5 Paige, 632; Marvin v. Inglis, 39 How. Pr. 329; Poillon v. Martin, 1 Sandf. Ch. 569; Judson v. Corcoran, 17 How. 612, 15 L. Ed. 231; Ballard v. Burgett, 40 N. Y. 314; Davis v. Bechstein, 69 N. Y. 440, 25 Am. Rep. 218; Ingraham v. Disborough, 47 N. Y. 421; Ledwich v. McKim, 53 N. Y. 307; Cutts v. Guild, 57 N. Y. 229; Barry v. Equitable L. Ins. Co., 59 N. Y. 587; Union College v. Wheeler, 61 N. Y. 88; Sherwood v. Meadow etc. Co., 50 Cal. 412; Chace v. Chapin, 130 Mass. 128.

145 McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Combes v. Chandler, 33 Ohio St. 178; Moore v. Metropolitan Bank, 55 N. Y. 41, 14 Am. Rep. 173; Farmers' National Bank v. Fletcher, 44 Iowa, 252.

146 Beckwith v. Union Bank, 9 N. Y. 211; Smith v. Felton, 43 N. Y. 419.

147 McCabe v. Grey, 20 Cal. 509. See St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876.

148 Harris v. Burwell, 65 N. C. 584; Leavenson v. Lafontane, 3 Kan. 523; Norton v. Foster, 12 Kan. 44; McPherson v. Weston, 85 Cal. 90, 24 Pac. 733; Wood v. Brush, 72 Cal. 224, 13 Pac. 627.

149 Barlow v. Myers, 3 Hun, 720, 6 N. Y. Sup. Ct. (T. & C.) 183.

150 Wilkins v. Batterman, 4 Barb. 47; Williamson v. Brown, 15 N. Y. 354.

proof of an assignment made after suit brought.[151] But a neglect to record an assignment within the statutory period fixed therefor, in cases where an assignment must be recorded, does not make it fraudulent.[152]

§ 3290. **Assignment after suit.**—Where a claim has been assigned after suit brought, the assignee has the right to continue the suit in the name of the assignor;[153] but when judgment is recovered thereon, a creditor's bill based upon that judgment must be brought in the name of the assignee, and when brought in the name of the assignor, no amendment as to parties can cure the defect, but the suit must be dismissed.[154]

§ 3290a. **Pleading—Matter of inducement.**—In an action by an assignee of a void county warrant against the assignor, the allegations in the complaint in regard to the warrant can only be regarded as inducement or as explanatory of the cause of action, while the cause of action for which recovery could be had is the amount of money advanced, with interest.[155]

§ 3291. **Right to sue on assignment—Party in interest.**—An assignee of an itemized verified account is not the real party in interest, and cannot sue thereon in his own name, where, by an oral agreement, he had agreed to pay the full amount, when collected, to his assignor.[156] An action at law may be maintained against a city on an order given on the city by a municipal contractor, though such order constitutes an equitable assignment of a fund owing the latter.[157] Where a claim was assigned by writing to plaintiff to secure a debt, and the debt was afterwards paid, but no assignment made, plaintiff's bare legal interest in the claim was sufficient to sustain a suit thereon, under the Washington statute,[158] permitting an assignee of a chose in action to bring action thereon, notwithstanding the assignor may

151 Garrigue v. Loescher, 3 Bosw. 578.

152 Denzer v. Mundy, 5 Rob. (N. Y.) 636.

153 National Bank v. Hapgood, 9 Utah, 85, 33 Pac. 241. See Hestres v. Brennan, 37 Cal. 385; O'Neil v. Dougherty, 46 Cal. 576.

154 Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488. See Dubbers v. Goux, 51 Cal. 153.

155 Jones v. Hayden, 3 Colo. App. 305, 33 Pac. 76.

156 Stewart v. Price, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581.

157 Dickerson v. City of Spokane, 26 Wash. 292, 66 Pac. 381.

158 Ballinger's Annot. Codes & Stats., § 4835.

have an interest in the thing assigned.[159] The fact that it was agreed between the assignor and assignee of a debt, that, if collected, the assignee would use the proceeds to pay a board-bill of the assignor, did not defeat the right of the assignee to recover the debt.[160] The assignee is the real party in interest and entitled to sue regardless of the negotiability of the instrument.[161]

§ 3292. **Complaint.**—A complaint is sufficient, if as follows: That defendant was indebted to plaintiff's assignor (naming him), for services rendered at defendant's special instance and request, between certain dates (within statutory period); that the services were reasonably worth one thousand fifty dollars, which had not been paid, except the sum of forty-six dollars; that the claim was assigned to plaintiff on a certain day, two days before the services were fully performed; that the plaintiff ever since has been, and now is, the owner and holder thereof . . . , it being immaterial when the assignment was made.[162] An assignment must be alleged, and, if denied, must be proved.[163]

§ 3293. **Trustees—When may sue alone.**—The provisions of the various codes provide, in effect, although there is some slight difference in their language, that "an executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section."[164] In order to entitle a trustee to sue alone, it is necessary that the trust should be express,—that is, a trust created by the direct and positive act of the parties, by some writing, deed, or will, or by the proceedings of a court.[165] Among trustees who are permitted to sue alone, without joining the person for whose benefit the action is prosecuted, these may be noted: assignees for the benefit of creditors;[166] one who holds a se-

159 Von Lobel v. Stetson etc. Mill Co., 32 Wash. 683, 73 Pac. 788.

160 Forsyth v. Ryan, 17 Colo. App. 511, 68 Pac. 1055.

161 Doyle v. Nesting, 37 Colo. 522, 88 Pac. 862.

162 Union Col. Co. v. National Fertilizer Co., 2 Cal. App. xiii, 82 Pac. 1129.

163 Calloway v. Oro Min. Co., 5 Cal. App. 191, 89 Pac. 1070.

164 See Cal. Code Civ. Proc., § 369; N. Y. Code Civ. Proc., § 449; Patchett v. Pacific Coast Ry. Co., 100 Cal. 509, 35 Pac. 73.

165 Considerant v. Brisbane, 22 N. Y. 389.

166 Mellen v. Hamilton Fire Ins.

curity which is to be collected and applied to the payment of a debt due by himself;[167] the assignee of a stock subscription;[168] the president or treasurer of an incorporated association,[169] the nominal proprietor of an individual bank;[170] trustees for the separate use of married women;[171] trustee to whom personal property is conveyed for the use of a husband and wife for life, with remainder to their children, in an action to recover the wrongful conversion of the property during the lifetime of the parents;[172] a receiver appointed in another state;[173] a grantee of lands in trust, in actions for the possession or to recover damages for trespass.[174] In California, the priest who appears to have charge of church property is the proper party in all actions concerning it. This would appear, however, to depend entirely upon the fact of in whom the title stands, and whether the society is incorporated, and how incorporated.[175]

An assignee of a cause of action to establish and enforce a trust is the real party in interest, and may maintain an action in his own name.[176]

§ 3294. **Persons in whose names contracts are made** for the benefit of another, although not necessarily trustees of an express trust, are made so by the statute, and may maintain an action in their own name. The circumstances under which this rule is generally applied are where an agent enters into a contract in his own name, and the promise is made directly to him, and not to the principal. In such case the agent is permitted to sue alone,

Co., 5 Duer, 101; Ryerss v. Farwell, 9 Barb. 615; Lewis v. Graham, 4 Abb. Pr. 106; Fletcher v. Derrickson, 3 Bosw. 181; St. Anthony's Mill Co. v. Vandall, 1 Minn. 246; Foster v. Brown, 65 Ind. 234; McClain v. Weidenmeyer, 25 Mo. 364; Cummins v. Barkalow, 4 Keyes, 514.

167 Gardinier v. Kellogg, 14 Wis. 605; Davidson v. Elms, 67 N. C. 228; Moorehead v. Hyde, 38 Iowa, 382; Thompson v. Toland, 48 Cal. 99; Clark v. Titcomb, 42 Barb. 122.

168 Kimball v. Spicer, 12 Wis. 668.

169 Tibbetts v. Blood, 21 Barb. 650.

170 Burbank v. Beach, 15 Barb. 326.

171 Reed v. Harris, 7 Rob. (N. Y.) 151.

172 Gibbens v. Gentry, 20 Mo. 468. See, also, Richardson v. Means, 22 Mo. 495.

173 Runk v. St. John, 29 Barb. 585; Lathrop v. Knapp, 37 Wis. 307; Garver v. Kent, 70 Ind. 428; Hope Life Ins. Co. v. Taylor, 2 Rob. (N. Y.) 278.

174 Goodrich v. City of Milwaukee, 24 Wis. 422; Boardman v. Beckwith, 18 Iowa, 292; Holden v. New York etc. Bank, 72 N. Y. 286; Tyler v. Granger, 48 Cal. 259; McKinnon v. McKinnon, 81 N. C. 201.

175 Santillan v. Moses, 1 Cal. 92.

176 O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236.

although of course an action might also be maintained in the name of the principal. And it makes no difference as to the agent's right to maintain the action, whether the principal was known or disclosed at the time of the contract or not.[177] As illustrations of all kinds of agents who are thus permitted to maintain an action in their own name, may be mentioned, ordinary mercantile factors, who transact business in their own name;[178] an auctioneer;[179] the managing owner of a vessel;[180] a contractor for the benefit of third parties;[181] the outgoing trustees of an association;[182] the agent for a foreign principal, or officer of a foreign bank or government;[183] a sheriff, for the purchase price of property sold on execution;[184] a payee of a note, for the benefit of others;[185] the people, where bonds are taken in their name for the benefit of individuals;[186] and on the same principle bonds given to superior officers for the faithful discharge of the duties of the obligor.[187] On the other hand, one who is a

177 Morgan v. Reed, 7 Abb. Pr. 215; St. John v. Griffith, 2 Abb. Pr. 198; Erickson v. Compton, 6 How. Pr. 471; Considerant v. Brisbane, 22 N. Y. 389; Rowland v. Phalen, 1 Bosw. 43; Cheltenham Firebrick Co. v. Cook, 44 Mo. 29; Wright v. Tinsley, 30 Mo. 389; Weaver v. Trustees, 28 Ind. 112; Rice v. Savery, 22 Iowa, 470; Winters v. Rush, 34 Cal. 136; Ord v. McKee, 5 Cal. 515; Scantlin v. Allison, 12 Kan. 85; Noe v. Christie, 51 N. Y. 270; Hubbell v. Medbury, 53 N. Y. 98; Presb. Soc. v. Beach, 8 Hun, 644; People v. Slocum, 1 Idaho, 62; Thompson v. Fargo, 63 N. Y. 479; Grinnell v. Schmidt, 2 Sandf. 706; Union India Rubber Co. v. Tomlinson, 1 E. D. Smith, 364; Van Lien v. Byrnes, 1 Hilt, 133; Higgins v. Senior, 8 Mees. & W. 834; Albany etc. Steel Co. v. Lundberg, 121 U. S. 451, 30 L. Ed. 982, 7 Sup. Ct. 958.

178 Grinnell v. Schmidt, 2 Sandf. 706; Ladd v. Arkell, 5 Jones & Sp. 35.

179 Bogart v. O'Regan, 1 E. D. Smith, 590; Hulse v. Young, 16 Johns. 1; Minturn v. Main, 7 N. Y. 220; Minturn v. Allen, 3 Sandf. 399.

180 Ward v. Whitney, 3 Sandf. 399; Kennedy v. Eilau, 17 Abb. Pr. 73; Houghton v. Lynch, 13 Minn. 85.

181 Rowland v. Phalen, 1 Bosw. 43.

182 Davis v. Garr, 6 N. Y. 124, 55 Am. Dec. 387.

183 Considerant v. Brisbane, 22 N. Y. 389; Habicht v. Pemberton, 4 Sandf. 657; Myers v. Machado, 6 Duer, 678; Peel v. Elliott, 16 How. Pr. 483; Republic of Mexico v. Arrangois, 11 How. Pr. 1.

184 Armstrong v. Vroman, 11 Minn. 220, 83 Am. Dec. 81; McKee v. Lineberger, 69 N. C. 217.

185 Scantlin v. Allison, 12 Kan. 85; Ord v. McKee, 5 Cal. 515.

186 People v. Norton, 9 N. Y. 176; Bos v. Seaman, 2 N. Y. Code Rep. 1; People v. Laws, 3 Abb. Pr. 450; People v. Walker, 21 Barb. 630; Hunter v. Commissioners, 10 Ohio St. 515; State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Meier v. Lester, 21 Mo. 112; Shelby Co. v. Simmonds, 33 Iowa, 345; Annett v. Kerr, 28 How. Pr. 524; People v. Townsend, 37 Barb. 520; Baggott v. Boulger, 2 Duer, 160.

187 Stillwell v. Hurlbert, 18 N. Y. 374; Fuller v. Fullerton, 14 Barb. 59; People v. Clark, 21 Barb. 214; People v. Norton, 9 N. Y. 176. See, as to further instances, Fargo v. Owen, 79 Hun, 181, 29 N. Y. Supp. 611; Stil-

mere agent, not embraced within the description of the statute, cannot prosecute an action in his own name, on a contract made in the name of his principal.[188]

§ 3295. **Averment of trust relation.**—In an action brought by an express trustee, or by one in whose name a contract is made for the benefit of another, the general rule of pleading, that the plaintiff must show title in himself in the capacity in which he sues, prevails. Unless, therefore, the description of the obligation and the breach thereof, disclose such facts, the complaint must make a positive and issuable averment of the trust or agency.[189] Thus, one who claims as a substituted trustee under a will should state all the material facts distinctly in his bill. If the will provides two modes for the appointment of new trustees, he must state in which mode he was appointed.[190]

§ 3296. **When cestui que trust may sue.**—A *cestui que trust* of an express trust has no right of action until the trust is denied, or some act is done by the trustees inconsistent with the trust; and until then the statute of limitations does not begin to run. Thus, when a person takes a title in his own name, at the request of another, who furnishes the consideration, the former has the right to presume that he is to hold it until a demand is made upon him for it.[191] And where the share of one of several *cestuis que trust* in a trust fund is ascertained and known, he may maintain a suit for a breach of the trust against the trustees, without joining the other *cestuis que trust*.[192]

§ 3297. **Notice of trust.**—Where an assignment is made to one as trustee of a mercantile firm, and he receives from an obligor

well v. Hamm, 97 Mo. 579, 11 S. W. 252; Coffin v. Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076; Cassidy v. Woodward, 77 Iowa, 354, 42 N. W. 319; McLaughlin v. First Nat. Bank, 6 Dak. 406, 43 N. W. 715; Lundberg v. Northwestern Elevator Co., 42 Minn. 37, 43 N. W. 685.

188 Swift v. Swift, 46 Cal. 266; Robbins v. Deverill, 20 Wis. 150; Redfield v. Middleton, 7 Bosw. 649; Rawlings v. Fuller, 31 Ind. 255; White v. Chouteau, 10 Barb. 202; Ferguson v. McMahon, 52 Ark. 433, 12 S. W. 1070.

189 Freeman v. Fulton Fire Ins. Co., 13 Abb. Pr. 124. One suing as trustee must state the facts showing the trust relation. Wilson v. Polk County, 112 Mo. 126, 20 S. W. 469; Mound City etc. Assoc. v. Slauson, 65 Cal. 425, 4 Pac. 396.

190 Cruger v. Halliday, 11 Paige, 314.

191 White v. Sheldon, 4 Nev. 280. See Howard v. Patterson, 72 Me. 57; Derome v. Vose, 140 Mass. 575, 5 N. E. 478.

192 Pickering v. DeRochemont, 45 N. H. 67.

a deed for land to members of the firm, and the firm sold the land to their successors in business, some of the original firm being a portion of such successors, the purchasers are chargeable with notice of the trust.[193]

§ 3298. **Trust deed.**—In Nevada, under section 55 of the statute concerning conveyances,[194] a declaration of trust as to land must be by deed or conveyance, in writing, subscribed by the party declaring the same, or by his lawful agent thereunto authorized by writing.[195] In most of the states, an express trust in lands can only be created by a written instrument.[196]

§ 3299. **Who may assign.**—When several parties ship fruit in the name of one party, that party may make a valid assignment of the whole carload of fruit thus shipped.[197] An administrator of an estate in New York may assign a judgment obtained there by an intestate against one who has since removed to California.[198] A foreign executrix may maintain an action in California in her individual name on a judgment recovered by her as executrix in another state on a debt due to her testator, and the averments in the complaint of the official capacity of the plaintiff are mere surplusage, and may be disregarded.[199]

Where one of several heirs is sued on his promise to pay the debt of the ancestor, the plaintiff need not allege that the defendant or heirs had assets.[200] Where the will by construction shows an intention to charge the real estate with the payment of a legacy, it is not necessary to aver in the bill a deficiency of personal assets.[201]

§ 3300. **Assignee for creditors.**—An assignee for the benefit of creditors is a trustee of an express trust, and as such he is entitled to sue,[202] or to defend an action, without joinder of a benefi-

193 Connelly v. Peck, 6 Cal. 348.

194 Stats. 1861.

195 Sime v. Howard, 4 Nev. 473. See Bowler v. Curler, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. 226.

196 Barr v. O'Donnell, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; Doran v. Doran, 99 Cal. 311, 33 Pac. 929; Green v. Cates, 73 Md. 115; Donlin v. Bradley, 119 Ill. 412, 10 N. E. 11.

197 Marx v. Raley Co., 6 Cal. App. 479, 92 Pac. 519.

198 Low v. Burrows, 12 Cal. 181.

199 Lewis v. Adams, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833.

200 Elting v. Vanderlyn, 4 Johns. 237.

201 Lewis v. Darling, 16 How. (U. S.) 1, 14 L. Ed. 819.

202 1 Daniell, 224; Spragg v. Binkes, 5 Ves. 587; De Golls v. Ward,

ciary.[203] He must allege in his complaint that he sues as such, or the court will not relieve him from payment of costs in case he fails in the action.[204] For any other purpose this allegation is unnecessary, as he is assignee of an express trust, has the entire legal title, and may sue in his own name without referring to his character as assignee.[205] In an action for the conversion of lumber, defendant having alleged that he claimed as assignee for the creditors of the original owner, could not interpose the defense that he was creditor of the assignor.[206] But an assignment by a creditor of a portion of a debt does not make the assignee joint owner of the whole, and he is not a necessary party in a suit for its recovery.[207]

An assignment for benefit of creditors, executed and recorded, cannot be altered without the consent of the assignor and every creditor affected thereby.[208] All the states and territories, excepting Alaska, Idaho, Nevada, and North Dakota, have statutes regulating such assignments, but differing from each other and from the California law. The California forms, so far as they go, may be readily adapted to all the statutes.[209]

In Indiana, a complaint in an action by a party claiming as assignee, which does not allege that the assignment has been duly recorded, and does not contain a copy thereof, is insufficient on demurrer.[210]

§ 3301. Assignee in bankruptcy.—Proceedings in bankruptcy do not affect the previously acquired right of an assignee of a chose in action to sue in the bankrupt's name.[211] In Connecticut, the insolvent act of 1853 provides that all the property of the

3 P. Wms. 311; Kaye v. Fosbroke, 8 Sim. 28; Dyson v. Hornby, 7 De G. M. & G. 1.

203 Collet v. Woolaston, 3 Bro. C. C. 228; Lloyd v. Lander, 5 Mad. 282; Sells v. Hubbell, 2 Johns. Ch. 394; Springer v. Vanderpool, 4 Edw. Ch. 362; Wakeman v. Grover, 4 Paige, 23; Dias v. Bouchaud, 10 Paige, 445; Ogden v. Prentice, 33 Barb. 161; Langdon v. Thompson, 25 Minn. 509.

204 Murray v. Hendrickson, 6 Abb. Pr. 96, 1 Bosw. 635.

205 Butterfield v. Macomber, 22 How. Pr. 150; Langdon v. Thompson, 25 Minn. 509. See Dambmann v. White, 48 Cal. 439.

206 Babcock v. Maxwell, 29 Mont. 31, 74 Pac. 64.

207 Leese v. Sherwood, 21 Cal. 152.

208 Cal. Civ. Code, §§ 3449-3473; McDougal v. Fuller, 148 Cal. 521, 83 Pac. 701.

209 Id.; Colo. Mill's Stats., vol. 3, §§ 169-195; Mont. Rev. Code, §§ 4535, 4579-4589, N Mex. Comp. Laws, §§ 2818-2870; Or. B. & C. Codes, §§ 5729-5742; Utah Rev. Stats., §§ 84-104; Wash. Bal. Codes, §§ 5842-5858; Wyo. Rev. Stats., §§ 4280-4488.

210 Ross v. Boswell, 60 Ind. 235; State v. Krugg, 82 Ind. 58.

211 Hayes v. Pike, 17 N. H. 564.

debtor shall be vested in the trustee, and that the trustee may sue in his own name on all choses in action.[212]

In an action brought by an assignee in bankruptcy, as the title of the plaintiff does not depend upon the voluntary acts of the parties, a general allegation of assignment is not sufficient. The plaintiff must set out the facts in connection with his appointment. Such facts must be alleged in a manner sufficient to show that an appointment has been made, and so as to be triable.[213] An allegation that the plaintiff was duly appointed on a certain day is insufficient.[214] In an action brought by a receiver of a bank, a complaint which showed such fact, and that the appointment was made by the supreme court, by an order made upon a certain day, upon filing security, and that such security had been filed, was held sufficient.[215]

The fact of assignment must be alleged; otherwise, the complaint will be insufficient.[216] The plaintiff's appointment is sufficiently alleged by an averment that he was appointed by an order of the proper court duly given and made; and it need not be alleged that notice to creditors was given before the appointment, or that they failed to act, or that the plaintiff was competent to be appointed assignee.[217] In a suit prosecuted or defended by the assignee under the California insolvent act, a certified copy of the assignment made to him is conclusive evidence of his authority to sue, or defend.[218] An insolvent debtor may give a trust-deed for the purposes of sale and applying the proceeds to pay a certain list of creditors, conditioned that before receiving his share each creditor must release the debtor of all claims.[219] If the expenses of the trusteeship are to be preferred claims, it must be so specified.[220] A creditor who has assented to an assignment for the benefit of creditors cannot attack the same for fraud.[221]

212 Hart v. Stone, 30 Conn. 94.

213 White v. Low, 7 Barb. 206.

214 Gillet v. Fairchild, 4 Denio, 80; White v. Joy, 13 N. Y. 83; Bangs v. McIntosh, 23 Barb. 591.

215 Stewart v. Beebe, 28 Barb. 34.

216 King v. Felton, 63 Cal. 66.

217 Bull v. Houghton, 65 Cal. 422, 4 Pac. 529.

218 Cal. Insolvent Act (1895), § 22. See Fitzgerald v. Neustadt, 91 Cal. 600, 27 Pac. 936, as to the power of the legislature to make such rule of evidence.

219 McAvoy v. Jennings, 44 Wash. 79, 87 Pac. 53.

220 Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 18, 82 Pac. 374; McDougal v. Fuller, 148 Cal. 521, 83 Pac. 701.

221 McAvoy v. Jennings, 39 Wash. 109, 81 Pac. 77.

FORMS—ASSIGNEES AND DEVISEES.

§ 3302. Common form of allegation.

Form No. 880.

[TITLE.]

The plaintiff complains, and alleges:

I. [State cause of action accruing to the plaintiff's assignor.]

II. That on the . . . day of . . ., 19.., at . . ., the said . . . assigned the said claim to plaintiff.

§ 3303. By assignee, where plaintiff is trustee.

Form No. 881.

[TITLE.]

The plaintiff complains, as assignee, for the benefit of [state whom], and alleges:

I. [State a cause of action accrued to the assignor.]

II. That on the . . . day of . . ., 19.., the said C. D. assigned all his property, including the said claim, to the plaintiff, in trust, for the purpose of [state the purpose].

§ 3304. Where plaintiff is a devisee.

Form No. 882.

[TITLE.]

The plaintiff, as devisee of A. B., deceased, complains, and alleges:

I. [State cause of action accrued to deceased.]

II. That the said A. B. was seised of the estate hereinbefore mentioned, and that he died on the . . . day of . . ., 19.., at . . ., and by his last will devised the same to this plaintiff.

§ 3305. By an assignee for the benefit of creditors.

Form No. 883.

[TITLE.]

The plaintiff, as assignee for the benefit of the creditors of . . ., complains of the defendant, and alleges:

I. [State a cause of action accrued to the assignor.]

II. That on the . . . day of . . ., 19.., at . . ., the said . . . assigned all his property, including the said claim, to the plaintiff [in trust for the purpose of paying all his debts].

§ 3306. By assignee under state insolvent law.

Form No. 884.

A. B., as Assignee of C. D., an Insolvent Debtor, Plaintiff,
v.
E. F., Defendant.

The plaintiff complains as assignee of C. D., an insolvent debtor, and alleges:

I. [Here set forth the facts showing a cause of action in C. D.]

II. That thereafter, in proceedings had before the Hon. I. K., judge of the . . . court, pursuant to [state the title of the law or chapter governing insolvency proceedings], an order was duly made by said judge [here state the facts, fully showing the terms of the order, the making of the assignment thereunder to the plaintiff, and the plaintiff's qualification as assignee].

[If action is in United States court, on ground of different citizenship, set forth citizenship of assignor as well as that of parties.]

§ 3307. By assignee after conversion.

Form No. 885.

I. That before and until the times hereinafter mentioned, one M. N. was the owner and lawfully possessed of [very briefly designate the goods; or, was entitled to the immediate possession of, designating the goods, etc.], of the value of . . . dollars.

II. That on the . . . day of . . ., 19.., the defendant unlawfully took and converted the same to his own use, to the damage of said M. N., in the sum of . . . dollars.

III. That on the . . . day of . . ., 19.., said M. N. duly assigned to the plaintiff for value his claim against the defendant for damages for said conversion.

Wherefore, etc.

§ 3308. By assignee against maker of negotiable note not indorsed.

Form No. 886.

I. [Allege execution and delivery of note.]

II. That A. B., [payee] before maturity, [or, before this action]

assigned and delivered said note to the plaintiff for a valuable consideration.

III. [Allege non-payment, ownership, etc.]

[Prayer for judgment.]

§ 3309. Assignee of devisee of reversion and rent against assignee of part of the premises.

Form No. 887.

I. That one M. N., being the owner in fee of certain premises [or very briefly designate them], on the . . . day of . . ., 19.., by lease in writing then made between him and one O. P., under the hand and seal of said O. P., [a copy of which is annexed as part of this complaint], leased to said O. P. said premises from the . . . day of . . ., 19.., for the term of . . . then next ensuing, for the yearly rent of . . . dollars, payable to said M. N., his heirs and assigns accordingly.

II. That by virtue thereof the defendant entered into the demised premises and was possessed thereof.

III. That thereafter, and during said term, to-wit, on the . . . day of . . ., 19.., [naming a day before the breach], said O. P. duly assigned all his interest in a divided part of the land, equal in value to the residue of the demised premises, and thereby the defendant became tenant of such part.

IV. That on the . . . day of . . ., 19.., said M. N. died, having by his last will and testament devised the [reversion and] rent to one Q. R., which said will was duly proved and recorded as a will of real estate.

V. That Q. R., on the . . . day of . . ., 19.., duly [conveyed and] assigned said [reversion and] rent to the plaintiff.

VI. That thereafter, to-wit, on the . . . day of . . ., 19.., the sum of . . . dollars of said rent, for the quarter ending on that day [or otherwise], became due to the plaintiff from the defendant, but no part thereof has been paid.

Wherefore, etc.

§ 3310. By an assignee upon domestic judgment.

Form No. 888.

I. That on the . . . day of . . ., 19.., at . . ., in the court of . . . county, or, before M. N., a justice of the peace in and

for the town of, etc., one O. P. recovered a judgment, which was duly given by said court [or, justice] against the defendant, for . . . dollars, in an action wherein the said O. P. was plaintiff and the defendant the defendant [or otherwise, as the case was].

II. That thereafter [or, on the . . . day of . . ., 19. . , at . . .], said M. N. duly assigned said judgment to this plaintiff [of which the defendant had due notice].

III. That no part thereof has been paid [except, etc.].

Wherefore, etc.

§ 3311. On special contract fulfilled by assignee.

Form No. 889.

I. That on the . . . day of . . ., 19. . , the defendants, in consideration of . . . dollars, executed in writing under their hands and seals, and delivered, a contract with one M. N., of which the following is a copy: [or, of which a copy is hereto annexed, and marked Exhibit A.]

II. That thereafter, and before the . . . day of . . ., 19. . , said M. N. duly assigned the same, and all his rights under it to the plaintiff.

III. That up to the time of the assignment, the assignor had duly performed all the conditions of the contract on his part, and that since said assignment plaintiff fully performed all the conditions thereof on his part.

IV. That no part of the same has been paid [except, etc.].

Wherefore, etc.

§ 3312. Alleging defendant's consent to assignment.

Form No. 890.

Plaintiff complains of the defendant, and alleges:

I. [Set forth the making of the contract.]

II. That thereafter said defendant duly gave his consent to said M. N. that he might assign said contract by an instrument in writing, indorsed thereon, [or, signed, sealed, and delivered to him by defendant], a copy of which consent is annexed to this complaint as a part hereof and marked "Exhibit B."

§ 3313. Alleging assignment in writing.

Form No. 891.

The plaintiff complains of the defendant, and alleges:

I. [Set forth the making of the contract.]

II. That thereafter, and on or about the . . . day of . . . , 19.. , and before the commencement of this action, said [assignor], for a valuable consideration, duly assigned said claim [or name the instrument or cause of action] to the plaintiff, by an instrument in writing signed [sealed] and delivered by him, a copy of which assignment is annexed to and made a part of this complaint, and marked "Exhibit A."

§ 3314. Against assignee of cargo.

Form No. 892.

I. That on or about the . . . day of . . . , 19.. , the plaintiff and one M. N. agreed by charter-party that the plaintiff's ship, named . . . , should with all convenient speed sail to . . . , and that the said M. N. should there load her with a full cargo of . . . , or other lawful merchandise, which she should carry to . . . , and there deliver, on payment by the said M. N. to the plaintiff of freight at . . . dollars per ton, one half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by approved bills on . . . at . . . months, or in cash, less . . . per cent discount, at the option of said M. N. [Or plead the agreement by copy, thus: That on or about the . . . day of . . . , 19.. , the plaintiff and said M. N. entered into an agreement, of which a true copy is attached hereto, made a part of this complaint and marked "Exhibit A."]

II. That thereafter the said M. N. assigned the cargo [or, the charter-party and cargo] to the defendant, who thereupon became the owner thereof and entitled to receive the same.

III. That afterward the said ship accordingly sailed to . . . aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to . . . aforesaid, and there delivered the same to the defendant.

IV. That said freight amounted in the whole to the sum of . . . dollars, and the defendant paid to the plaintiff one half of said freight in cash, and all conditions were fulfilled, and all things

happened, and all times elapsed which were necessary to entitle the plaintiff to maintain this action; yet the defendant did not pay to the plaintiff the remainder of said freight, either by such approved bills as aforesaid, or in cash, less discount as aforesaid.

Wherefore, etc.

§ 3315. Denial by assignee—Action on lease.

Form No. 893.

The defendant denies that any assignment of the lease described in the complaint was at any time made to or accepted by the defendant, and further denies that the defendant at any time occupied the said premises under the said lease.

§ 3316. Assignment of partnership assets to receiver.

Form No. 894.

This indenture, made the . . . day of . . ., 19. . , between A. B. and C. D., heretofore partners in trade, doing business in the city of . . ., under the style of A. B. & Co., of the first part; and R. C., of [etc.], receiver of the estate and effects hereinafter referred to, appointed by the . . . court of . . ., of the second part;

Whereas, in and by an order of the said court, before [etc.], in a certain action, wherein the said A. B. was plaintiff and the said C. D. was defendant, it was ordered that said R. C. be appointed receiver of the estate and property of said partnership, with powers as in the order of appointment contained; and whereas, the said party of the second part has given and filed the requisite security, pursuant to the rules and practice of the said court, and to the provisions of the said order:

Now, this indenture witnesseth: That the said parties of the first part, in obedience to the said order and in consideration of the premises aforesaid, and of one dollar to each of them in hand paid by the said party of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them has, conveyed, assigned, transferred, and delivered over, and by these presents do, and each of them does, convey, assign, transfer, and deliver over, unto the said party of the second part, under the direction of the said referee, testified by his approval indorsed hereon, all and every the stock

in trade, good-will, estate real and personal, chattels-real, moneys, outstanding debts, things in action, equitable interests, property, and effects whatsoever and wheresoever, of or belonging or due to the said firm, or to the said parties of the first part as partners therein, or in which the said firm, or they or either of them as such partners, had any estate, right, title, or interest at the time of filing the complaint in said action, to-wit, on the . . . day of . . . last; and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers, and other evidences whatsoever relating or appertaining thereto;

To have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the order, direction, and control of the said . . . court. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the stock, estate, book-debts, property, choses in action, and effects hereby conveyed, assigned, and transferred, they, the said A. B. and C. D., have made and appointed, and by these presents do make and appoint, the said R. C., party of the second part, his successors and assigns, the attorney and attorneys of them, the said parties of the first part, in their names, or in his own name, to commence, continue, discontinue, and again bring, perfect, and carry out actions and suits against any persons or corporations, for or on account of all or any part of the said estate, stock, property, book-debts, choses in action, or effects.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

A. B. [SEAL.]
C. D. [SEAL.]

Signed and delivered in the presence of:
[ACKNOWLEDGMENT.]

§ 3317. Assignment of unliquidated claims.

Form No. 895.

For value received [or, In consideration of . . . dollars received], I hereby assign and transfer to C. D., of . . .,

[For the unlawful conversion of personal property:] all claims and demands owned by me against E. F., and arising out of the

unlawful conversion by said E. F. of one certain lumber-wagon, together with all rights of action accruing to me by reason of such conversion.

[For breach of covenant:] all claims and demands for damages caused by the breach of the covenant against incumbrances [or other covenant, naming it] contained in a certain deed of real estate in the city of . . ., state of . . ., executed by E. F., of . . ., to me, dated . . ., 19.., and recorded in volume . . . of deeds on page . . ., in the office of the register of deeds [or clerk or other proper officer] of the county of . . .

[For damages arising from fraud affecting personal property:] all my right, title, and interest in ten certain shares of the . . . company, numbered from one to ten inclusive, now owned by me, together with all claims and demands of every nature which I may have or be entitled to against any and all persons on account of any fraud or deceit practiced upon me and by reason of which my subscription to said stock was obtained [or, by reason of which said stock has been rendered less valuable].

[For a share of the profits of a joint enterprise:] all claims and demands owned by me arising out of a joint adventure with one E. F. in the purchase and sale of a certain herd of cattle, on or about . . ., 19.., together with all rights of action accruing to me on account thereof.

[For a personal injury:] all claims and demands owned by me against any and all persons and corporations arising out of the loss of my right arm, on or about . . ., 19.., which loss was directly caused by the negligence [or, wrongful acts] of the . . . company, their agents and servants.

[For false return:] all claims and demands arising out of the neglect of E. F., sheriff of . . . county, to make return within the time required by law of an execution against property upon a judgment in the action of A. B. v. C. D., and also all demands resulting from the making of a false return by said sheriff to said execution.

[Close in each case as follows:]

Witness my hand and seal, this . . . day of . . ., 19..

A. B. [Seal.]

In presence of:

G. H.

I. K.

§ 3318. Complaint to set aside an assignment void on its face.

Form No. 896.

I, II, and III. [Allege judgment and issue and return of execution, and amount due.]

IV. [Allege making of assignment, setting it forth or annexing it:] And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face, for the reason that [here set forth specifically the grounds of invalidity], and he alleges that it was made and executed by the said defendant [assignor], [and accepted by the defendants, assignees] with the intent to hinder, delay, and defraud the creditors of said [assignor].

Wherefore, etc.

CHAPTER XCIV.

EXECUTORS AND ADMINISTRATORS.

§ 3319. Essential averments of representative capacity.—The capacity of the plaintiff to sue is independent of the cause of action, and, therefore, in an action by an executor or administrator to enforce a cause of action on which he is authorized to sue as such, the complaint must allege his representative capacity. No formal mode of allegation is essential, provided the plaintiff's right to maintain the action is substantially shown, so that issue may be joined thereon.[1] In conformity with this rule, the complaint should state, in cases of testacy, the death of the decedent, his leaving a last will and testament, the appointment therein of the plaintiff as executor, the probate of the will, the issuance of letters testamentary thereon to the plaintiff, and his qualification and entry upon the discharge of his duties as executor, and that he is still acting as such.[2] In cases of intestacy, the death of the decedent, without leaving a last will and testament, must be shown, together with appropriate allegations of the plaintiff's appointment as administrator, his qualification and entry upon the discharge of his duties as such, and that he is still so acting; and this is so, although the plaintiff may be the public administrator.[3] In the case of either an executor or administrator, the date, place, and court by whom letters were granted should be stated.[4] If this is not done, the complaint is bad on demurrer

1 Bank of Lowville v. Edwards, 11 How. Pr. 216; Johnson v. Kemp, 11 How. Pr. 186; Bank of Havana v. Wickham, 16 How. Pr. 97; Thomas v. Cameron, 16 Wend. 579; Halleck v. Mixer, 16 Cal. 574; Barfield v. Price, 40 Cal. 535; Beach v. King, 17 Wend. 197; Welles v. Webster, 9 How. Pr. 251; Kingsland v. Stokes, 58 How. Pr. 1; English v. Roche, 6 Ind. 62; Duncan v. Duncan, 19 Mo. 368; State v. Matson, 38 Mo. 489; Bird v. Cotton, 57 Mo. 568; State v. Patton, 42 Mo. 530; Headlee v. Cloud, 51 Mo. 301.

2 Thomas v. Cameron, 16 Wend. 579; Halleck v. Mixer, 16 Cal. 574; Barfield v. Price, 40 Cal. 535; Kirsch v. Derby, 96 Cal. 602, 31 Pac. 567.

3 Ketchum v. Morrell, 2 N. Y. Leg. Obs. 58.

4 Morrell v. Dickey, 1 Johns. Ch. 156; Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340; Vroom v. Van Horn, 10 Paige, 550; Vermilya v. Beatty, 6 Barb. 429; Warren v. Eddy, 13 Abb. Pr. 28; Gulick v. Gulick, 21 How. Pr. 22; Robbins v. Wells, 26 How. Pr. 15; Emery v. Hildreth, 2 Gray, 228; Bloom v. Burdick, 1 Hill, 134, 37 Am. Dec. 299; Beach v. King, 17 Wend. 197; Gillett v. Fairchild, 4 Denio, 80; White v. Joy, 13 N. Y. 83; Forrest v. Mayor of New York,

on that ground.[5] If the liability is clearly personal, the words "as executrix" should be considered as merely descriptive.[6] By parity of reasoning, where suit is brought by an administrator during the minority of the executor, his powers being determined when the executor attains full age, the fact that he has not attained majority must be averred.[7] Where the plaintiff's representative capacity is shown, profert of letters testamentary or of administration is no longer necessary.[8] In an action by executors in their representative capacity, the introduction of the letters testamentary is sufficient evidence of the death of deceased and the order of court appointing them executors.[9] One executor may sue his co-executor to set aside a deed secured by fraud from the decedent.[10]

§ 3320. Illustrations of sufficient and insufficient allegations.— In New York, the word "as" is essential in the title to the action; nor can it be easily replaced by any other word. Thus, a declaration which invariably, and more than a dozen times, mentioned the plaintiff as "the said Sarah, executrix as aforesaid," closing with profert of letters testamentary, was held to be fatally defective under the old practice.[11] In the same state, a complaint averring that the plaintiff has been duly appointed and qualified by the surrogate of New York, to act as the "sole executor of A. B., deceased," was held not sufficient in an action to recover a demand due the estate of the plaintiff's testator;[12]

13 Abb. Pr. 350; Christopher v. Stockholm, 5 Wend. 36; Tolmie v. Dean, 1 Wash. T. 46; Dayton v. Connah, 18 How. Pr. 326; Sheldon v. Hoy, 11 How. Pr. 11; Barfield v. Price, 40 Cal. 535. See, also, Munro v. Pacific Coast Dredging etc. Co., 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; Cohu v. Husson, 14 Daly, 200; affirmed, 113 N. Y. 662, 21 N. E. 703.

5 Sheldon v. Hoy, 11 How. Pr. 11. That the New York Code of Procedure (§ 161) and the California Code of Civil Procedure (§ 1365) are applicable to the decision of the surrogate (probate court) in the appointment of an administrator, see Anderson v. Potter, 5 Cal. 63; Wheeler v. Dakin, 12 How. Pr. 537.

6 St. Mary's Hospital v. Perry, 152 Cal. 338, 92 Pac. 864.

7 Yeaton v. Lynn, 5 Pet. 224, 8 L. Ed. 105.

8 Bright v. Currie, 5 Sandf. 433; Welles v. Webster, 9 How. Pr. 251.

9 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

10 Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777.

11 Henschall v. Roberts, 5 East, 151, 154. Compare Merritt v. Seaman, 6 N. Y. (2 Seld.) 168, with Smith v. Levinus, 8 N. Y. 474. See, also, Gould v. Glass, 19 Barb. 185; Sheldon v. Hoy, 11 How. Pr. 14; Ogdensburg Bank v. Van Rensselaer, 6 Hill, 241.

12 Forrest v. Mayor of New York, 13 Abb. Pr. 350.

and the allegation "duly appointed" was held to be not insufficient, but indefinite.[13] A complaint commencing "A. B., administrator of the goods, etc., of . . ., deceased, plaintiff in this action," and containing no other statement of the fact of the plaintiff's appointment as administrator, does not allege that he is administrator, or show that he prosecutes in that capacity.[14] On the contrary, a bill alleging that there was an instrument purporting to be the last will and testament of M., deceased, duly executed and attested; that it was admitted to probate as such will; that letters testamentary were issued, and that the executors took upon themselves the execution of the instrument, sufficiently shows that the instrument was a will, and that it had been so adjudged by the surrogate's court.[15] And so, also, a complaint which describes the plaintiff as an executor, and states the cause of action as an indebtedness due to the plaintiff as an executor, and that the money was had and received by the defendant for the use of the plaintiff as such executor, sufficiently shows that the plaintiff sues in his representative capacity.[16] Judgment in an action to foreclose a lien, entitled against G. individually and as administratrix of O., cannot be sustained, so far as it purports to foreclose the interest of the estate, though a general appearance was entered by G. individually and as such administratrix, there being no allegation in the complaint touching the estate, and none of the appointment of G. as such administratrix, or that she was acting in such capacity.[17]

An averment that letters testamentary, on, etc., and not before, were issued to, etc., is sufficient to import that no other or prior letters had been issued.[18] In Missouri, a petition stating the character in which the plaintiff sued, the indebtedness to the intestate, and the prayer for judgment as administratrix, was held sufficient as showing her right to sue.[19] In California, in an action brought by an administrator who has been appointed after the resignation of a former administrator, the complaint is sufficient if it avers the issue of letters to the former administrator; that he qualified and entered upon the discharge of the trust;

13 Cheney v. Fisk, 22 How. Pr. 238.

14 Merritt v. Seaman, 6 N. Y. 168; Sheldon v. Hoy, 11 How. Pr. 11; Christopher v. Stockholm, 5 Wend. 36; Worden v. Worthington, 2 Barb. 368.

15 Mason v. Jones, 13 Barb. 461.

16 Scranton v. Farmers' etc. Bank, 33 Barb. 527.

17 Flinn v. Gouley, 139 Cal. 623, 73 Pac. 542.

18 Benjamin v. De Groot, 1 Denio, 151.

19 Duncan v. Duncan, 19 Mo. 368.

that he resigned, and his resignation was accepted by the probate court; and that the plaintiff was afterwards appointed administrator, and qualified, and that letters were issued to him.[20] And the same effect was given to an averment that letters of administration were issued on a certain day, by the appropriate court, to the plaintiff, who duly qualified as such administrator, and entered upon the discharge of his duties as such, and now is, and has been continuously from the date of appointment, such administrator;[21] and also to the averment that "plaintiff is the duly appointed, qualified, and acting administrator."[22] In that state, there are only two classes of administrators, special and general; and no such officer as an "administrator *de bonis non*" is known to our law. When the authority of a general administrator is terminated, and a new one appointed, the latter takes the place of the first, and succeeds to the office, clothed with the same powers, and subject to the same restrictions; and when he invokes the action of the court, he must institute the same proceedings, and, so far as he is able, must make a similar showing.[23] The order for the appointment, the qualifications of the appointee, and the issuing of letters to him thereon, are all necessary proceedings to invest such appointee with the office of an administrator. The appointment is *in fieri* until the appointee has qualified and received his letters.[24] The allegation of the representative capacity of a substituted executor or administrator may be made by way of amended complaint, and need not be pleaded by supplemental complaint; nor need the allegation be so full as in an original complaint by an executor.[25]

An allegation in an action by an administrator "that plaintiff is the duly appointed, qualified, and acting administrator," is a sufficient allegation of his official character as administrator.[26] Where an administratrix is, by order of court, made a party to a suit commenced by her decedent, no allegation of her official capacity is required.[27] In an action by the trustees, under a non-intervention will, an averment that they have duly qualified and accepted the trust, and are the acting executors, sufficiently

20 Lucas v. Todd, 28 Cal. 182.

21 McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

22 Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327.

23 Haynes v. Meeks, 20 Cal. 288.

24 Estate of Hamilton, 34 Cal. 464.

25 Campbell v. West, 93 Cal. 653, 29 Pac. 219.

26 Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327.

27 Noyes v. Young, 32 Mont. 226, 79 Pac. 1063.

shows that they are the executors, though it is not alleged that letters testamentary have been granted to them.[28]

§ 3321. **Corporation as executor, trustee, etc.**—If a corporation brings suit or makes application to the courts to act as executor, administrator, guardian, assignee, receiver, depositary, or trustee, it must allege a compliance with the statutory requirements as to receiving authority to qualify and act as such by its articles of incorporation, issued to it by the secretary of state, upon affidavit of the first-named directors of such corporation, to the effect that at least one hundred thousand dollars of the capital stock has been subscribed and paid in to a person named, for the benefit of such corporation.[29]

Corporations organized to act as executors, administrators, trustees, etc., incorporate under the general incorporation laws, but must have a paid-up capital of two hundred and fifty thousand dollars, of which one hundred thousand dollars must be paid in, in cash. The usual oaths required shall be taken for said corporation, by the president, secretary, manager, or trust officer of the corporation, and the corporation shall be liable to the full amount of its capital stock. The corporation receives proper compensation, but not in excess of the fees allowed to natural persons.[30]

§ 3322. **Action by foreign administrator or executor.**—Except as modified by the statute, the authority of an executor or administrator is limited to the state or country in which he receives his authority. Consequently, he is not authorized to maintain an action in his representative capacity outside of such state. If objection is not raised to the plaintiff's capacity to sue, either by answer or demurrer, it is waived.[31] But it has been held that a plaintiff may maintain a suit in the United States circuit court, as a citizen of Maine, in his character of administrator, if he has

28 Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119.

29 Cal. Civ. Code, § 290a.

30 Cal. Code amendments 1907, p. 567.

31 Ham v. Henderson, 50 Cal. 367; Cashman v. Wood, 6 Hun, 520; Robbins v. Wells, 18 Abb. Pr. 191; Connor's Admx. v. Paul, 12 Bush. (75 Ky.) 144; Duncan v. Whedbee, 4 Colo. 143; Mullin's Appeal, 40 Wis. 154; Harte v. Houchin, 50 Ind. 327; Wright v. Wright, 72 Ind. 149; S. W. Railway v. Paulk, 24 Ga. 370; Dougherty v. Walker, 15 Ga. 444; Brookshire v. Dubose, 2 Jones Eq. (N. C.) 279; Rucks v. Taylor, 49 Miss. 560; Palmer v. Phœnix Mut. etc. Ins. Co., 84 N. Y. 67. See Matter of Webb, 11 Hun, 124; Johnson v. Wallis, 112 N. Y. 230, 8 Am. St. Rep. 742, 19 N. E. 653, 2 L. R. A. 828.

taken out his letters in New Hampshire.[32] In Wyoming, a nonresident appointed executor must come into the state within a reasonable time and submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate.[33] An action against a foreign executrix for a conversion of assets, in fraud of the rights of plaintiffs, could not be maintained on the evidence that the executrix had brought any of the assets belonging to the estate within the state.[34]

If the plaintiff who has recovered a judgment as administrator in one jurisdiction brings an action on the judgment in another jurisdiction, naming himself as administrator in the latter action, the averment may be rejected as surplusage.[35] Where the cause of action alleged in the complaint is based upon a special contract with the administrator to collect a draft for the use of the estate, there can be no recovery upon the theory of a constructive involuntary trust, as to which no allegations are made in the complaint, and which are not sufficiently proved by the evidence.[36]

§ 3323. Executor or administrator, when may sue or be sued in own name.—Contracts made by an executor or administrator subsequently to the death of the deceased, although affecting the assets of the estate, may be sued on by such executor or administrator in his personal, and not in his representative, capacity. The action need not necessarily be in such form, as the executor or administrator has an election whether to sue personally or in a representative capacity.[37] Thus, an executor or administrator may sue in his own name to recover back money of the estate paid by mistake;[38] or on a note payable to him as representative;[39] or to bearer;[40] or to him individually for money due the estate;[41] or for the price of property sold by him as representa-

32 Carter v. Treadwell, 3 Story, 25, Fed. Cas. No. 2480.

33 Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828.

34 Falke v. Terry, 32 Colo. 85, 75 Pac. 425.

35 Lewis v. Adams, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833.

36 Gray v. Farmers' etc. Bank, 105 Cal. 60, 38 Pac. 519.

37 Sears v. Daly, 43 Or. 346, 73 Pac. 5; Wolf v. Beaird, 123 Ill. 585, 5 Am. St. Rep. 565, 15 N. E. 161; Mowry v. Adams, 14 Mass. 327.

38 Rogers v. Weaver, Wright, 174; Gulke v. Uhlig, 55 How. Pr. 434.

39 Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am. Rep. 215; Merritt v. Seaman, 6 N. Y. 168; Carleton v. Byington, 17 Iowa, 579; Kalkhoff v. Zoehrlaut, 40 Wis. 427.

40 Holcomb v. Beach, 112 Mass. 450.

41 McGehee v. Slater, 50 Ala. 431; Walt v. Walsh, 10 Heisk. (Tenn.) 314; Cocker v. Cocker, 2 Mo. App. 451; Blankenship v. Nimmo Admr., 50 Ala. 506.

tive;[42] or on a judgment obtained by him;[43] or for the wrongful conversion of the property of the estate,[44] although such conversion was made prior to his appointment. In such case, he has a special property in the goods taken sufficient to support the action. No demand is necessary if such taking were tortious.[45] Where the same person owns one half of a mortgage, and, as executrix, represents the other half, in an action to foreclose she properly appears as plaintiff jointly in the two capacities.[46]

In actions against executors or administrators, the complaint need not allege the facts showing how the defendants became invested with their representative character.[47] Where a will gave an executor power to sell land, and the executor entered into a contract authorizing an agent to sell a portion of the land, promising him a commission therefor, and the agent secured a purchaser to whom a conveyance was executed, the agent can maintain an action against the executor as such for his services.[48]

§ 3324. **Personal liability of executor, etc.**—No executor or administrator is chargeable upon any special promise to answer in damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement, or some memorandum thereof, is in writing, or signed by such executor or administrator, or his agent specially authorized in writing.[49] One executor may sue his co-executor to set aside a deed fraudulently secured from the decedent.[50] The estate is not liable to the widow for the misapplication by the administrator of the proceeds of an insurance policy paid to the administrator for the widow.[51] For applying a stranger's property to the use of the estate, an administrator is liable, both in his representative capacity and

42 Laycock v. Oleson, 60 Ill. 30.

43 Page v. Cravens, 3 Head. (Tenn.) 383; Hunt v. Lyle, 6 Yerg. (14 Tenn.) 417.

44 Munch v. Williamson, 24 Cal. 167.

45 Ham v. Henderson, 50 Cal. 367.

46 Casey v. Gibbons, 136 Cal. 368, 68 Pac. 1032.

47 Wise v. Williams, 72 Cal. 544, 14 Pac. 204.

48 Ingham v. Ryan, 18 Colo. App. 347, 71 Pac. 899.

49 Cal. Code Civ. Proc., § 1612; Ariz. Civ. Code, pars. 1847, 2696; Idaho Rev. Codes, § 5580; Mont. Rev. Codes, § 7627; Nev. Comp. Laws, § 2963; Or. B. & C. Codes, § 797; Utah Rev. Stats., § 2467; Wash. Bal. Codes, §§ 4576, 6308; Wyo. Rev. Stats. §§ 2953, 4706.

50 Stohr v. Stohr, 148 Cal. 180, 82 Pac. 777.

51 Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117.

personally, and may be sued in either.[52] If the liability is clearly personal, the words "as executrix" should be considered as merely descriptive.[53]

§ 3325. Action against executor or administrator on new promise.—Whether an executor or administrator can, by a new promise, revive a debt barred by the statute of limitations, depends upon the special statutes of the different states. Where there is no limitation upon the power of the executor or administrator imposed by statute, it has been held that a new promise would avoid the statute.[54] In South Carolina, it has been held that before the bar of the statute is complete the administrator may revive the debt by an acknowledgment or promise.[55] In another case in that state it was held that a promise by the executor would revive a debt barred by the statute at the time of the acknowledgment or promise, if not barred at the death of the testator.[56] In California, the allowance of a claim against an estate after it is barred by the statute is prohibited.[57] But a widow, executrix of an estate of her deceased husband, who has an interest in the same, who gives her own note for a debt of her husband, which is barred, under the mistaken opinion that it is still binding, will be held personally liable thereon.[58] Where a will gave an executor power to sell land, and the executor entered into a contract authorizing an agent to sell a portion of the land, promising him a commission therefor, and the agent secured a purchaser to whom a conveyance was executed, the agent can maintain an action against the executor as such for his services.[59]

§ 3326. Presentation of claims against estate.—Statutes have been passed in most of the states which limit the absolute right of the creditors of a deceased debtor to proceed against the estate. These statutes differ greatly in their details, but their general effect is to require the creditor to present his claim to

52 Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

53 St. Mary's Hospital v. Perry, 152 Cal. 338, 92 Pac. 864.

54 Executors of Niemcewicz v. Bartlett, 13 Ohio, 271; Brown v. Anderson, 13 Mass. 201.

55 Wilson's Admr. v. Wilson, 1 McMull, Eq. (S. C.) 329.

56 Pearce v. Exrs. of Zimmerman, Harp. (S. C.) 305.

57 Code Civ. Proc., § 1499.

58 Mull v. Van Trees, 50 Cal. 547.

59 Ingham v. Ryan, 18 Colo. App. 347, 71 Pac. 899.

the executor or administrator, within a certain time, for allowance. If not, such claim is forever barred. If a party makes an attempt to present his claim, but from some cause fails to properly do so, he is not estopped from again presenting it in due form, if within due time.[60] In California, the executor or administrator is required to publish notice to creditors to present their claims against the estate. If the value of the estate exceeds ten thousand dollars, such time is limited to ten months after the first publication; otherwise, to four months. All claims arising upon contract, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever. Where, however, it is made to appear by the affidavit of the claimant, to the satisfaction of the court or a judge thereof, that the claimant had no notice, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered.[61] One who knew of decedent's death, was present in the state during the first two publications of the notice to present claims, returned to the state, and had actual notice of the publication for more than one month prior to the expiration of the time for filing his claim, but failed to do so until long after that time had expired, was not one who, "by reason of being out of the state," had no notice "as provided in this chapter" to present his claim, within the meaning of section 1493 of the Code of Civil Procedure, and his claim was therefore barred.[62] The provision that a claim may be allowed if it appear to the satisfaction of the administrator and the judge that the claimant had no notice, etc., does not give to them the right to arbitrarily say they are not satisfied, and therefore reject the claim. The affidavit must make such showing as would satisfy a fair, reasonable, and impartial mind, and that is all that is required. If the claim be rejected for want of such satisfactory showing, it should be so indorsed.[63] Every claim which is due when pre-

60 Cal. Code Civ. Proc., § 1498; Westbay v. Gray, 116 Cal. 660, 48 Pac. 800.

61 Cal. Code Civ. Proc., §§ 1490-1493; Estate of Taylor, 16 Cal. 434; Cullerton v. Mead, 22 Cal. 96; Melton v. Martin, 28 Mont. 150, 72 Pac. 414. As to necessity for presentment of claims, see Cowgill v. Dinwiddie, 98 Cal. 481, 33 Pac. 439; McDonald v. McElroy, 60 Cal. 484, 495; Hibernia etc. Loan Soc. v. Conlin, 67 Cal. 178, 7 Pac. 477; In re Smith, 108 Cal. 115, 40 Pac. 1037; Dodson v. Nevitt, 5 Mont. 518, 6 Pac. 358.

62 MacGowan v. Jones, 142 Cal. 593, 76 Pac. 503.

63 Cullerton v. Mead, 22 Cal. 95.

sented to the executor or administrator must be verified by the affidavit of the claimant, or some one in his behalf, to the effect that the amount thereof is justly due; that no payments have been made thereon which are not credited, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated.[64]

Since the amendment of 1880 to section 1493 of the California Code of Civil Procedure, all contingent claims which are provable and payable at any time must be presented within the time limited in the notice to creditors, or such claims are barred forever, although the amount of the claim cannot be ascertained within the ordinary period of administration.[65] A claim may be presented before the notice to creditors is published, and such presentation is good.[66] Under the statutes of Nevada, it is not a sufficient presentation of a claim to hand it to the "attorney for the estate,"—at least not without showing that it actually reached the executor or administrator within the proper time for the presentation of claims.[67]

Upon the presentation of a claim, the executor or administrator must indorse thereon his allowance or rejection, with the date thereof. If he allows the same, it must be presented to the judge for his approval, who must indorse thereon his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection, for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day. If the claim be presented to the executor or administrator before the expiration of the time limited, it is a sufficient presentation, although not acted upon until after the expiration of such time.[68] No claim must be allowed

64 Code Civ. Proc., § 1494. As to necessity and sufficiency of affidavit, see Warren v. McGill, 103 Cal. 153, 37 Pac. 144; Pico v. De La Guerra, 18 Cal. 422; Hall v. Superior Court, 69 Cal. 79, 10 Pac. 257; Winder v. Hendricks, 56 Cal. 464; In re Hildebrandt, 92 Cal. 433, 28 Pac. 486.

65 Verdier v. Roach, 96 Cal. 467, 31 Pac. 554. Compare Hibernia etc. Soc. v. Wackenrender, 99 Cal. 506, 507, 34 Pac. 219. See, generally, as to time of presentment, Estate of Swain, 67 Cal. 637, 8 Pac. 497; Janin v. Browne, 59 Cal. 37; Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; Browning v. Browning, 3 N. Mex. 371 (659), 9 Pac. 677.

66 McCann v. Pennie, 100 Cal. 547, 35 Pac. 158.

67 Douglass v. Folsom, 21 Nev. 441, 33 Pac. 660. Compare Roddan v. Doane, 92 Cal. 555, 28 Pac. 604; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375.

68 Cal. Code Civ. Proc., § 1496.

by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. No claim against any estate which has been presented and allowed is affected by the statute of limitations pending the proceedings for the settlement of the estate.[69] After the allowance of a claim by the executor or administrator and the judge, the statute provides that it shall be filed in court within thirty days, and thereafter it ranks among the acknowledged debts of the estate to be paid in due course of administration.[70] The foregoing provision, so far as the time in which the filing of an approved claim is concerned, has been held merely directory.[71] If the claim be founded on a bond, bill, note, or other instrument, a copy of such instrument must accompany the claim. If the claim has been secured by mortgage or other recorded lien, it is sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record.[72]

If the claim is rejected, either by the executor or administrator, or the judge, suit must be brought thereon within three months after notice of its rejection, if it be then due, or within two months after it becomes due; otherwise, it is barred forever.[73] The time during which there is a vacancy in the administration is not included in such limitation.[74] If an action is pending against the decedent at the time of his death, the plaintiff must, in like manner, present his claim for allowance, authenticated as in other cases; and no recovery can be had in the action unless proof be made of such presentation.[75] If the defendant dies after verdict against him, and before judgment, the claim need not be presented. The proper practice in such case is to direct the entry of a judgment against him by name, and then suspend all further proceedings until the substitution of an executor or administrator.[76] Such judgment is not a lien on the real estate

69 Cal. Code Civ. Proc., § 1499.

70 Cal Code Civ. Proc., § 1497.

71 Willis v. Farley, 24 Cal. 501; Estate of Schroeder, 46 Cal. 304.

72 Code Civ. Proc., § 1497. See Estate of Kibbe, 57 Cal. 407; Estate of Galland, 92 Cal. 293, 28 Pac. 287.

73 Code Civ. Proc., § 1498; Benedict v. Hoggin, 2 Cal. 385; Smith v. Hall, 19 Cal. 85; Rice v. Inskeep, 34 Cal. 224.

74 Danglada v. De La Guerra, 10 Cal. 386; Smith v. Hall, 19 Cal. 85.

75 Code Civ. Proc., § 1502; Hibernia etc. Soc. v. Wackenrender, 99 Cal. 503, 34 Pac. 219.

76 Estate of Page, 50 Cal. 40.

of the decedent, but is payable in due course of administration.[77] An objection that such claim was not presented to the administrator or executor after the death of the defendant must be made in the court below. It comes too late if made in the appellate court for the first time.[78]

§ 3327. The same—Further construction of California statutes. —The words "claimant" and "claim" and "demand," as used in the California statutes, are synonymous, and have reference to such debts and demands against the decedent as might have been enforced against him during his lifetime by personal action for the recovery of money, and upon which only a money judgment could have been rendered.[79] They do not include expenses incurred in the administration,[80] or the family allowance,[81] as the object of the statute is mainly to prevent estates from being squandered or wasted in unnecessary litigation;[82] nor an assessment for public improvements made after the death of the decedent.[83] And in an action of accounting between a surviving partner and the representative of the deceased partner, the surviving partner is entitled to an allowance for sums drawn by the deceased partner from the partnership assets in his lifetime, although the claim for the sum so drawn has never been presented for allowance and approval,[84] as the claim for such advances need not be presented until the partnership affairs are wound up.[85] Nor need a claimant of specific property present a claim.[86] Claims which are necessary to be presented may be, before notice to creditors is published.[87] In Ohio, a formal presentation of a claim, which the administrator had previously seen, is not neces-

77 Code Civ. Proc., § 1506; Drake v. Foster, 52 Cal. 225.

78 Drake v. Foster, 52 Cal. 225.

79 Gray v. Palmer, 9 Cal. 616; Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140; Estate of McCausland, 52 Cal. 568. See Toulouse v. Burkett, 2 Idaho, 184, 10 Pac. 26; Lusk v. Patterson, 2 Colo. App. 306, 30 Pac. 253; Weill v. Clark's Estate, 9 Or. 387.

80 Deck v. Gherke, 6 Cal. 666.

81 Estate of McCausland, 52 Cal. 568. As to payment of funeral expenses from estate of deceased, see Van Emon v. Superior Court, 76 Cal. 589, 9 Am. St. Rep. 258, 18 Pac. 877; In re Weringer, 100 Cal. 345, 34 Pac. 825.

82 Ellissen v. Halleck, 6 Cal. 386; Falkner v. Folsom, 6 Cal. 412.

83 Hancock v. Whittemore, 50 Cal. 522; People v. Olvera, 43 Cal. 492.

84 Manuel v. Escolle, 65 Cal. 110, 3 Pac. 411.

85 Gleason v. White, 34 Cal. 258.

86 Gunter v. Janes, 9 Cal. 643.

87 Ricketson v. Richardson, 19 Cal. 330; Janin v. Browne, 59 Cal. 37; Hibernia Sav. etc. Soc. v. Hayes, 56 Cal. 306; Field v. Field, 77 N. Y. 294.

sary when, on being requested to allow it, he refuses, the claim being then present in the owner's pocket.[88] A refusal to allow a claim in that state is equivalent to a rejection;[89] but the requirement of presentation does not apply to proceedings to revive an action before judgment against the personal representative.[90] In Missouri, a defendant in an action by an administrator need not aver presentation of a set-off.[91] Nor, in New Jersey, need an assignee whose assignor presented the claim again present it.[92] In Arkansas, a plaintiff seeking to foreclose a mortgage or vendor's lien need not present the same for allowance.[93] In Idaho, it has been held that when the United States comes into court seeking to enforce a claim against an estate, it is subject to the same statutory requirements as individuals, and must present its claim.[94] The non-presentation of a claim only defeats the present right to recover. If the plaintiff has failed in his action by reason of such non-presentation, the claim may be presented, if within the statutory time, and, if rejected, a new suit instituted, which will not be barred by the former judgment.[95]

§ 3328. **Claims that need not be presented.**—An action will lie against an executor, without presentation of a claim against the estate, for money which can be identified in specie as belonging to plaintiff.[96] Where defendant's intestate received a sum from a decedent's estate to be held in trust for the plaintiff, the presentation of a claim against the estate is not required in order to recover the trust property.[97] A claim for an assessment on shares in an insolvent bank against an estate which did not exist until after the expiration of the year specified in the notice to creditors was not affected by the notice, or barred because not presented in time.[98] It is well settled that one who claims

88 Cheeseman v. Kyle, 15 Ohio St. 15.

89 Harter v. Taggart's Exrs., 14 Ohio St. 122; Stambaugh v. Smith, 23 Ohio St. 584.

90 Musser's Exrs. v. Chase, 29 Ohio St. 577.

91 Lay, Admr. etc. v. Mechanics' Bank, 61 Mo. 72.

92 Ryan v. Flanagan, Admx., 38 N. J. L. 161.

93 Allen v. Smith, 29 Ark. 74; Simms v. Richardson, 32 Ark. 297; McClure v. Owens, 32 Ark. 443.

94 United States v. Hailey, 2 Idaho, 22, 3 Pac. 263.

95 Hentsch v. Porter, 10 Cal. 560.

96 Sprague v. Walton, 145 Cal. 228, 78 Pac. 645.

97 Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

98 In re Macdonald's Estate, 29 Wash. 422, 69 Pac. 1111.

as his own, adversely to an estate, specific property held and claimed by the estate, cannot be called a creditor of the estate within the meaning of the probate law. The decisions are clear and conclusive upon the proposition that where one seeks to recover from representatives of an estate specific property alleged to have been held in trust by decedent at the time of his death, he is not seeking payment of a claim from the assets of the estate, and is not required to present a claim as creditor, and is not "creditor of the estate." His action is not founded upon a demand against the estate.[99] Money deposited in a bank transferred by a husband to his wife in trust, and not as a gift, may be recovered by his executors from the wife's estate without presentation of claim.[100]

§ 3329. Allowance and rejection of claims.—Claimant on a note must plead presentation of the claim, with a copy of the note, and its rejection.[101] An allowance of a claim by one executor is sufficient to bind the estate.[102] Such allowance must be made in writing; a verbal allowance gives the claimant no cause of action.[103] After allowance by the executor or administrator, and approval by the judge, the claim has the force and effect of a judgment against the estate, and is payable in due course of administration.[104] The presentation of a claim to the executor or administrator is the commencement of a suit upon it, and stops the running of the statute of limitations.[105] And where the executor neglects to indorse his allowance or rejection for more than ten days, the law presumes that the claim was rejected on the expiration of the tenth day.[106] But, in Oregon, six months,

99 Cal. Code Civ. Proc., § 1493; Estate of Dutard, 147 Cal. 253, 81 Pac. 519; Cal. Civ. Code, § 2236; Orcutt v. Gould, 117 Cal. 315, 49 Pac. 188.

100 Sprague v. Walton, 145 Cal. 228, 78 Pac. 645.

101 Cal. Code Civ. Proc., §§ 1494, 1497; Wills v. Booth, 6 Cal. App. 197, 91 Pac. 759.

102 Willis v. Farley, 24 Cal. 490; Cross v. Long, 66 Kan. 293, 71 Pac. 524.

103 Pitte v. Shipley, 46 Cal. 154.

104 Estate of Cook, 14 Cal. 129; Deck's Estate v. Gherke, 6 Cal. 666; Estate of Hidden, 23 Cal. 363; Magraw v. McGlynn, 26 Cal. 420; Pico v. De La Guerra, 18 Cal. 422; McKinney v. Davis, 6 Mo. 501; Kennerly v. Shepley, 15 Mo. 640, 57 Am. Dec. 219; Walkerly v. Bacon, 85 Cal. 137, 24 Pac. 638; Estate of Olvera, 70 Cal. 184, 11 Pac. 624. See Wilkes v. Cornelius, 21 Or. 341, 23 Pac. 473; Johnston v. Schofner, 23 Or. 111, 31 Pac. 254; In re Mouillerat's Estate, 14 Mont. 245, 36 Pac. 185.

105 Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237.

106 Rice v. Inskeep, 34 Cal. 225. See Roddan v. Doane, 92 Cal. 555, 28 Pac. 604; Cowgill v. Dinwiddie, 98 Cal. 481, 33 Pac. 439.

without excuse for delay, was a reasonable time, as a matter of law, for an executrix to act on a claim presented.[107] The allowance of a claim against a decedent's estate for less than the full amount thereof is a rejection of the rest of the claim.[108] The claimant of a rejected claim, in recovering judgment thereon, is entitled to interest from the time of presentment.

§ 3330. **Presentation of claim secured by mortgage—In California.**—The statutes of California regulating the presentation of claims secured by mortgage or other lien have been frequently changed. The decisions of the courts in that state, unless interpreted with reference to the provisions of the particular statute applicable thereto, would seem in irreconcilable conflict. Under the original sections of the act to regulate the estates of deceased persons, the requirement that all claims must be presented for allowance or rejection before any action could be maintained thereon was held broad enough to include claims secured by mortgage.[109] Such continued to be the law on this subject until the adoption of the Code of Civil Procedure in 1873. By sections 1493 and 1500 thereof, it was rendered unnecessary for the holder of a mortgage or other lien to present the same to the representative of the estate. In 1874, these sections were amended so as to render such presentation necessary. In 1876, these sections were again amended so as to make a presentation unnecessary. Section 1500, after providing that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, contains the following provision: "An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so presented." These sections, as amended in 1876, continue to be the law in California,[110] and render it unnecessary for a

107 Goltra v. Penland, 45 Or. 254, 77 Pac. 129.

108 Jones v. Walden, 145 Cal. 523, 78 Pac. 1046.

109 Probate Act, §§ 130, 136; Ellissen v. Halleck, 6 Cal. 386; Pico v. De La Guerra, 18 Cal. 428; Fallon v. Butler, 21 Cal. 32, 81 Am. Dec. 140; Willis v. Farley, 24 Cal. 490; Ellis v. Polhemus, 27 Cal. 350; Pitte v. Shipley, 46 Cal. 160; Marsh v. Dooley, 52 Cal. 232.

110 Hibernia Sav. etc. Soc. v. Jordan, 5 Pac. C. L. J. 381; Hibernia Sav. etc. Soc. v. Conlin, 67 Cal. 180, 7 Pac. 477; German Sav. etc. Soc. v. Hutchinson, 68 Cal. 52, 8 Pac. 627; Wise v. Williams, 72 Cal. 544, 14 Pac.

pledgee to present his claim to the representative of the pledgor, unless he seeks recourse against other property of the estate than that pledged.[111] In foreclosure of a mortgage, the heirs of the decedent are not necessary parties, but the administrator is.[112]

In construing the amendments of 1874, repealing the provision authorizing actions upon mortgages to be maintained against the property of the estate of a deceased mortgagor without presentation, it has been held that the same are not retroactive, and do not give to a notice to creditors previously published any effect which it did not have under the law under which it was published; and that a mortgage falling due after the amendment was not barred by a failure to present the claim.[113] If, however, the mortgage or other lien is on the homestead, the claim must be presented for allowance, as section 1475 of the Code of Civil Procedure requires such presentation, and section 1500 will be construed so as to give it effect.[114] But where a debtor, before his decease, conveys land to a person in trust, to secure his promissory note, and after his decease the creditor fails to present his claim to the executor or administrator within the time fixed by the statute after publication of notice to creditors, the executor cannot invoke the power of a court of equity to compel the surrender of the security, or to enjoin the creditors from selling the land under the power contained in the deed of trust.[115] This rule is based upon the well-known doctrines that statutes of limitations do not destroy the right of action, but merely bar the remedy, and that he who seeks equity must do equity.

Where, after the commencement of a suit on a note, the same was transferred, and the action continued in the name of the original party, and subsequently he died, his administrator might not maintain an action on the note, inasmuch as his estate had no interest in the cause of action, and a judgment in his favor

204; Moran v. Gardemeyer, 82 Cal. 96, 23 Pac. 6; Hibernia Sav. etc. Soc. v. Wackenrender, 99 Cal. 503, 34 Pac. 219; Security Sav. Bank v. Connell, 65 Cal. 574, 4 Pac. 580.

111 Estate of Kibbe, 57 Cal. 407.

112 McCaughey v. Lyall, 152 Cal. 615, 93 Pac. 681.

113 Hibernia Sav. etc. Soc. v. Hayes, 56 Cal. 297; Dreyfuss v. Giles, 79 Cal. 409, 21 Pac. 840; German Sav. etc. Soc. v. Fisher, 92 Cal. 502, 28 Pac. 591.

114 Camp v. Grider, 62 Cal. 20; Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Mechanics' etc. Loan Assoc. v. King, 83 Cal. 440, 23 Pac. 376; Bollinger v. Manning, 79 Cal. 7, 21 Pac. 375; Perkins v. Onyett, 86 Cal. 348, 24 Pac. 1024.

115 Whitmore v. San Francisco Sav. Union, 50 Cal. 145. See, also, Sichel v. Carrillo, 42 Cal. 493.

would not be binding on the transferee.[116] Where plaintiff mortgaged certain premises to a building and loan association to secure a usurious loan, and after making certain payments for interest, premium, and stock installments, he conveyed the property to his mother, subject to the mortgage, and she thereafter continued to make payments until shortly before she died, and upon her death plaintiff was appointed her executor, plaintiff was entitled to sue on behalf of himself, and as executor of his mother, to have such mortgage canceled, after the payments made by himself and his mother had been sufficient to extinguish the debt.[117]

§ 3331. Allegation of presentation and rejection of claim.— Where the statute provides that claims must be presented for allowance and rejected before action can be maintained thereon, all the facts necessary to show a valid presentation and rejection, with the dates on which they severally occurred, must be alleged. It is well also to attach to and make part of the complaint a copy of the claim as presented, that the court may judge of its legal sufficiency.[118] An allegation of the presentation of a claim in the complaint in an action which was subsequently dismissed, and in which the court found no such claim had been presented, does not preclude the presentation of the claim thereafter, or bar the commencement of an action within three months from its rejection.[119] A claim for funeral expenses is not required to be presented, and an action therefor is not limited to three months after rejection. Presentation and allowance in part of such claim is immaterial, upon the question of limitation of right of action.[120]

A complaint is not demurrable for not alleging that the plaintiff presented his claim to the administrator within the time limited in the notice to creditors, if it does not show upon its face that it was not so presented, or that it was presented at a date after the time limited in the notice.[121]

116 Daneri v. Gazzola, 139 Cal. 416, 73 Pac. 179.

117 Epping v. Washington Nat. Bank etc. Assoc., 44 Or. 116, 74 Pac. 923.

118 Ellissen v. Halleck, 6 Cal. 393; Falkner v. Folsom, 6 Cal. 412; Heutsch v. Porter, 10 Cal. 558; Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; Ellis v. Polhemus, 27 Cal. 354; Benedict v. Hoggin, 2 Cal. 386.

119 Westbay v. Gray, 116 Cal. 660, 48 Pac. 800; Cal. Code Civ. Proc., § 1498.

120 Potter v. Lewin, 123 Cal. 146, 55 Pac. 783.

121 McCann v. Pennie, 100 Cal. 547, 35 Pac. 158.

§ 3332. **Forms of complaints—Description of party—Capacity—Promise.**—In an action against executors for a legacy, plaintiff must aver and prove existing assets.[122] A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. In such case it is not sufficient to allege ignorance at the time of allowance, but the plaintiff must go further, and show that he could not, with the use of due diligence on his part, have made himself acquainted with, or ascertained the existence of, the facts.[123] A declaration on a promise made by the defendant as administrator must aver assets in order to charge him personally *de bonis propriis*.[124] In Louisiana, an action brought by a creditor of a testator against his executor, charging him with a *devastavit*, without averring proceedings to compel the defendant to exhibit a table of distribution, cannot be maintained.[125] A complaint against executors, seeking to charge them in their representative capacity, cannot be sustained on demurrer, if the facts alleged show only a personal liability on their part.[126] If the defendant is described in the caption of the complaint as administrator, it is immaterial so long as the facts stated in the body of the complaint show he is not sought to be charged as administrator.[127]

In an action against executors, plaintiff may, to save the statute of limitations, lay the promise as made by the representative.[128] A complaint which alleges a promise by deceased, and also a promise by his administrators, though informal, is not bad on general demurrer, if it appears that defendants are charged in their representative capacity.[129] Where the complaint did not state that the promises were made in the testator's lifetime, nor to him, nor for an indebtedness to him, nor to them as administrators, the action is in their individual, and not in their representative, capacity.[130] An action to recover the amount dis-

122 Dewitt v. Schoonmaker, 2 Johns. 243.

123 Williams v. Price, 11 Cal. 212.

124 Adams v. Whiting, 2 Cranch C. C. 132, Fed. Cas. No. 69.

125 McGill v. Armour, 11 How. 142, 13 L. Ed. 638.

126 Bartlett v. Hatch, 17 Abb. Pr. 461.

127 People v. Houghtaling, 7 Cal. 350.

128 Whitaker v. Whitaker, 6 Johns. 112; Carter v. Phelps, 8 Johns. 440.

129 Curtis v. Bowrie's Admrs., 2 McLean, 374, Fed. Cas. No. 3498.

130 Worden v. Worthington, 2 Barb. 368. See Merritt v. Seaman, 6 N. Y. 168.

tributed to the plaintiff by the decree of distribution in the estate of a decedent should be brought against the defendant individually, and not in his representative capacity. In such action the complaint need not allege a demand on the defendant as executor or administrator, the action itself being a sufficient demand.[131] A complaint by the surviving husband of a testatrix against the executor of his deceased wife, alleging that as such executor he has received from a savings bank a sum of money "to and for the use of and belonging to the plaintiff," which the defendant has refused to pay to the plaintiff upon demand, states sufficient facts for a personal judgment against the executor.[132] A complaint in an action upon an executor's bond which alleges that the executor was appointed; that letters testamentary were ordered to be issued to him upon his executing a bond according to law; and that the executor and sureties duly made and executed the bond required by the order, sufficiently alleges compliance with the requirements of the statute, as against a general demurrer, although the complaint does not specifically allege that the bond sued on was approved by the judge or was filed or recorded, or that a certificate of justification was attached thereto.[133] A complaint in an action against an administrator and the sureties on his bond for failure to pay the claims allowed against the estate which does not allege that the fund in his hands is sufficient to pay all in full, including costs of administration, is held to be defective.[134]

§ 3333. Torts, actions on.—No action can be sustained against an executor or administrator as such on a penal statute; nor when the cause of action is founded upon any malfeasance or misfeasance, is a tort, or arises *ex delicto*, such as trespass, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, etc., when the complaint imputes a tort done to the person or goods of another by the testator or intestate.[135] In New Jersey, an action in tort for negligence or deceit will lie against the personal representative of a deceased wrongdoer.[136]

131 Melone v. Davis, 67 Cal. 279, 7 Pac. 703.

132 Kirsch v. Derby, 96 Cal. 602, 31 Pac. 567.

133 Evans v. Gerken, 105 Cal. 311, 38 Pac. 725.

134 Howe v. People, 7 Colo. App. 535, 44 Pac. 512.

135 Williams on Executors, pp. 1728, 1729; People v. Gibbs, 9 Wend. 29; Eustace v. Jahns, 38 Cal. 3; Melone v. Davis, 67 Cal. 279, 7 Pac. 703.

136 Tichenor v. Hayes, 41 N. J. L. 193, 32 Am. Rep. 186.

§ 3334. **Administrator with will annexed.**—If the testator appoints an executor of his will, and the executor dies, and an administrator with the will annexed is appointed, the administrator with the will annexed, under the statutes of California, possesses all the powers conferred on the executor named in the will, and can sell the land devised if the executor could have sold it.[137]

§ 3335. **Action for use and occupation against executor.**—At the common law, an executor has constructive possession of the decedent's goods from the time of his death, and may declare on his own possession "as executor," although in fact he never has had possession. Under the laws of California, an administrator is vested with the right to the possession of the real estate of his intestate as well as to the personal property; and his duties and liabilities in respect thereto are therefore of the same general character. If the administrator occupies and uses premises belonging to his estate, he becomes at least the tenant of the estate, liable in any event for the value of its use and occupation; and if he makes a profit, he becomes liable for that also, at the election of the parties in interest; such is the law of his relation. If in this case the administrator sustains a loss, the loss is his, and the hardship is no greater than a like result in the case of any other tenant.[138] Under section 1572 of the Code of Civil Procedure, one having an estate of inheritance in land fraudulently sold by an executor or administrator, may maintain an action against him to recover double the value of the land sold; but that section does not authorize an action against the sureties on his official bond.[139]

§ 3336. **To recover embezzled property of estate.**—The executor or administrator of an estate may recover, for the benefit of the estate, double the value of any money or property of the estate which has been embezzled, concealed, smuggled, or fraudulently disposed of;[140] and for the purpose of locating any of the property of such estate suspected to have been embezzled,

137 Kidwell v. Brummagim, 32 Cal. 436.

138 Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290. See Estate of Misamore, 90 Cal. 169, 27 Pac. 68; In re Rose, 80 Cal. 166, 173, 22 Pac. 86.

139 Weihe v. Statham, 67 Cal. 245, 7 Pac. 673.

140 Cal. Code Civ. Proc., § 1458.

he may, upon proper representation to the superior court by affidavit, have any such suspected person or persons cited to appear before the court and answer interrogatories put to him touching the matters of complaint. Other witnesses may be subpœnaed and examined, on either side, at the hearing.[141]

§ 3337. **Suit for waste.**—An administrator having no estate in the premises, except the right to lease it, has no action for waste.[142]

§ 3338. **Costs.**—Unless otherwise provided by statute, the costs of a suit will be imposed upon an executor individually, leaving him the right to seek reimbursement from the estate.[143] If the administrators of two estates join in an appeal, the costs should be borne by both estates jointly.[144] If suit is brought without former presentation of the claim, the administrator, the claim being just, may pay the claim without costs or liability for costs; but if contest is made, judgment may include costs.[145] An executor is personally liable to his attorney for the reasonable value of his services, regardless of the amount allowed by the probate court.[146] The attorney has no personal claim against the estate, and the executor can have no larger allowance for attorney fees than that actually paid.[147]

141 Cal. Code Civ. Proc., §§ 1459, 1460; Ariz. Civ. Code, par. 1722; Idaho Rev. Codes, § 5432; Mont. Rev. Codes, § 7505; Nev. Comp. Laws, § 2882; Or. B. & C. Codes, § 1148; Utah Rev. Stats., § 3927; Wash. Bal. Codes, § 6212; Wyo. Rev. Stats., § 4690.

142 Adams v. Slattery, 36 Colo. 35, 85 Pac. 87.

143 Cal. Code Civ. Proc., § 1022; Meyer v. O'Rourke, 150 Cal. 177, 88 Pac. 706.

144 In re Davis's Estate, 33 Mont. 539, 88 Pac. 957.

145 Clayton v. Dinwoodey, 33 Utah, 251, 93 Pac. 723.

146 In re Scott's Estate, 1 Cal. App. 740, 83 Pac. 85.

147 In re Goodrich's Estate, 6 Cal. App. 730, 93 Pac. 121.

FORMS—EXECUTORS AND ADMINISTRATORS.

§ 3339. Complaint by an executor.

Form No. 897.

[TITLE OF COURT.]

A. B., Executor of the Will of C. D., Deceased, Plaintiff,
v.
John Doe, Defendant.

The plaintiff, as such executor, complains, and alleges:

I. [State cause of action.]

II. That the said C. D. in his lifetime made and published his last will, whereby he appointed the plaintiff executor thereof.

III. That on the . . . day of . . ., 19.., at . . ., the said C. D. died.

IV. That on the . . . day of . . ., 19.., at . . ., said will was proved and admitted to probate, in the superior court in the county of . . ., in this state.

V. That thereupon, on the . . . day of . . ., 19.., letters testamentary were issued on the said will to the plaintiff, by the superior court of said county.

VI. That thereupon the plaintiff duly qualified and entered upon the discharge of his duties as executor, and that said letters testamentary have not been revoked.

§ 3340. Complaint by an administrator.

Form No. 898.

[TITLE.]

The plaintiff, as such administrator, complains, and alleges:

I. [State cause of action accruing to the intestate.]

II. That on the . . . day of . . ., 19.., at . . ., the said A. B. died intestate.

III. That on the . . . day of . . ., 19.., letters of administration upon the estate of the said A. B. were issued by the superior court of the county of . . ., in this state, to the plaintiff.

IV. That the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office, and that said letters of administration have not been revoked.

§ 3341. Commencement of complaint by executor or administrator suing in his own right.

Form No. 899.

[TITLE.]

The plaintiff complains, as administrator of the estate [or, executor of the will] of A. B., deceased, and alleges:

I. [State cause of action.]

§ 3342. Complaint against an administrator or executor.

Form No. 900.

[TITLE OF COURT.]

A. B., Plaintiff,
v.
C. D., Administrator [or, Executor] of the Estate of E. F., Deceased, Defendant.

The plaintiff complains, and alleges:

I. [State a cause of action against the decedent.]

II. [Allege death of decedent, and defendant's appointment as administrator or executor, as in preceding forms.]

III. That said defendant, as such executor [or, administrator], in pursuance of an order of the superior court of . . . county, caused a notice to the creditors of said deceased to be published in . . ., the same being the newspaper designated by said court, requiring all persons having claims against said deceased to exhibit them, with the necessary vouchers to the said executor [or, administrator] at [specify the place], the same being specified therein as his place of business, within . . . months after the first publication of said notice; and said notice was first published on the . . . day of . . ., 19..

IV. That on the . . . day of . . ., 19.., at . . ., the claim hereinbefore set forth, verified by the oath of the claimant, and upon which this action is founded, was duly presented in writing by the plaintiff to the defendant, as such administrator [or, executor], for allowance. And that the same was by him, as such administrator [or, executor], rejected, on the . . . day of . . ., 19.. That a copy of said claim as presented is hereunto attached and made a part of this complaint.

[DEMAND OF JUDGMENT.]

§ 3343. Petition by executor, administrator, or heir of deceased plaintiff.

Form No. 901.

[TITLE OF ORIGINAL ACTION.]

To the . . . Court in and for the County of . . .

The petition of C. D. and E. F., executors of the last will and testament [or, administrators of the estate] of A. B., deceased, [or, heirs of A. B., deceased], shows to the court:

I. That on or about the . . . day of . . ., 19.., one A. B. commenced the above-entitled action in this court for [state cause of the action, and its condition].

II. That said A. B. died on or about the . . . day of . . . last, and pending said action, having first duly made and published his last will and testament, by which, among other things, he appointed your petitioners his executors; that your petitioners have proved said will, and letters testamentary thereon were duly made and issued to them by the . . . court of the county of . . . on the . . . day of . . ., 19..; and that they have duly qualified and undertaken the execution thereof.

[Or, where the application is by administrators: II. That said A. B. died intestate on or about the . . . day of . . ., 19.., and pending said action; and that letters of administration upon his estate were duly made and issued, on the . . . day of . . ., last, by the . . . court of the county of . . ., to the petitioners, who have qualified and entered upon their duties as such administrators.]

III. That at the time of his death the said note [or other cause of action], was still owned by the said A. B.; and the amount thereof, with the interest thereon, is still due from the said defendant; and the said [note] is now held by these deponents, and forms a part of the assets in their hands belonging to the estate of said A. B., deceased.

[Or, where the application is by heirs, substitute for II and III above: That said A. B. died intestate on or about the . . . day of . . ., 19.., and pending said action, and leaving your petitioners, who are his only children, his heirs at law, and as such they inherited his interest and estate in the lands which are the subject of said action.]

IV. That your petitioners are desirous of continuing the action above referred to, as executors [or, administrators; or, heirs] of said A. B., against said Y. Z.

Wherefore, your petitioners pray that said action may be so continued by them, and that your petitioners may have leave to amend the complaint herein, setting forth the facts above stated [or, to serve and file the annexed proposed supplemental complaint herein], and for such further relief as may be just.

[VERIFICATION.] [SIGNATURE.]

§ 3344. Allegation when executor refuses to join in action.

Form No. 902.

[Title and appropriate preliminary allegations.]

II. That this plaintiff, prior to the commencement of this action, applied to his co-executor, the said C. D., named as defendant herein, to join with him in the prosecution of this action, but that said defendant refused and neglected to do so; wherefore the said C. D. is made a defendant in this action.

§ 3345. Nonjoinder of co-executor.

Form No. 903.

I. That the said M. N., the testator mentioned in the complaint, by his will duly appointed the plaintiff and one O. P., jointly, executors of his said will.

II. That on or about the . . . day of . . ., 19.., letters testamentary thereupon were duly issued to said O. P. [together with the plaintiff] by the . . . court of the county of . . . ; and he thereupon duly qualified as executor, and still is such, and living at . . .

§ 3346. Answer of set-off, by executors.

Form No. 904.

The defendant, for a counterclaim herein, alleges that the plaintiff before, and at the time of, the death of the said M. [the defendant's testator], was indebted to the said M. [or, was at and before the commencement of this action indebted to the estate of the said M.], and still is so indebted to the estate of the said M., in the sum of . . . dollars, for the following cause: [here state the cause of action relied on as a set-off], out of which said sum of money, so due to the defendant, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages, if any, in respect to the alleged

matters complained of. [Or, if the cause of action in the complaint is admitted, say: sufficient to satisfy the sum so due to the plaintiff.]

§ 3347. Order, by consent, substituting executors, without prejudice to proceedings already had.

Form No. 905.

[TITLE.]

On reading and filing the affidavit of M. N., showing the death of A. B., the plaintiff in the above-entitled action, and the granting of letters testamentary, under and by virtue of his last will and testament, to C. D. and E. F., by the . . . court of . . . county, and on motion of M. N., plaintiff's attorney, [defendant's attorney consenting thereto]:

Ordered, that this action be and the same is hereby revived and continued in the name of the said C. D. and E. F., executors of the last will and testament of A. B., deceased, as plaintiffs; and that the said executors be and they hereby are substituted as plaintiffs in the place and stead of the said A. B., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.

§ 3348. Action by legatee on executor's bond.

Form No. 906.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., one [testator] died a resident of said county of . . ., leaving his last will and testament duly executed, by the terms of which the said [testator] bequeathed to this plaintiff the sum of . . . dollars [or, a copy of which will is hereto annexed, marked "Exhibit A," and made a part of this complaint].

II. That thereafter, and on the . . . day of . . ., 19.., upon application duly made for that purpose, the said last will and testament was by the judgment and decree of the . . . court of . . . county duly admitted to probate as and for the last will and testament of the said deceased, and the defendant [executor] was by order of said court appointed executor of said last will and testament and of the estate of said deceased.

III. That on the . . . day of . . ., 19.., the said [executor], together with the defendants [sureties], executed and delivered to J. K., judge of the . . . court of said county, their joint and several obligation in writing, of which a true copy is attached hereto, made part of this complaint and marked "Exhibit B."

IV. That the said instrument was thereupon duly approved by the . . . judge aforesaid, and letters testamentary were thereafter, and on the . . . day of . . ., 19.., duly issued by said court to the said [executor], who thereupon entered upon the duties of his said trust, and took possession of the property and assets of the estate of said [deceased], amounting in all to the sum of . . . dollars.

V. That said [executor] collected and received assets belonging to said estate amounting to . . . dollars, and converted the same to his own use, and refused and neglected to account therefor to the said court, or to any court having jurisdiction thereof.

VI. That on the . . . day of . . ., 19.., the plaintiff demanded payment of said sum from the said [executor], and a settlement of his accounts; but said [executor] refused to make said payment, or to file an account with the said court.

[Allege application and leave to sue.]

[Demand of Judgment.]

[Annex exhibits.]

CHAPTER XCV.

INFANTS.

§ 3349. Infants defined.—Minors include males under twenty-one years of age, and females under eighteen years of age;[1] and the time must be calculated from the first minute of the day of birth to the same minute of the day completing the period of minority.[2] Thus a girl born on the 17th of March has become an adult at the commencement of the day of the 16th of March, the eighteenth year after her birth.[3] The marriage of a minor female takes her out of the class known as "children and minors," under statutes providing for their commitment to the state school.[4]

§ 3350. Actions by or against infants should be brought in the name of their general guardian, or by their guardian *ad litem*.[5] A guardian appears in the action simply to manage and take care of the interests of the ward or infant for whom he appears, and does not thereby become a party to the action.[6] The father of a minor has legal capacity to sue as guardian *ad litem* for personal injuries to the minor, and to enforce a specific claim for medical attendance, nursing, and medicine.[7] A judgment rendered against an infant, in which no guardian *ad litem* has been appointed, is not for that reason void;[8] and a judgment rendered against him in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person.[9] While section 101 of the Kansas Code of Civil Procedure requires a guardian *ad litem* to file a general denial, and it is error to try a case against a minor without it, his omission to file such a pleading is not a jurisdictional defect.[10]

1 Cal. Civ. Code, § 25.

2 Cal. Civ. Code, § 26.

3 Ex parte Wood, 5 Cal. App. 471, 90 Pac. 961.

4 Ex parte Lewis, 3 Cal. App. 738, 86 Pac. 996.

5 Cal. Code Civ. Proc., § 372; N. Y. Code Civ. Proc., § 469. See Richardson v. Loupe, 80 Cal. 491, 22 Pac. 227; Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328.

6 O'Shea v. Wilkinson, 95 Cal. 454, 30 Pac. 588.

7 Donald v. City of Ballard, 34 Wash. 576, 76 Pac. 80.

8 Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418; Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681.

9 Childs v. Lanterman, 103 Cal. 387, 42 Am. St. Rep. 121, 37 Pac. 382.

10 Swartwood v. Sage, 68 Kan. 817, 75 Pac. 508.

§ 3351. **Appointment of guardian.**—Where the will appoints a guardian, there is no necessity for any letters of guardianship.[11] On an application for admission of a will to probate, a nonresident may be appointed guardian *ad litem* for the minor heirs.[12] The court has no right to appoint a guardian *ad litem* for an infant defendant till the defendant is properly brought before the court.[13] But where his interests require it, the court will appoint such a guardian, even though the minor may have a general guardian.[14] The provisions of sections 9 and 10 of the California Civil Practice Act,[14a] relative to the appointment of guardians *ad litem,* where infants are parties, did apply only where there was no general guardian, or where he did not act;[15] but since the amendment of 1880 a guardian *ad litem* may be appointed in any case, notwithstanding the general guardian may have entered an appearance for the minor.[16]

§ 3352. **Guardian ad litem—How appointed.**—If the infant be plaintiff, and fourteen years or older, he must make the application himself, either in person or by writing; if under that age, the application should be made by a relative or friend of the infant; and if the infant be defendant, and fourteen years old, he has ten days after service of summons in which to make application; and thereafter, a relative, friend, or any other party to the action may make the application for appointment of a guardian *ad litem.*[17] If the application does not show the minor's choice, it is erroneous but not void.[18] No notice of the application is necessary.[19] It is made *ex parte.*[20] It may be made *ore tenus* in open court, and, in absence of the record of the proceedings, the appointment will be presumed to be regular; but it is the better practice to file a petition setting forth facts necessary to confer jurisdiction on the court.[21] If the infant is

11 Norris v. Harris, 15 Cal. 255.

12 Pine v. Callahan, 8 Idaho, 684, 71 Pac. 473.

13 Gray v. Palmer, 9 Cal. 616. See McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943.

14 Gronfier v. Puymirol, 19 Cal. 629; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

14a Code Civ. Proc., §§ 372, 373.

15 Fox v. Minor, 32 Cal. 119, 91 Am. Dec. 566; Spear v. Ward, 20 Cal. 676.

16 Cal. Code Civ. Proc., § 372.

17 Cal. Code Civ. Proc., § 373.

18 Johnston v. Southern Pacific Co., 150 Cal. 535, 89 Pac. 348.

19 Granger v. Sherriff, 133 Cal. 416, 65 Pac. 873.

20 Crawford v. Neal, 56 Cal. 321; Granger v. Sherriff, 133 Cal. 416, 65 Pac. 873.

21 Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

defendant, the court has no jurisdiction to appoint a guardian *ad litem* until after the infant has been served.[22] A premature appointment of a guardian *ad litem* may be irregular and erroneous, but will not divest the court of its jurisdiction, which became complete over the minors upon service of summons upon them.[23]

§ 3353. Guardian ad litem—Appointment, how and when must be alleged.—In New York, where the plaintiff is an infant suing by guardian, the complaint shall contain an allegation of the appointment of the guardian, and it should be stated in a traversable form.[24] So where an infant sues by a guardian *ad litem* as provided in section 372 of the California Code of Civil Procedure, the complaint must allege the due appointment of the guardian, since the appointment of such guardian is a traversable fact, and must be stated in order that it may be traversed.[25] Such appointment must be alleged with certainty as to time, place, and power of the appointment.[26] But an allegation that the appointment was made on the plaintiff's application is implied by the averment that the guardian was "duly appointed."[27] When, however, a complaint was entitled, "J. T., by J. G., his Guardian, v. G. T.," and commenced thus: "The plaintiff, complaining, states," etc., but contained no allegation that the plaintiff was an infant, under the age of twenty-one years, or that the guardian was appointed by any court, it was held bad on demurrer, for the reason that, while it showed that the plaintiff appeared by guardian, it did not show that the guardian was duly appointed, so as to authorize such appearance.[28] If the allegation be deemed too general, the objection cannot be taken by demurrer. The remedy is by motion to make it more definite.[29] Where a bill is brought on behalf of infant complainants by their "next

22 McCloskey v. Sweeney, 66 Cal. 53, 4 Pac. 943; Estate of Callaghan, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689.

23 Welsh v. Koch, 4 Cal. App. 571, 88 Pac. 604. See, also, State v. District Court, 34 Mont. 306, 87 Pac. 615.

24 Hulbert v. Young, 13 How. Pr. 414; Grantman v. Thrall, 44 Barb. 173. See, also, Stanley v. Chappell, 8 Cow. 235.

25 Crawford v. Neal, 56 Cal. 321.

26 Stanley v. Chappell, 8 Cow. 235; Hulbert v. Young, 13 How. Pr. 413.

27 Polly v. Saratoga etc. R. R. Co., 9 Barb. 449; People v. Walker, 2 Abb. Pr. 421; People v. Ryder, 12 N. Y. 433.

28 Stanley v. Chappell, 8 Cow. 235; Hulbert v. Young, 13 How. Pr. 413; Grantman v. Thrall, 44 Barb. 173.

29 Sere v. Coit, 5 Abb. Pr. 481.

friend," it will be presumed that the next friend was duly appointed by the court and leave given to file the bill.[30]

§ 3354. **Power of guardian ad litem.**—An infant's guardian *ad litem,* while not having power to compound or settle a judgment in favor of the infant, has a right to satisfy it.[31]

§ 3355. **Actions by general guardian.**—A general guardian cannot sue in his own name to recover money due the infant. Such actions must be brought in the name of the infant, by his guardian.[32] In an action by an infant, a general guardian designated in the complaint as a guardian *ad litem* is of no importance, if the body of the complaint shows him to be a general guardian.[33] In an action by a guardian to recover from his ward's estate for services rendered in a suit at law, it must be alleged that the employment of the plaintiff was a reasonable and proper expense incurred by the guardian.[34] Where the intention to join the minors and guardian in the appeal is manifest, it would not be dismissed because the notice was not signed by the guardian *ad litem* as such.[35]

§ 3356. **Disaffirmance of deed.**—Where an infant conveys his land, and afterwards, on coming of age, would avoid the deed and recover possession, he must before suit make an entry upon the lands, and execute a second deed to a third person, or do some other act of equal notoriety in disaffirmance of the first deed, or an action cannot be maintained.[36] After disaffirmance of a reconveyance, made while a minor, the title is in such one disaffirming.[37] The act is valid until avoided.[38] The act of disaffirmance must be averred in the pleading, and is necessary to be proved. The want of this allegation makes the complaint fatally defective.[39] An agreement by a minor to partition land

30 Bent v. Maxwell etc. Ry. Co., 3 N. Mex. 158 (227), 3 Pac. 721.

31 State v. Ballinger, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72.

32 Spear v. Ward, 20 Cal. 676; Fox v. Minor, 32 Cal. 119, 91 Am. Dec. 566.

33 Spear v. Ward, 20 Cal. 676.

34 Caldwell v. Young, 21 Tex. 800.

35 Noble v. Whitten, 34 Wash. 507, 76 Pac. 95.

36 Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285; Dominick v. Michael, 4 Sandf. 420.

37 Seed v. Jennings, 47 Or. 464, 83 Pac. 872.

38 Eldriedge v. Hoefer, (Or.) 94 Pac. 563.

39 Voorhies v. Voorhies, 24 Barb. 150. See, also, Cal. Civ. Code, §§ 35-37. As to what acts will amount to

is voidable only on failure to disaffirm within a reasonable time after majority.[40] Under the Washington statute,[41] providing that a minor who desires to disaffirm his contract must do so within a reasonable time after he becomes of age, one who did not attempt to disaffirm a deed executed by him during minority until more than three years after attaining majority must be deemed bound thereby.[42]

§ 3357. **Partition.**—A guardian *ad litem* appointed to represent an infant in a suit in partition has no power to admit away by his answer the rights of the infant, as it is not a matter within the scope of his appointment. He has power to defend for the infant solely against the claim set up for partition of the common estate.[43]

§ 3358. **Promissory notes.**—The promissory note of an infant is voidable, not void.[44] Certain land having been conveyed to a minor, subject to a mortgage, the mortgage was foreclosed, and the land sold to the mortgagee. After the sale was confirmed, the minor's mother applied to complainant for a loan of the amount necessary to redeem, and represented to him that if he advanced the money he would be subrogated to the rights of the mortgagee, that the minor had no means, and that the loan was necessary to enable him to redeem. Since the minor was not legally bound to redeem, and such redemption was not necessary, such facts were insufficient to entitle complainant to a decree imposing a lien on the land for the amount so loaned.[45]

§ 3359. **Special obligation of ancestor.**—Where the infant was sued upon a special obligation of the ancestor, chargeable upon the inheritance, he might pray that the proceedings be stayed until he should attain his majority. This privilege is confined to the heir alone.[46] In Ohio, it is held that in an action against

affirmance, see Henry v. Root, 33 N. Y. 526.

40 McCullough v. Finley, 69 Kan. 705, 77 Pac. 696.

41 Bal. Codes, § 4581.

42 Johnson v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

43 Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212.

44 Young v. Bell, 1 Cranch C. C. 342, Fed. Cas. No. 18152; Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345; Hastings v. Dollarhide, 24 Cal. 195; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245.

45 Burton v. Anthony, 46 Or. 47, 114 Am. St. Rep. 847, 79 Pac. 185, 68 L. R. A. 826.

46 Joyce v. McAvoy, 31 Cal. 273, 89 Am. Dec. 172.

an infant for the specific performance of an alleged contract with his ancestor, he is entitled to a day in court after coming of age to show cause against the decree, and if an absolute decree be taken against him, it will be error.[47] In the same case, it was held that the right of parol demurrer, or staying proceedings until the infant attained his majority, was abolished by statute; but that the right of the infant to a day in court after coming of age does not depend upon the existence or non-existence of the right of parol demurrer.

§ 3360. **Trover.**—Infancy is no bar to an action of trover for conversion of goods.[48]

§ 3361. **Wages.**—An infant, after the death of his father, cannot recover his wages for services performed in the lifetime of his father, under a contract made with the father.[49] Where a minor has been paid in full for his personal services, his parents or guardian cannot recover therefor.[50] An adult dealing with an infant cannot avail himself of the latter's infancy in order to defeat his own liability on such contract.[51]

§ 3362. **Torts.**—Infancy is no defense to an action founded on fraud and falsehood of the party pleading it; but an infant is not liable in exemplary damages, unless he was capable of knowing that the act was wrongful at the time.[52]

§ 3363. **Estoppel.**—Where the final account of an administrator, involving a sale, had been settled during the minority of the heirs, it was not necessary for the administrator *de bonis non* to include such sale in his final account, nor proper for the court to open up the same; and hence the heirs, on reaching majority, were not precluded from impeaching the administrator's sale by joining in the petition for the discharge of the administrator

47 Long v. Mulford, 17 Ohio St. 485, 93 Am. Dec. 638. See Thompson v. Maxwell etc. Ry. Co., 3 N. Mex. 269 (448), 6 Pac. 193.

48 Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207; Fish v. Ferris, 5 Duer, 49; Schunemann v. Paradise, 46 How. Pr. 426; Manufacturing Co. v. Jacobs, 21 N. Y. Supp. 1006.

49 Roby v. Lyndall, 4 Cranch C. C. 351, Fed. Cas. No. 11972.

50 Ping Min. etc. Co. v. Grant, 68 Kan. 732, 75 Pac. 1044.

51 Chapman v. Duffy, 20 Colo. App. 471, 79 Pac. 746.

52 Catts v. Phalen, 2 How. 376, 11 L. Ed. 306. See Cal. Civ. Code, § 41; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53, 9 N. E. 420.

de bonis non, and for the distribution of the remaining estate.[53] Since the doctrine of estoppel *in pais* does not apply to an infant, his misrepresentations as to age are immaterial.[54]

§ 3364. **Against guardian for non-support.**—Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his ward, the court may order him to do so, and may enforce said order by proper process.[55]

§ 3365. **Limitations of actions.**—Where limitations began to run against an administrator by reason of adverse possession of land, a posthumous heir of the intestate, born after the administrator's appointment, could not avail himself of the disability of infancy to stop the running of the statute.[56] Ejectment by a minor heir is barred by failure of the administrator, who is also the heir's guardian, to sue within the period of limitations.[57] A minor coming of age, paying off an outlawed mortgage and taking a release and conveyance of the premises, is bound to take notice of a judgment which became a lien upon the premises after the mortgage became outlawed.[58]

§ 3366. **Hiring an attorney.**—The guardian of a minor has authority, by virtue of his general powers and duties, to contract for the services of an attorney at law to prosecute and defend actions for the benefit of the ward.[59]

53 Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

54 Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869.

55 Cal. Code Civ. Proc., § 1771; Alaska Codes, pt. 4, ch. 88, §§ 887-917; Ariz. Civ. Code, par. 1991; Idaho Rev. Codes, § 5791; Mont. Rev. Codes, §§ 7761-7772; Nev. Comp. Laws, §§ 569-591; Utah Rev. Stats., §§ 1962, 1963, 4003, 4007; Wash. Bal. Codes, § 6407.

56 Jenkins v. Jensen, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

57 Dignan v. Nelson, 26 Utah, 186, 72 Pac. 936.

58 De Voe v. Runkle, 33 Wash. 604, 74 Pac. 836.

59 Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

FORMS—INFANTS.

§ 3367. Complaint by infant, suing by general guardian.

Form No. 907.

[TITLE.]

A. B., an Infant, by C. D., his Guardian,
Plaintiff,
v.
E. F.,
Defendant.

The plaintiff complains, and alleges:

I. That he is under the age of twenty-one years.

II. That on the . . . day of . . ., 19.., at . . ., the above-named C. D. was duly appointed by the . . . court of the . . . county, state of California, guardian of the property and person of the plaintiff.

III. [State the cause of action.]

[DEMAND OF JUDGMENT.]

§ 3368. Complaint by infant, suing by guardian ad litem.

Form No. 908.

[TITLE.]

A. B., an Infant, by C. D., his Guardian ad litem,
Plaintiff,
v.
E. F.,
Defendant.

The plaintiff complains, and alleges:

I. That he is under the age of twenty-one years, to-wit, of the age of . . . years.

II. That on the . . . day of . . ., 19.., at . . ., the above-named C. D. was duly appointed by the . . . court of the county of . . ., state of California, the guardian of the above-named A. B., for the purposes of this action.

III. [State the cause of action.]

[DEMAND OF JUDGMENT.]

§ 3369. Complaint by infant, for injuries from being negligently run over by street-car.

Form No. 909.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is an infant under the age of twenty-one years, to-wit, of the age of . . . years, and that on the . . . day of . . ., 19.., on the application duly made, A. B. was, by order of J. K., judge of the . . . court of . . . county, duly appointed the guardian *ad litem* of this plaintiff, for the purposes of this action.

II. [Allege incorporation and business of defendant.]

III. That on the . . . day of . . ., 19.., a certain car of the defendant, propelled by electricity, was, by its servants, being driven upon . . . street in said city in a southerly direction, when the said infant plaintiff was lawfully passing said . . . street in a westerly direction at a point [locate the point]; that the defendant, by its said servants, so negligently and carelessly propelled and conducted said street-car that the same was driven with great force against and over said infant plaintiff, cutting off his left arm, and otherwise seriously and permanently injuring him.

IV. That in addition to the negligence hereinbefore mentioned, the defendant carelessly and negligently permitted said street-car to become and remain out of repair, in that the brakes thereon had become weakened and unserviceable, so that they would not stop said car with reasonable certainty or celerity, or within a reasonable distance, yet that the defendant carelessly and negligently operated the same while said brakes were so defective and unserviceable, and its said servants so negligently conducted and operated said unsafe and unserviceable car, by reason whereof the same was driven against said infant plaintiff as aforesaid, causing the loss of his said arm, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3370. Allegation of injury to infant, or other person inexperienced in use of tools, and who received no warning.

Form No. 910.

IV. That at the time of plaintiff's said employment he was [an infant], of the age of . . . years, and was entirely inexperi-

enced in the use of machinery of any kind, and ignorant of the dangers surrounding the use of said machine, which facts were well known to the defendant, and that it was the duty of the defendant to instruct the plaintiff as to the proper manner of operating said machine, and warn him of the danger incident to such operation, but that the defendant, on the contrary, negligently set the plaintiff at work upon said machine without warning or instruction, and without explanation of the danger to an unskilled workman necessarily resulting from the management and operation of said machine.

§ 3371. Petition by infant over fourteen years of age, for appointment of guardian ad litem.

Form No. 911.

[Title of Court and Cause.]

To the Honorable . . . Judge of the Superior Court.

Your petitioner respectfully represents:

I. That he is an infant of the age of fourteen years and upward, and resides with his mother at . . ., and that he has no general or testamentary guardian [or, if he has one, state name, with residence].

II. That your petitioner has a cause of action against . . ., of . . ., for the partition of certain real estate in said county of . . ., described as follows: [description], said real estate being owned by your petitioner and said . . . as tenants in common [or state other facts of cause of action]; and that your petitioner is desirous of bringing an action in the . . . court against said . . . for the partition of said land.

III. That . . ., the uncle of your petitioner, who resides at . . ., is a competent and responsible person to become the guardian of your petitioner in such action, and that no previous application for the appointment of a guardian *ad litem* in this matter has been made. [Or state facts why second application is made.]

IV. [If petitioner has a general guardian, also:] That the said . . ., the general guardian of your petitioner, declines to be appointed guardian *ad litem* for the purpose of bringing this action, wherefore it is necessary that some other person be ap-

pointed for that purpose. [Or state other reason why the general guardian cannot be appointed.]

Wherefore, your petitioner prays that . . ., or some other competent person, may be appointed guardian *ad litem* of your petitioner, to prosecute such action in his behalf.

Dated . . ., 19.. [SIGNATURE.]

[Verification by petitioner.]

§ 3372. Petition by party to procure appointment of guardian ad litem for infant defendant under the age of fourteen, or who has neglected to apply.

Form No. 912.

[TITLE OF COURT AND CAUSE.]

To the . . . Court of . . . County: [Or, To the Hon. I. K., Judge, or Court Commissioner.]

The petition of A. B., the plaintiff in this action [or, one of the defendants in this action], respectfully shows:

I. That said action has been commenced, and is now pending, in this court for the purpose of [here state briefly the object of the action]; and that the summons therein has been served upon the defendant C. D., as appears by the summons and proof of service thereof, now on file in this court.

II. That the said defendant, C. D., is an infant less than fourteen years of age, to-wit, of the age of . . . years, on the . . . day of . . ., 19.., [or, if the infant be over fourteen years of age: more than fourteen years of age, to-wit, of the age of . . . years, on the . . . day of . . ., 19..; and that although more than ten days have elapsed since the service of the summons herein upon him, he has neglected to apply for the appointment of a guardian *ad litem* in this action]; and that no application for the appointment of such guardian *ad litem* has been made by any relative or friend of said infant. [Or, if previous application has been made, state facts showing why second application has become necessary.]

III. That said infant resides with his mother, E. F., at . . ., and has not, to the best of the knowledge and information of your petitioner, any general or testamentary guardian within this state. [Or, if the infant have a general guardian, state the name and residence of such guardian.]

Wherefore, your petitioner prays that some suitable and competent person be appointed guardian *ad litem* for said defendant, to defend said action in his behalf.

Dated . . ., 19.. A. B.

[VERIFICATION.]

§ 3373. Affidavit and application in case of non-resident infant defendant.

Form No. 913.

[TITLE OF COURT AND CAUSE.]

[VENUE.]

A. B., being duly sworn, says:

That he is the plaintiff [or, one of the defendants] in the above-entitled action; that said action has been commenced, and is now pending, in this court, and is brought for the partition of certain real estate situate in said county of . . . [or, otherwise, state briefly the purpose of the action]; that the defendant, C. D., is a necessary or proper party to said action, and is an infant over fourteen years of age [or, under fourteen years of age], and that he resides without this state, to-wit, at . . ., in the city of . . ., [and, in case the infant be under fourteen years of age: with one E. F., the mother of said infant; or, in case the residence of the infant be unknown: the said infant is a resident of this state, and his residence is not known to the affiant, nor can the same be ascertained, though diligent inquiry has been made by affiant for that purpose].

That no appearance by or on behalf of said infant, and no application for the appointment of a guardian *ad litem* by him, or on his behalf, has been made, to the best of affiant's knowledge and belief; that said C. D. has no general or testamentary guardian in this state; and that this affidavit is made for the purpose of basing thereon an application for the appointment of a guardian *ad litem* for said infant.

[JURAT.] A. B.

§ 3374. Order appointing guardian of infant defendant.

Form No. 914.

[TITLE OF COURT AND CAUSE.]

Upon reading and filing the annexed petition praying the appointment of a guardian *ad litem* for C. D., an infant, and one

of the defendants in the above-entitled action, and it appearing to the court that E. F. is a competent and responsible person, and an attorney of this court, and that he has consented to act as such guardian:

It is ordered, that the said E. F. be and he hereby is appointed guardian *ad litem* for the said C. D., and is authorized and directed to appear and defend said action on his behalf.

[DATE.] I. K., Judge.

§ 3375. Ratification by infant after coming of age.

Form No. 915.

I. That said [infant], after the making of said deed, attained the age of twenty-one years.

II. That thereupon [or, afterwards], and on or about the . . . day of . . ., 19.., and before this action, he assented to, and ratified and confirmed the same, with full knowledge of the facts.

CHAPTER XCVI.

INSANE PERSONS.

§ 3376. **Appointment of guardian.**—Upon petition, under oath, by any relative or friend of any insane person, or any person who by old age or from any other cause is mentally incompetent, the court must, after hearing and examination, appoint a guardian of his person and estate.[1] Where an order appointing a conservator of a lunatic is made, without notice to the lunatic of the application therefor, it should be set aside, though such notice is not expressly described by the statute.[2] Notice of such hearing must be given the alleged incompetent, and his person brought into court, except when a patient at a state hospital, and the medical superintendent thereof certifies that the patient is unable to attend.[3] Every such guardian shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend.[4] An order providing for the appointment of a guardian of an alleged incompetent will be reversed, if purely a consent order.[5]

§ 3377. **"Duly appointed."**—The word "duly," as used in the New York forms, may be omitted, as jurisdiction of the probate court will be presumed.[6]

§ 3378. **Limitations.**—The probate of a will shall be conclusive, if not contested within one year; but in the case of infants and persons of unsound mind a like period of one year, after their respective disabilities are removed, is granted by the probate act.[7] Section 2972 of the Montana Code of Civil Pro-

1 Cal. Code Civ. Proc., § 1764.

2 Jones v. Learned, 17 Colo. App. 76, 66 Pac. 1071.

3 Cal. Code Civ. Proc., § 1763. Amendments, 1909, p. 329.

4 Cal. Code Civ. Proc., § 1769. See Redmond v. Peterson, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923; Justice v. Ott, 87 Cal. 530, 25 Pac. 691; Boyd v. Dodson, 66 Cal. 360, 5 Pac. 617.

5 In re Sullivan, 143 Cal. 462, 77 Pac. 153; In re Moss, 141 Cal. xviii, 74 Pac. 546.

6 See Bloom v. Burdick, 1 Hill, 130, 37 Am. Dec. 299. As to presumption of jurisdiction, see "Jurisdiction," chap. XXXV.

7 Cal. Code Civ. Proc., § 1333.

cedure does not extend the authority of a guardian until he is discharged by an order of court; but it is, under section 2973, terminated *ipso facto* by an adjudication of restoration to capacity.[8] Limitations will not run in favor of one claiming under a deed made by a mentally incompetent person, and under the undue influence of the grantee.[9]

§ 3379. **Attack on authority of guardian.**—Letters of guardianship of an insane person cannot be questioned in a collateral proceeding, and are admissible in evidence.[10] An alleged incompetent is not deprived of the right to appeal from an order appointing a guardian on the ground of his incompetency because he sought an order under section 1766 of the California Code of Civil Procedure for his restoration to capacity.[11]

§ 3380. **Ejectment.**—The guardian of a lunatic, etc., has no estate in his lands; and an action of ejectment for the lunatic's land must be brought in the lunatic's name.[12]

§ 3381. **Equity suits.**—If any person has a legal or equitable claim against the estate of an insane person which is under the care of the guardian who refuses to allow the same, he must apply to chancery by petition. He will not be permitted to sue at law, except under the sanction of chancery.[13]

§ 3382. **Duty of guardian of a lunatic.**—A stipulation of an idiot's guardian to abide the result of an action under a defense interposed by another defendant is not a compliance with the Washington statute [14] requiring him to defend actions brought against the ward.[15] The guardian of an insane person has a right

8 In re Scheuer's Estate, 31 Mont. 606, 79 Pac. 244.

9 Howard v. Carter, 71 Kan. 85, 80 Pac. 61.

10 Warner v. Wilson, 4 Cal. 310.

11 In re Sullivan, 143 Cal. 462, 77 Pac. 153.

12 Petrie v. Shoemaker, 24 Wend. 85. For history of the judicial custody of lunatics, see Brown's Case, 1 Abb. Pr. 108, 4 Duer, 613. That the guardian of an incompetent person is neither a necessary nor a proper party to an action upon a note and mortgage assigned by the incompetent person to the plaintiff, see Redmond v. Peterson, 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923. For insufficient allegation of want of understanding, see More v. Calkins, 85 Cal. 177, 24 Pac. 729.

13 Matter of Heller, 3 Paige, 199; Brasher v. Van Cortlandt, 2 Johns. Ch. 242; Williams v. Estate of Cameron, 26 Barb. 172.

14 Bal. Codes, § 6432.

15 Mattson v. Mattson, 29 Wash. 417, 69 Pac. 1087.

to appeal from an order directing him to pay a disputed claim against the estate of his ward. The rule that an administrator, after he has performed his duties of settling the estate, has no interest in the final distribution, and cannot take the part of one distributee against another, has no application to such guardian, as regards his right to appeal.[16] Where a guardian loans the money of his ward on the sole credit of the borrower, it devolves on him to show that he acted in good faith and with due prudence, since, in the absence of such evidence, the presumption is otherwise.[17]

§ 3383. **Ability of incompetent to contract.**—An insane person, not entirely void of understanding, may make a contract which will bind him, unless it is rescinded for cause.[18] A contract made by one entirely without understanding is void;[19] but such an incompetent person is liable for the reasonable value of things furnished to him necessary for his or his family's support.

§ 3384. **Divorce of an incompetent.**—A complaint for divorce against the wife alleging acts committed by her prior to her becoming insane is sufficient, and her subsequent insanity constitutes no ground for the trial court to refuse to try the cause during the continuance of her insanity.[20] If a person is insane at the time of marriage, and, after returning to reason, refuses to ratify it, the court will decree such marriage void.[21]

§ 3385. **Habitual drunkard.**—In New York, where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the court in which the former suit is pending cannot properly proceed to final judgment.[22] The rules of comity

16 In re Breslin's Estate, 135 Cal. 21, 66 Pac. 962.

17 In re Averill's Estate, 133 Cal. xix, 66 Pac. 14.

18 Ratliff v. Baltzer's Admr. 13 Idaho, 152, 89 Pac. 71; Maionchi v. Nicholini, 1 Cal. App. 690, 82 Pac. 1052.

19 Idaho Rev. Codes, § 2606.

20 State v. Murphy, 29 Nev. 149, 85 Pac. 1004. See, also, County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 Pac. 972.

21 Wightman v. Wightman, 4 Johns. Ch. 343; Castor v. Davis, 120 Ind. 231, 22 N. E. 110.

22 In re Heller, 3 Paige, 199; Clarke v. Dunham, 4 Denio, 262; In re Hopper, 5 Paige, 489; Robertson v. Lain, 19 Wend. 649.

always observed toward each other by courts of concurrent jurisdiction would prevent the granting of a decree as prayed for.[23]

§ 3386. **Lunatic.**—A suit in equity for the benefit of a lunatic must be brought in his own name.[24] An unmarried woman who is an imbecile and incompetent to testify cannot institute and prosecute any proceeding in bastardy.[25]

§ 3387. **Necessary averment.**—A complaint against the guardian of an habitual drunkard must state with particularity the court and authority by which the debtor was declared an habitual drunkard.[26]

§ 3388. **Personal actions.**—There is no distinction between actions concerning the realty of a lunatic and those relating to his personal estate, since all actions must be brought in the name of the lunatic.[27] In Alabama, a person may sue an adult lunatic for necessaries furnished him, and is entitled to proceed in the case upon the appointment of an attorney for the defendant, although there is no guardian *ad litem*.[28]

§ 3389. **Restoration to capacity.**—The incompetent, his guardian, any relative within the third degree, or any friend may petition the superior court in which he was adjudged incompetent for his restoration to capacity. The petition must be verified, and must allege his competency, and the guardian or a relative of the incompetent, and, in the discretion of the court, any other person may contest the petition. A day must be appointed by the court for hearing the petition, and notice thereof must be given to the guardian and to the spouse of the incompetent, and to his father or mother, if living in the county. It may be tried before a jury; and if he be found of sound mind, and capable of taking care of himself and his property, his restoration to capacity must be adjudged, and the guardianship of such person shall cease, unless the ward be a minor.[29]

23 Niblo v. Harrison, 9 Bosw. 668.

24 McKillip v. McKillip, 8 Barb. 552; Lane v. Schermerhorn, 1 Hill, 97; Petrie v. Shoemaker, 24 Wend. 85; Davis v. Carpenter, 12 How. Pr. 287; In re McLaughlin, Clarke Ch. 113.

25 State v. Jehlik, 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265.

26 Hall v. Taylor, 8 How. Pr. 428.

27 Lane v. Schermerhorn, 1 Hill, 97; McKillip v. McKillip, 8 Barb. 552.

28 Ex parte Northington, 37 Ala. 496, 79 Am. Dec. 67.

29 Cal. Code Civ. Proc., § 1766; Ariz. Civ. Code, par. 1987; Idaho Rev. Codes, § 5787; Mont. Rev. Codes, § 7767; Wyo. Rev. Stats., § 4895.

INSANE PERSONS—FORMS.

§ 3390. Complaint by guardian of insane person, or person of unsound mind.

Form No. 916.

[TITLE OF COURT.]

C. D., an insane person [or, person of unsound mind], by A. B., his Guardian, Plaintiff,

v.

E. F., Defendant.

The plaintiff complains, and alleges:

I. [State the cause of action.]

II. That on the . . . day of . . ., 19.., at the county of . . ., the superior judge of said county [or, city and county], state of California, upon the petition of . . ., and after due notice and hearing, adjudged the said C. D. to be an insane person [or, incapable of taking care of himself and managing his property].

III. That afterward on the same day [or, on the . . . day of . . ., 19..], at said county [or, city and county], said superior judge [or, court] appointed the plaintiff guardian of the person and estate of the said C. D.; that he, this plaintiff, has given bond as required by law, and still and now is such guardian of the said C. D., as aforesaid.

[DEMAND OF JUDGMENT.]

§ 3391. Complaint against guardian of insane person.

Form No. 917.

[TITLE OF COURT.]

A. B., Plaintiff,

v.

C. D., Guardian of E. F., an insane person [or, person of unsound mind], Defendant.

The plaintiff complains, and alleges:

I. [State a cause of action against an insane person.]

II. That afterwards [or, on the . . . day of . . ., 19..], the

said E. F. was adjudged by the . . . court to be a person of unsound mind.

III. That the defendant was, on the . . . day of . . ., 19.., appointed by the said court guardian of the person and estate of the said E. F.; that he, the defendant, accepted said appointment, and is now such guardian.

Wherefore, the plaintiff demands judgment for . . . dollars, with interest from . . . to be paid out of the estate of the said E. F., in the hands of the defendant.

§ 3392. Petition by relative or friend for appointment of guardian ad litem for insane defendant.

Form No. 918.

[TITLE OF COURT AND CAUSE.]

To the . . . Court of . . . County: [Or, To the Hon. I. K., Judge, or Court commissioner.]

The petition of A. B. respectfully shows:

I. That an action has been commenced in this court between the parties above named by the filing of a complaint and the issuance of summons, and the service thereof, upon some of the defendants.

II. That C. D., one of the said defendants, is an insane person, totally incapable of conducting the defense of said action; and that he is of full age, to-wit, of the age of . . . years, and has no general guardian, and resides with your petitioner.

III. That your petitioner has no interest adverse to the rights of the said C. D., and is not connected in business with the attorney or counsel of the adverse party, and is in every way competent to defend the interests of said defendant.

Wherefore, your petitioner prays that he may be appointed the guardian of the said C. D. for the purposes of this action.

Dated . . ., 19.. A. B.

[VERIFICATION.]

§ 3393. Order appointing guardian ad litem for infant or insane person interested in land condemned.

Form No. 919.

[TITLE.]

It appearing, by the petition filed in the above matter, that Y. Z., one of the owners of a part of the real estate sought to be

condemned in this proceeding, is an infant of the age of . . . years [or, an insane person], and has no general guardian [or, and that X. Y., of . . ., is the general guardian of Y. Z., and has received due notice of the pendency of these proceedings and of the application for the appointment of a guardian *ad litem* for said Y. Z., to act for him in this proceeding]:

It is ordered, that L. M., Esq., an attorney of this court, be and he is hereby appointed guardian *ad litem* of said Y. Z., and authorized to act for said Y. Z. in this proceeding, [upon his filing a bond according to law in the penal sum of . . . dollars, with sufficient surety, to be approved by the clerk of this court; and that he will faithfully account for and apply, under the direction of the court, any money or property of said ward which he may receive as such guardian, and faithfully and in all things discharge his said trust as such guardian.]

[DATE.]

By the Court: J. K., Judge.

§ 3394. Action by general guardian of insane or incompetent person.

Form No. 920.

[TITLE OF COURT.]

A. B., as Guardian of the Person and Estate of C. D., an insane person [or, incompetent],
Plaintiff,
v.
E. F.,
Defendant.

The plaintiff, complaining as guardian of the person and estate of C. D., an insane person [or, incompetent, etc.], alleges:

I. That on the . . . day of . . ., 19.., such proceedings were duly had in the county court of . . . county, upon petition duly filed in that behalf, that it was by said county court duly adjudged and determined that, by reason of insanity, the said C. D. was mentally incompetent and incapable of taking care of himself and managing his property [or, that the said C. D., by excessive drinking, was and is unable to attend to business; or, state other facts authorizing the appointment of a general guardian]; and the said plaintiff was thereupon, by said . . . court, duly ap-

pointed guardian of the person and estate of said C. D., with the powers and duties specified by law; and that he accepted and duly qualified, by executing a bond, which was by said court duly approved, and entered upon the duties of, and is now, such guardian.

II. [State cause of action.]

§ 3395. General answer of infant or lunatic, in foreclosure, partition, etc.

Form No. 921.

[TITLE.]

This defendant, answering by his said guardian, says: That he is a stranger to all and singular the matters and things in the complaint in this action set forth, and that he is an infant under the age of twenty-one years [or, a lunatic, duly adjudged to be such by . . ., on the . . . day of . . ., 19..], and claims such interest in the premises as he is entitled to; and that he submits his rights and interests in the matters in question in this action to the protection of the court.

§ 3396. Affidavit of service on infant [or insane] defendant.

Form No. 922.

[TITLE OF COURT AND CAUSE.]

[VENUE.]

. . ., being duly sworn, says: That on the . . . day of . . ., 19.., he personally served the within summons [and complaint, or notice] on the above-named defendant, . . ., who is a minor, under the age of fourteen years, [or, who is a person judicially declared to be of unsound mind] by delivering to and leaving with him, the said . . ., a true copy of said summons and a copy of the complaint attached thereto, and also by then and there delivering to and leaving with . . ., the father [or, mother; or, duly appointed guardian] of said . . ., a true copy of said summons and complaint, and that he knew the person so served as defendant to be the person named in the said summons as defendant therein, and also knew the said . . . to be the father [or, mother; or, duly appointed guardian] of said infant defendant.

Subscribed and sworn to before me, this . . . day of . . ., 19..

. . ., Notary Public [or other officer].

§ 3397. Consent of proposed guardian ad litem.

Form No. 923.

[VENUE.]

. . . , being duly sworn, says: That he resides at . . . , in said county of . . . , and is the general guardian of . . . [infant, or incompetent person] named in the foregoing petition [or, that said infant has no general guardian], and affiant believes he is fully competent to properly understand and protect the rights of the said infant as guardian *ad litem* in the manner stated in the foregoing petition; that he is in no wise adversely interested to the interests of said minor in said matter, and is not connected in business with the adverse party nor with his counsel; and that he is financially responsible to answer for any liability he may incur as such guardian *ad litem;* and he hereby consents to act as such guardian.

[JURAT.] [SIGNATURE.]

CHAPTER XCVII.

PUBLIC OFFICERS.

§ 3398. Actions against officers.—In an action against the collector of the customs for refusing a clearance, a count stating that the plaintiff was the owner of the vessel, laden, with a cargo of a certain value, is a sufficient allegation as respects ownership of the cargo.[1] A water commissioner being sued in his official capacity cannot complain when he is relieved from further liability and his successor substituted in his stead.[2]

§ 3399. Acts of deputy.—In an action against a sheriff for wrongful acts of his deputy, it is not essential that the complaint should allege that he is sheriff, nor that the acts complained of were committed by his deputy.[3] The act of the deputy should be alleged as that of the sheriff.[4] Though liable for acts of his deputy, the sheriff cannot be charged in exemplary damages for misconduct of such deputy, as though he himself had personally committed the act.[5] A sheriff is personally liable for abuse of process committed by a deputy.[6]

§ 3400. Official character must be averred.—The official character must be averred in the body of the complaint.[7] A very short averment, if clear in its terms, is sufficient,[8] although a special authority must be averred with fullness sufficient to make it clearly apparent.[9] But a sheriff, suing as such, need not state

1 See Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1088.

2 Bickers v. Farmers-Ditch Co., 31 Colo. 62, 72 Pac. 49.

3 Poinsett v. Taylor, 6 Cal. 78; Curtiss v. Fay, 37 Barb. 64. See Greig v. Clement, 20 Colo. 167, 37 Pac. 960.

4 People v. Ten Eyck, 13 Wend. 448; Hirsch v. Rand, 39 Cal. 318; Campbell v. Phelps, 17 Mass. 246.

5 Nixon v. Rauer (Cal.), 66 Pac. 221.

6 Foley v. Martin, 142 Cal. 256, 100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842.

7 Compare Gould v. Glass, 19 Barb. 185, with Smith v. Levinus, 8 N. Y. 472; Ogdensburg Bank v. Van Rensselaer, 6 Hill, 240; Delafield v. Kinney, 24 Wend. 345; Fowler v. Westervelt, 17 Abb. Pr. 59, 40 Barb. 374.

8 Smith v. Levinus, 8 N. Y. 472; Root v. Price, 22 How. Pr. 372; Hallett v. Harrower, 33 Barb. 537.

9 Id.

in his complaint how he acquired his office. It is enough to show that he is sheriff in fact.[10]

An averment that a certain person acted as under-sheriff, without allegation that he wrongfully acted as such, implies that he was under-sheriff *de jure* as well as *de facto*.[11]

§ 3401. **Official capacity, how averred.**—That "the plaintiff is sheriff of the city and county of San Francisco," is a sufficient allegation of his official character.[12] Where the title gives the names of the plaintiffs with the description "commissioners of highways," and in the body of the complaint it is averred "that the plaintiffs, commissioners of highways, complain," the character in which they complain is sufficiently indicated.[13]

§ 3402. **Title.**—A party suing as a public officer should sue in his own name, with the addition of his name of office.[14] Suit against an officer in his official capacity is binding upon his successor.[15]

§ 3403. **Wrongful levy.**—Seizure of property by an officer under a void attachment is a naked trespass against a stranger who is in rightful possession thereof.[16] Where a sheriff levies on part of a stock of goods and takes possession of all, the owner may bring action for the wrongful possession first taken, which was never surrendered, although the same goods were rightly covered by subsequent levies, and the right of action accrues, for conversion, when the sheriff refuses to release, and states that he assumes all responsibility.[17] The owner of the goods levied upon is not estopped from suing for their conversion, though they were mixed with others levied on, and he did not until the next day lay claim to them, when none of them belonged to the execution defendant, and he so informed the officer.[18] A writ

10 Kelly v. Breusing, 33 Barb. 123; affirming 32 Barb. 601.

11 People v. Otto, 77 Cal. 45, 18 Pac. 869.

12 Kelly v. Breusing, 32 Barb. 601; affirmed in 33 Barb. 123.

13 Fowler v. Westervelt, 40 Barb. 374.

14 Paige v. Fazackerly, 36 Barb. 392; Trustees Fire Dept. v. Acker, 26 How. Pr. 263; Fowler v. Westervelt, 40 Barb. 374, 17 Abb. Pr. 59.

15 Waldron v. City of Snohomish, 41 Wash. 566, 83 Pac. 1106.

16 Hagar v. Haas, 66 Kan. 333, 71 Pac. 822.

17 Burdge v. Kelchner, 66 Kan. 642, 72 Pac. 232.

18 Beaman v. Stewart, 19 Colo. App. 222, 74 Pac. 342.

against the former owner does not justify a sheriff for the seizure of property in hands of a subsequent purchaser.[19]

§ 3404. **Right of action.**—The sheriff who levies an attachment has not the right of property in the debt, and cannot maintain an action in his own name for the recovery thereof.[20] An indemnity bond to the sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect.[21] In an action on the official bond of a constable, if the complaint is not sufficient against the sureties, a joint judgment is erroneous.[22]

§ 3405. **Arrest, neglecting to execute order of.**—"That before the return of said order, to-wit, on [etc.], notice was given to the defendant that said E. F. was within the said county, and that the defendant there had said E. F. in his view and presence, so that if the defendant had desired so to do he could have arrested the said E. F. by virtue of said order; but the defendant, disregarding his duty, did not arrest the said E. F., and willfully neglected the execution of said order," is sufficient.[23]

In an action against a sheriff for a neglect of an official duty, the complaint must allege the particular neglect or omission upon which the plaintiff relies.[24]

§ 3406. **Averment of official capacity.**—That defendant was sheriff, or acted as such, is a sufficient averment of capacity.[25] If the object of the suit is to establish a personal and not an official liability, for which the sheriff could be sued while he is out of office, an averment of official character in the title is not necessary.[26] If sued in his official character, service is binding upon his successor in office.[27]

19 Cook v. Higgins, 66 Kan. 762, 71 Pac. 259.

20 Sublette v. Melhado, 1 Cal. 105.

21 Davidson v. Dallas, 8 Cal. 227.

22 Felonicker v. Stingley, 142 Cal. 630, 76 Pac. 504.

23 Dininny v. Fay, 38 Barb. 18.

24 Kohn v. Hinshaw, 17 Or. 308, 20 Pac. 629.

25 Potter v. Luther, 3 Johns. 431; Dean v. Gridley, 10 Wend. 255. See Hall v. Luther, 13 Wend. 491. Compare Curtis v. Fay, 37 Barb. 64.

26 Stillman v. Squire, 1 Denio, 327; Armstrong v. Garrow, 6 Cow. 465; Overton v. Hudson, 2 Wash. (Va.) 172; Hirsch v. Rand, 39 Cal. 315; Curtis v. Fay, 37 Barb. 64; Wymond v. Amsbury, 2 Colo. 213. See Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954.

27 Waldron v. City of Snohomish, 41 Wash. 566, 83 Pac. 1106.

§ 3407. **Breach of duty.**—"That although defendant could have levied, of goods of the execution debtor within his bailiwick, the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods the moneys, or any part thereof," sufficiently charges a breach of duty, and implies improper conduct in the sale of the goods.[28] But the mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff, in case a writ last in hand was executed first.[29]

§ 3408. **Writ, averment of.**—It is not necessary to state the terms of the execution, as the courts take judicial notice of the forms of their own proceedings. The steps involved in the issuance of the writ need not be stated. It is sufficient to aver that it was duly issued; the same is true of the levy.[30] The jurisdictional facts to justify seizure under a writ of attachment must be alleged.[31] To recover money paid a sheriff for the release of property wrongfully levied upon, it must appear that payment was made under protest, and had to be paid to secure release of the goods, and that the levy was wrong.[32]

§ 3409. **Damages, how averred.**—The measure of damages for failure to execute an execution is *prima facie* the amount due on the execution. If such amount could not have been collected by the exercise of due diligence, such fact may be shown in defense. Special damage need not be averred.[33] In Illinois, the action lies where the officer so delays in making a proper levy that the rights of third parties intervene.[34] The damages on failure to collect an execution are such as the plaintiff shall actually suffer by the sheriff's neglect.[35] Where the sheriff accepts an assign-

28 Mullett v. Challis, 16 Q. B. 239, 20 Law J. R. (N. S.) Q. B. 161, 15 Jur. 243; Cal. Pol. Code, § 4161.

29 Whitney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

30 French v. Willet, 10 Abb. Pr. 99; First Nat. Bank v. Rogers, 13 Minn. 407, 97 Am. Dec. 239.

31 Beckstead v. Griffith, 11 Idaho, 738, 83 Pac. 764.

32 O'Brien v. Quinn, 35 Mont. 441, 90 Pac. 166.

33 Moore v. Floyd, 4 Or. 101; Ledyard v. Jones, 7 N. Y. 550; Dunphy v. Whipple, 25 Mich. 10; Clough v. Monroe, 34 N. H. 381; Evans v. House, 26 Ohio St. 488; Roth v. Duvall, 1 Idaho, 149; People v. Roper, 4 Scam. 560. That damages must be averred, see Nash v. Whitney, 39 Me. 341; Commonwealth v. Lelar, 1 Phila. 333.

34 Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206.

35 French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193.

ment of a chattel mortgage, the plaintiff in execution, being ignorant thereof, is not bound by his acts.[36]

§ 3410. **Notice.**—The allegation of notice, though usual, seems unnecessary.[37]

§ 3411. **Refusal to make deed.**—In an action against a sheriff for special damages, resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, when there is no allegation in the complaint of title, nor any averment that in case the deed had been executed plaintiff would have been able to recover possession of the premises, or of the rents and profits, it was held that such complaint is insufficient.[38]

§ 3412. **Replevin.**—The proper mode of declaring in a complaint against a sheriff for not taking sufficient security in replevin, or in executing a writ in replevin, is stated in the cases cited below.[39] Where defendant had a right to replevy, a complaint which avers that the marshal neglected to make the money is bad.[40]

§ 3413. **Selling homestead.**—A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which set out that the sheriff was in possession of a certain execution against plaintiff, J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. No damage has or can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at sale could acquire no right to the property, nor could the plaintiff suffer any injury.[41] No demand is necessary before suing the sheriff for conversion of goods when the goods had been purchased by plaintiff from the mortgagor, and the goods were seized by the sheriff, under the mortgage.[42]

36 Dibble v. Briggs, 28 Ill. 48.

37 Tomlinson v. Rowe, Hill & D. Supp. (N. Y.) 410.

38 Knight v. Fair, 12 Cal. 296.

39 See Gibbs v. Bull, 18 Johns. 435; Westervelt v. Bell, 19 Wend. 531.

40 Bispham v. Taylor, 2 McLean, 355, Fed. Cas. No. 1443.

41 Kendall & Wife v. Clark, 10 Cal. 17, 70 Am. Dec. 691.

42 Stevens v. Curran, 28 Mont. 366, 72 Pac. 753.

§ 3414. **Against sheriff for neglecting to return execution—Under California statute.**—The Political Code of California provides as follows:—

"If the sheriff does not return a notice or process in his possession, with the necessary indorsement thereon, without delay, he is liable to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him."[43]

§ 3415. **Issue of process.**—It is sufficient, after showing jurisdiction to issue process, to allege that it was issued.[44] In an action against a constable and his sureties for selling under execution without giving notice, a valid execution is implied, and plaintiff cannot raise the objection that the execution is void.[45]

§ 3416. **Property.**—In an action for not returning an execution, the complaint need not aver that defendant had property out of which the money might have been levied. The gist of the action is the neglect to return.[46] It is not necessary to allege or prove special damages.[47]

§ 3417. **Remedy.**—Plaintiff may proceed by attachment, or may sue for neglect.[48] This action lies, although the sheriff has not been ordered to make return.[49]

§ 3417a. **Fees paid.**—It is not necessary to allege in the complaint that the fees of the sheriff were paid. If the fees were not paid, and the writ was not served or returned on that ground, it must be pleaded by the sheriff as matter of defense.[50]

§ 3418. **Against sheriff for neglecting to pay over moneys collected on execution—Under California statute.**—The Political Code of California provides: "If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting

43 Pol. Code, § 4160.

44 French v. Willet, 4 Bosw. 649, 10 Abb. Pr. 99.

45 Bellmer v. Blessington, 136 Cal. 3, 68 Pac. 111.

46 Pardee v. Robertson, 6 Hill, 550.

47 Ledyard v. Jones, 7 N. Y. 550.

48 Burk v. Campbell, 15 Johns. 456; Bank of Rome v. Curtiss, 1 Hill, 275.

49 Id.; Pardee v. Robertson, 6 Hill, 550.

50 Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954.

his legal fees), the amount thereof, with twenty-five per cent damages, and interest at the rate of ten per cent per month from the time of demand, may be recovered by such person."[51] Under this section, neither the rate of interest specified therein nor twenty-five per cent as damages can be recovered unless there has been a demand for the money collected prior to the commencement of the suit, and in such case the complaint must aver such demand and the date thereof. The plaintiff is not entitled to recover the penalty provided by this section, if the demand made on the sheriff was for the payment of a larger amount than the plaintiff was entitled to.[52] In an action to recover from a sheriff the amount received on sale of property under execution, an order of court fixing the compensation of a special custodian is admissible without being specially pleaded.[53] In an action against a constable for proceeds of an execution sale, defendant admitting in his answer that he had the money when demand was made, evidence that as a matter of fact defendant had at that time paid over the money should be refused.[54]

§ 3419. **Against deputy.**—To render a deputy liable, an express promise must be shown.[55] If the sheriff is disqualified to serve a process, his office and all his deputies are also disqualified.[56]

§ 3420. **Demand.**—In an action against a sheriff to recover property seized under process, or its value, by the owner, it is not necessary that the plaintiff should show affirmatively notice and demand before bringing suit. This rule is now established by the weight of authority. The early cases in California held the contrary, but they have since been overruled.[57] The sheriff

51 Pol. Code, § 4162.

52 Shumway v. Leakey, 73 Cal. 260, 14 Pac. 841.

53 Blyth v. People, 16 Colo. App. 526, 66 Pac. 680.

54 Yank v. Bordeaux, 29 Mont. 74, 74 Pac. 77.

55 Tuttle v. Love, 7 Johns. 470; Paddock v. Cameron, 8 Cow. 212. See Colvin v. Holbrook, 2 N. Y. 126; affirming 3 Barb. 475.

56 State v. Barber, 13 Idaho, 65, 88 Pac. 418.

57 Wellman v. English, 38 Cal. 583; Boulware v. Craddock, 30 Cal. 190; overruling Ledley v. Hays, 1 Cal. 160; Daumiel v. Gorham, 6 Cal. 44. See, also, Holdridge v. Lee, 3 S. Dak. 134, 52 N. W. 265; Kluender v. Lynch, 2 Abb. App. Dec. 538; Moore v. Murdock, 26 Cal. 514; Woodbury v. Long, 8 Pick. 543, 19 Am. Dec. 345; Owings v. Frier, 2 A. K. Marsh. 268, 12 Am. Dec. 393; Jamison v. Hendricks, 2 Blackf. 94, 18 Am. Dec. 131; Hicks v. Cleveland, 48 N. Y. 84; Glossop v. Pole, 3 M. & S. 175; Glasspoole v. Young, 9 B. & C. 696;

is not liable for damages for the taking or keeping of property of a third party, unless such third person serves him with a verified claim to it; and if so served, he is not bound to the plaintiff or judgment creditor to hold it, unless a proper bond is put up by such creditor to save him harmless.[58] No demand is necessary before suit for conversion, where the sheriff has seized mortgaged property under the mortgage, which property had previously been sold to plaintiff.[59] Failure to serve the verified demand required by statute is no defense where the demand would be of no avail.[60]

§ 3421. **Money paid over.**—Where it is averred in the complaint that the money has been collected, and that defendant has failed to return the execution, it will not be presumed that the money has not been paid over. An averment to this effect is essential.[61]

§ 3422. **Obligation to pay.**—So to say that plaintiff has been obliged to pay the amount of, etc., in consequence of the negligence and acts of the defendant in his office of under-sheriff, is good, at least on general demurrer;[62] even if process is voidable.[63]

§ 3423. **Remedy.**—An action on the case, or an action for money had and received, may be maintained, at the option of the plaintiff.[64]

§ 3424. **Statute penalties—False return.**—Where a sheriff fails to pay over money collected on execution, the action should be for a false return.[65] The statute penalties against sheriffs for the non-payment of moneys collected on execution are only recoverable when the sheriff by his return admits the collection of the money, but refuses to pay it over.[66] A sheriff being sued

Edwards v. Bridges, 2 Stark. 396. But see Cal. Code Civ. Proc., § 689, as amended in 1891, also amended in 1901 and 1907; Black v. Clasby, 97 Cal. 482, 32 Pac. 564.

58 Cal. Code Civ. Proc., § 689.

59 Stevens v. Curran, 28 Mont. 366, 72 Pac. 753.

60 Rickey v. Haley, 138 Cal. 441, 71 Pac. 499.

61 Hoag v. Warden, 37 Cal. 522.

62 Hughes v. Smith, 5 Johns. 168.

63 Walden v. Davison, 15 Wend. 575; Bacon v. Cropsey, 7 N. Y. 195. See Ontario Bank v. Hallett, 8 Cow. 192; Grosvenor v. Hunt, 11 How. Pr. 355; Ginochio v. Orser, 1 Abb. Pr. 433.

64 Crane v. Dygert, 1 Wend. 534; Shepard v. Hoit, 7 Hill, 198.

65 Egery v. Buchanan, 5 Cal. 54.

66 Johnson v. Gorham, 6 Cal. 196,

for a false return of *nulla bona* has no defense on the grounds that there was an execution issued to the sheriff of another county, who sold the property of defendant, or that the court had, after defendant sheriff had levied upon the personal property of the judgment debtor, appointed a receiver to take charge of all the property, as the property levied upon did not thereby pass to the receiver.[67]

§ 3425. **Sufficient averment.**—It is enough to say, generally, that the defendant had collected or embezzled, etc., such a sum, which he had refused, etc., without setting forth the particular items, which would lead to prolixity.[68] In an action by the plaintiff in a writ of execution against a sheriff for neglect to pay over moneys realized on such writ, it is sufficient to allege in the complaint the existence of the judgment on which the execution was issued, the issuance thereof, the realization of the money, and the neglect to pay it over.[69] Where the action is against a sheriff for wrongfully seizing and selling goods mortgaged to secure an indebtedness, it is not necessary to plead their value at the time of the taking, where no elements of special damage are alleged, but, in order to support a judgment in such case for the amount of the debt, there must be evidence as to the value of the goods seized.[70]

§ 3426. **Cause of action.**—The cause of action for a false return arises only on actual return of the writ; but it relates back to the return day, and the false return is properly alleged to have been on that day.[71] The time commenced to run from the date of the negligent act.[72] An officer who should refuse to proceed upon a second execution would be liable for a false return.[73] A "fee bill" is a process, and governed by the same rule as executions.[74]

65 Am. Dec. 501; Giffin v. Smith, 2 Nev. 378; Gregory v. Ford, 14 Cal. 143, 73 Am. Dec. 639.

67 People v. Finch, 19 Colo. App. 512, 76 Pac. 1120.

68 Postmaster-General v. Cochran, 2 Johns. 413; Hughes v. Smith, 5 Johns. 168.

69 Schneider v. Sears, 13 Or. 69, 8 Pac. 841.

70 Sheehan v. Levy, 1 Wash. 149, 23 Pac. 802.

71 Michaels v. Shaw, 12 Wend. 587.

72 Lambert v. McKenzie, 135 Cal. 100, 67 Pac. 6.

73 Ross v. Weber, 26 Ill. 221; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Moore v. Fitz, 15 Ind. 43. See Howe v. White, 49 Cal. 658.

74 De Wolf v. Long, 2 Gilm. 679, Ferris v. Crow, 5 Gilm. 96; Newkirk v. Chapron, 17 Ill. 344; Crow v. State, 24 Tex. 12.

§ 3427. **Measure of damages.**—The plaintiff is entitled, *prima facie*, to the face of the execution.[75] And in case of loss of property by negligence, the damages are the value of the property lost.[76] It is not essential to aver any special damage. The amount due on the judgment is, *prima facie*, the measure of damages.[77]

§ 3428. **That return was false.**—The complaint should show that the return was false, and that the respect in which it was false is material; deceit or fraud need not be alleged.[78] In such action, plaintiff must prove a valid judgment.[79]

§ 3429. **Liability of sheriff for escape.**—In California, "a sheriff who suffers the escape of a person arrested in a civil action, without the consent or connivance of the party in whose behalf the arrest or imprisonment is made, is liable as follows: 1. When the arrest is upon an order to hold to bail, or upon surrender in exoneration of bail before judgment, he is liable to the plaintiff as bail. 2. When the arrest is upon an execution or commitment to enforce the payment of money, he is liable for the amount expressed in the execution or commitment. 3. When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained. 4. Upon being sued for damages for an escape or rescue, he may introduce evidence in mitigation and exculpation."[80]

"He is liable for a rescue of a person arrested in a civil action, equally as for an escape."[81]

"An action cannot be maintained against the sheriff for a rescue, or for an escape of the person arrested upon an execution or commitment, if, after his rescue or escape, and before the

75 Ledyard v. Jones, 7 N. Y. 550; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 Hill, 550; Kellogg v. Manro, 9 Johns. 300.

76 Morgan v. Meyers, 14 Ohio, 538; Smith v. Fuller, 14 Ohio, 545.

77 Ledyard v. Jones, 7 N. Y. 550; affirming 4 Sandf. 67; Pardee v. Robertson, 6 Hill, 550; Bank of Rome v. Curtiss, 1 Hill, 275. See Bacon v. Cropsey, 7 N. Y. 195.

78 Peebles v. Newson, 74 N. C. 473; Bacon v. Cropsey, 7 N. Y. 195; Kidzie v. Sackrider, 14 Johns. 195; Houghton v. Swarthout, 1 Denio, 589.

79 McDonald v. Bunn, 3 Denio, 45.

80 Pol. Code, § 4163.

81 Pol. Code, § 4164.

commencement of the action, the prisoner returns to the jail, or is retaken by the sheriff." [82]

§ 3430. **Evidence.**—The return of the constable is not conclusive of the fact that he made no levy; [83] but the return of a sheriff, stating a levy on money on a certain day is conclusive against him in a suit on his official bond.[84] Where property claimed by a third party is sold by the sheriff, evidence as to where the lumber that went into the building was secured, what it cost, and who paid for it, is competent.[85]

§ 3431. **Arrest for contempt.**—A complaint in an action against a sheriff for the escape from his custody of a person arrested by him upon a process for contempt which alleges that the sheriff "suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape; and an answer which avers that such person may have "wrongfully and privily, and without the knowledge, permission, or consent of this defendant, escaped," etc., and that "if he did so escape, he afterwards" returned into custody, etc., is insufficient as a pleading, as it does not deny, either generally or specifically, the allegation that the sheriff permitted the prisoner to escape.[86]

§ 3432. **Authority to release.**—The general authority of the attorney as such is not sufficient to authorize the sheriff to discharge the prisoner upon his consent.[87]

§ 3433. **Committed.**—That he had arrested the debtor and detained him in custody in execution, sufficiently imports commitment to jail.[88]

§ 3434. **Damages.**—The measure of damages is only *prima facie* the amount of the debt.[89] A complaint which claimed the

82 Pol. Code, § 4165.

83 Dreese v. Keller, 66 Kan. 313, 71 Pac. 520.

84 Breckenridge v. Bailif, 16 Colo. App. 554, 66 Pac. 1079.

85 Porter v. Hawkins, 27 Mont. 486, 71 Pac. 664.

86 Loosey v. Orser, 4 Bosw. 391. See Cosgrove v. Bowe, 10 Daly, 353.

87 Kellogg v. Gilbert, 10 Johns. 220, 6 Am. Dec. 335.

88 Ames v. Webbers, 8 Wend. 545.

89 Ginochio v. Orser, 1 Abb. Pr. 433; Potter v. Lansing, 1 Johns. 215, 3 Am. Dec. 310; Russell v. Turner, 7 Johns. 189, 5 Am. Dec. 254; Thomas v. Weed, 14 Johns. 255; Brown v. Littlefield, 1 Wend. 398; Patterson v. Westervelt, 17 Wend. 543; Fairchild v. Case, 24 Wend. 381; Ames v. Webbers, 8 Wend. 545; Hutchinson v. Brand, 9 N. Y. 208.

amount of the debt, with interest and costs, without using the word "damages," is equivalent to a declaration in debt.[90]

§ 3435. **Escape, definition of.**—In New York, if a person admitted to the liberties of the jail limits is without such limits by virtue of a valid legal process which affords justification to the officer taking him thence, it is not to be deemed an escape within the meaning of the statute,[91] although that section contains no express exception to the rule that being without the boundaries is an escape. To constitute an escape, there must be some agency of the prisoner employed, or some wrongful act by another against whom the law gives a remedy.[92] The act of the law, as well as the act of God or of public enemies, will excuse the sheriff in an action for escape.[93]

§ 3436. **Excuse.**—Nothing but the act of God or public enemies will excuse the sheriff for an escape.[94] In California, the sheriff is liable for a rescue equally as for an escape;[95] but an action cannot be maintained for either after the prisoner returns to jail, or is recaptured by the sheriff.[96] A return of the prisoner before the commencement of an action for the escape is also a good defense under the Code of Civil Procedure of New York.[97]

§ 3437. **Indorsement.**—The indorsement on the execution or writ need not be set out.[98]

§ 3438. **Liability as bail.**—If, after being arrested upon an order to hold to bail, or upon a surrender in exoneration of bail before judgment, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.[99] Whether a judgment creditor, injured by the escape of his debtor from arrest, elects to sue the sheriff

90 Renick v. Orser, 4 Bosw. 384; McCreery v. Willet, 4 Bosw. 643.

91 2 N. Y. Rev. Stats., 437, § 63.

92 Allen on Sheriffs, 231; Baxter v. Taber, 4 Mass. 361; Cargill v. Taylor, 10 Mass. 206.

93 Wilckens v. Willett, 1 Keyes, 521; affirming S. C. sub nom. Wickelhausen v. Willet, 12 Abb. Pr. 319, 21 How. Pr. 40.

94 Fairchild v. Case, 24 Wend. 381; Rainey v. Dunning, 2 Murph. 86.

95 Pol. Code, § 4164.

96 Pol. Code, § 4165.

97 Didsbury v. Van Tassell, 12 N. Y. Supp. 30.

98 Jones v. Cook, 1 Cow. 309.

99 Pol. Code, § 4163, subd. 1; Cal. Code Civ. Proc., § 501.

at common law for escape, or under section 201 of the Code of Procedure of New York, as bail, is manifested by the complaint. If he proceeds against the sheriff as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail, and must bear the appropriate judgment. If he elects to prosecute for an escape, the complaint will contain the same matters, but all allegations as to the character of the defendant as bail should be omitted, as wholly irrelevant to a cause of action for an escape. A complaint in such case, which makes no mention of the defendant as bail, and contains nothing manifesting an intention or election to hold him liable in that character, is to be treated as intending an action for an escape.[100]

§ 3439. **Negligence.**—An officer who negligently permits an escape is liable to the person injured by his neglect of duty;[101] and an escape from a deputy may be declared on as an escape from the sheriff.[102]

§ 3440. **Voluntary escape.**—A complaint which alleges that "the sheriff suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape.[103] Under the averment that he voluntarily suffered the party to escape, a negligent escape may be proved;[104] and evidence of a negligent escape supports an action for a voluntary one.[105]

§ 3441. **Liability of sureties.**—Sureties on an official bond of a county attorney are liable for such sums as their principal may lawfully receive in the discharge of his official duties.[106] The application of a surety on an official bond to be released requires the execution of an entirely new bond, and discharges the sureties on the old bond.[107]

One who gives a sheriff a bond of indemnity on his levying on property is jointly liable with him for any wrongful seizure.[108] Where one recovers a judgment in replevin against a sheriff

100 Smith v. Knapp, 30 N. Y. 581.
101 Brown v. Genung, 1 Wend. 115; Pease v. Hubbard, 37 Ill. 257.
102 Skinner v. White, 9 N. H. 204.
103 Loosey v. Orser, 4 Bosw. 391. See Cosgrove v. Bowe, 10 Daly, 353.
104 2 T. R. 126; O'Neil v. Marson, 5 Burr. 2814, 1 Saund. 35.
105 Skinner v. White, 9 N. H. 204.
106 Wilson v. State, 67 Kan. 44, 72 Pac. 517.
107 Cochise County v. Ritter, 3 Ariz. 208, 73 Pac. 448.
108 Woodworth v. Gorsline, 30 Colo. 186, 69 Pac. 705.

levying on personal property, a suit in trover against the obligors in the bond of indemnity to the sheriff is not an inconsistent remedy.[109] Judgment in replevin being recovered against a sheriff for wrongful levy on personal property, a tender of the goods being refused by the plaintiff, the judgment in replevin is not satisfied, and an action in trover may be brought against the sureties in the indemnity bond.[110] Sureties may bind themselves without joining the sheriff, and where part of the sureties had not justified, and the full amount of the bond was not signed for, the sheriff had no apparent authority to deliver the bond, and the question of actual authority to so deliver the bond for the sureties is one of fact.[111] Ordinarily, the surety's liability ceases upon expiration of the principal's term of office.[112] An injured party has both the right of *mandamus* and of damages by suit upon the officer's bond, and may enforce both of them.[113]

§ 3442. When sureties to defend main action.—Where the officer against whom an action is brought has received an indemnity bond, and he gives seasonable notice of the suit, in writing, to the parties who executed the bond, and permits them to conduct the defense of such action, the judgment recovered is conclusive evidence against the persons so notified; and the court may on motion of defendant officer, upon notice of five days, and upon proof of such bond or covenant, and of such notice and permission, enter judgment against them for the amount so recovered and costs.[114] Of course, if no notice is given the sureties, the sheriff still has his right of reimbursement from the indemnity-bond sureties; but the judgment against him is only *prima facie* evidence of the amount he is entitled to recover, and may be attacked for fraud.[115]

109 Woodworth v. Gorsline, 30 Colo. 186, 69 Pac. 705.

110 Id.

111 Baker County v. Huntington, 46 Or. 275, 79 Pac. 187.

112 Aultman v. Burchett, 15 Okla. 490, 83 Pac. 719.

113 Payne v. Baehr, 153 Cal. 441, 95 Pac. 895.

114 Cal. Code Civ. Proc., § 1055, as amended 1907.

115 Whinnery v. Wiley, 38 Colo. 203, 88 Pac. 171.

FORMS—PUBLIC OFFICERS.

§ 3443. Complaint by or against public officers.

Form No. 924.

[STATE AND COUNTY.] [COURT.]

A. B., as Controller of the State of California, Plaintiff,

v.

C. D., Defendant.

The plaintiff complains, and alleges:

I. That he is [controller of the state of California], duly elected, qualified, and acting as such.

II. [State the cause of action, etc.]

[DEMAND OF JUDGMENT.]

§ 3444. Complaint by sheriff suing in aid of attachment.

Form No. 925.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is the sheriff of the [city and] county of . . ., duly elected, qualified, and acting as such.

II. That on the . . . day of . . ., 19.., a warrant of attachment was issued out of this court, and to him directed and delivered, as such sheriff, in an action against A. B., whereby he was directed to attach and keep all the property of said A. B. in his county.

III. That the defendant then had in his possession . . . dollars belonging to A. B. [or, was indebted to the said A. B. in the sum of . . . dollars].

IV. That on the . . . day of . . ., 19.., the plaintiff made due service of said warrant by delivering to and leaving with said defendant a copy thereof, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said . . . dollars, which the defendant refuses to pay over to the plaintiff, or to account to him therefor; to his damage in the sum of . . . dollars.

§ 3445. Complaint against sheriff for not executing process.

Form No. 926.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution hereinafter mentioned, the defendant was the sheriff of the county of Sacramento, in this state.

II. That on the . . . day of . . ., 19.., at . . ., judgment was duly given and made in an action in the . . . court, in favor of the plaintiff, against one E. F., for [one thousand] dollars.

III. That on the . . . day of . . ., 19.., an execution against the property of the said E. F. was issued upon the said judgment, and directed and then delivered to the defendant as sheriff aforesaid.

IV. That on that day the said E. F. had [a large quantity of general merchandise] in his store, No. . . . First street, San Francisco, and owned the said store and lot [or as the case may be], in the said county, out of which the said execution might have been satisfied, of which the defendant had notice.

V. That he refused and neglected to make a levy under or by virtue of said execution, upon said property, or any part thereof [or as the case may be; and if he levies a part, specify it], as by said execution he was required to do, to the damage of the plaintiff in the sum of . . . dollars.

§ 3446. Complaint against sheriff for neglecting to return execution.

Form No. 927.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the issuing of the execution hereinafter mentioned, the defendant was the sheriff of the county of . . ., in this state.

II. That on the . . . day of . . ., 19.., in an action in the superior court of the county of . . ., in this state [or other court], wherein this plaintiff was plaintiff, and one A. B. was defendant, the plaintiff recovered a judgment duly given by said court against the said A. B., for . . . dollars.

III. That on the . . . day of . . ., 19.., an execution against the property of said A. B. was issued on said judgment and directed and delivered to the defendant, as sheriff of the county

of . . ., of which execution the following is a copy: [Copy the execution and indorsement.]

IV. That although [more than] . . . days elapsed after delivery of said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, to the damage of the plaintiff in the sum of . . . dollars.

§ 3447. Complaint against sheriff for neglecting to pay over moneys collected on execution.

Form No. 928.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant was the sheriff of the county of . . ., in this state.

II. That on the . . . day of . . ., 19.., at . . ., an execution, then duly issued, in form and effect as required by law against the property of one A. B., and in favor of the plaintiff, upon a judgment for the sum of . . . dollars, theretofore duly given in favor of the plaintiff against said A. B., in the superior court of the county of . . ., in this state, was by the plaintiff directed and delivered to the defendant as such sheriff.

III. That the defendant thereafter, as such sheriff, collected and received upon said execution, to the use of the plaintiff, the sum of . . . dollars, besides his lawful fees.

IV. That although [more than] sixty days elapsed, after the delivery of said execution to the defendant, before this action, yet he has, in violation of his duty as sheriff, failed to pay over to the plaintiff the amount so collected.

[Or, IV. On the . . . day of . . ., 19.., the plaintiff demanded of the defendant that he pay over to him the moneys so received by him upon said execution, as aforesaid, less his lawful fees thereon, yet he has, in violation of his duty as such sheriff, failed and neglected to pay over to the plaintiff the amount so collected; by reason whereof the said defendant has become and is liable to the plaintiff for the moneys collected as aforesaid, to-wit, the sum of . . . dollars, together with twenty-five per cent thereof as damages for the non-payment thereof, and interest on the said sum of . . . dollars, at the rate of ten per cent per month from the said . . . day of . . ., 19..]

Wherefore, the plaintiff demands judgment against the defendant for the said sum of . . . dollars and interest thereon at the rate of ten per cent per month from the said . . . day of . . ., 19.., and the further sum of . . . dollars, being twenty-five per cent of said sum of . . . dollars, under the provisions of the statute aforesaid, and for costs of suit.

§ 3448. Complaint against sheriff for false return.

Form No. 929.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution hereinafter mentioned, the defendant was the sheriff of the county of . . ., in this state.

II. That on the . . . day of . . ., 19.., at . . ., judgment was duly given and made in an action in the . . . court, in favor of the plaintiff, against one G. W., for [ten thousand] dollars.

III. That on the . . . day of . . ., 19.., an execution against the property of the said G. W. was issued upon the said judgment, directed and delivered to the defendant, as sheriff aforesaid.

IV. That the defendant afterwards, and during the life thereof, levied, under the said execution, on property of the said W. [of the value of ten thousand dollars; or sufficient to satisfy the said judgment, with all the expenses of the execution; or state particulars of property on which he might have levied.]

V. That the defendant afterwards, in violation of his duty as such sheriff, falsely returned upon the said execution, to the clerk of the county of . . ., that the said W. had no property in his county on which he could levy the amount of said judgment or any part thereof.

VI. That by means of said premises, the plaintiff has been deprived of the means of obtaining the said moneys directed to be levied as aforesaid, and which are still wholly unpaid, and is likely to lose the same.

[DEMAND OF JUDGMENT.]

§ 3449. The same—Allegation for not levying when there was an opportunity, and falsely returning nulla bona.

Form No. 930.

[Allege as in preceding form down to IV, and insert:]

IV. That the defendant neglected to make any levy on the goods and chattels, lands, and tenements of the said G. W.; and falsely and fraudulently returned upon the said writ to the said court, that the said G. W. had not any goods or chattels, lands or tenements, in his county. That by reason of the premises, the plaintiff is deprived of his remedy for obtaining payment of his judgment and costs aforesaid, and has wholly lost the same.

[DEMAND OF JUDGMENT.]

§ 3450. The same—Another form of allegation.

Form No. 931.

[Allege as in preceding form, and insert:]

IV. That the defendant, so being sheriff as aforesaid, and having the said order in his hands to execute, and knowing that the said G. W. was in his county and view as aforesaid, falsely and deceitfully returned on the same order to said court, that the said G. W. could not be found in his county.

[DEMAND OF JUDGMENT.]

§ 3451. Complaint for seizing vessel.

Form No. 932.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is, and at the time hereinafter mentioned was, the owner of [naming the vessel], her tackle, apparel, and furniture, and that he had chartered the same to one A. B., for a voyage from . . . to . . . and back, for . . . dollars per week.

II. That when said vessel was at . . ., on her voyage aforesaid, and in the possession of C. D., her master, appointed by the plaintiff, the defendant, on or about the . . . day of . . ., 19.., forcibly seized the same, with her apparel, furniture, and cargo, of the value of . . . dollars, and brought the same to . . .

III. That in consequence thereof, the plaintiff has lost the said vessel, her apparel, equipments, and furniture, and the money which he was to receive for the charter for the period of . . .

weeks, and has been put to great cost and expense in and about asserting and maintaining his rights to said vessel, her tackle and furniture.

[DEMAND OF JUDGMENT.]

§ 3452. Complaint for an escape.

Form No. 933.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of issuing the execution and of the escape hereinafter mentioned the defendant was the sheriff of the county of . . ., in this state.

II. That on the . . . day of . . ., 19.., in an action in the [superior court of the county of . . ., in this state], brought by this plaintiff against one A. B. for embezzlement [or other cause authorizing arrest], this plaintiff recovered judgment, duly given by said court against said A. B., for . . . dollars.

III. That on the . . . day of . . ., 19.., an execution against the property of said A. B. was duly issued by the clerk of said court on said judgment, and thereafter duly returned wholly unsatisfied.

IV. That thereafter, on the . . . day of . . ., 19.., an order of arrest was issued by the judge of the said court against the person of said A. B., and then directed and delivered to the defendant as said sheriff, whereby he was required to arrest said A. B., and commit him to the jail of said county of . . ., until he should be discharged according to law.

V. That thereafter the defendant, as such sheriff, arrested said A. B. and committed him to jail, pursuant to said execution, and order of arrest.

VI. That thereupon the plaintiff entered into an undertaking, with good and sufficient securities, duly executed and approved, conditioned for the payment of the expenses of said A. B. for necessary food, clothing, and bedding [or state a deposit for this purpose].

VII. That in violation of his duty as such sheriff, he has since, to-wit, on the . . . day of . . ., 19.., without the consent or connivance of the plaintiff, permitted said A. B. to escape, to the damage of the plaintiff in . . . dollars.

Wherefore, the plaintiff demands judgment against the defendant, according to the statute, for the debt [or, for damage,

or sum of money] for which such prisoner was committed, to-wit, . . . dollars, with interest from, etc.

§ 3453. **Complaint against officers of an election for refusing plaintiff's vote.**

Form No. 934.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendants were the inspectors and judges of an election duly held at . . ., in and for the . . . precinct, in the city of . . ., on the . . . day of . . ., 19.., for the purpose of electing [state what officers], and being duly appointed and qualified as such inspectors and judges, the defendants had the polls open for said election at No. . . . street [or at the school-house] in said town [or city], between the hours of . . . and . . . on the day aforesaid.

II. That the plaintiff then was, and for the space of . . . months had been, a citizen of the state of . . ., and then was, and for the space of . . . days had been, a resident in said town [or, ward, or otherwise, according to the statute], and was a legal elector at said election [or that the plaintiff was registered in the great register of the city and county of . . ., and was enrolled on the poll-lists of the said . . . precinct].

III. That as such elector, the plaintiff, while the polls were so open, duly offered to the defendants his vote or ballot for the election of [insert what officers he offered to vote for; as, sheriff, etc.], in and for said town, and requested them to receive the same.

IV. That the defendants, not regarding their duty, wrongfully refused to receive or deposit the same, although they and each of them then well knew he was a qualified voter, whereby he was deprived of his vote at said election, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3454. **Complaint by municipality on bond of public officer.**

Form No. 935.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff at the times hereinafter stated was, and still is, a municipal corporation, organized and existing under the laws of the state of . . .

II. That at the municipal election held in said city of . . . on the . . . day of . . ., 19.., the defendant C. D. was duly elected to the office of . . . for the period of . . . years, from the . . . day of . . ., 19..

III. That on the . . . day of . . ., 19.., the said C. D., as principal, and the defendants E. F. and G. H., as sureties, made, executed, and delivered to the said city of . . . [or, filed in the office of . . ., stating the officer in whose office the bond is required by law to be filed] their certain bond or obligation, in writing, of which a copy is attached hereto, marked "Exhibit A," and by this reference made part of this complaint.

IV. That on the . . . day of . . ., 19.., the said bond was duly approved by [here state officer or officers whose duty it is to approve bond; if an oath of office is required by law to be executed:] and that on the . . . day of . . ., 19.., the said defendant C. D. thereupon entered upon the duties of his said office, and continued to exercise the same until on or about the . . . day of . . ., 19..

V. That [here state particularly the acts complained of which constitute breaches of the bond].

VI. That, by reason of the premises, the plaintiff has suffered damages in the sum of . . . dollars, with interest from the . . . day of . . ., 19..

[DEMAND OF JUDGMENT.]

§ 3455. Complaint for trespass by city officers while abating alleged public nuisance.

Form No. 936.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation and existence of the defendant city.]

II. That on the . . . day of . . ., 19.., and upon sundry other days and times of day, and before the commencement of this action, the defendant unlawfully entered upon the lands and premises of the plaintiff, lying and being in the said city of . . ., described as follows: [Give description], and dug up and carried away . . . thousand cubic feet of earth, and thereby destroyed about six thousand surface square feet of said lot, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

CHAPTER XCVIII.

JOINT TENANTS AND TENANTS IN COMMON.

§ 3456. Who are tenants in common or joint tenants.—The rule which prevails in a majority of the states of the Union is, that when two or more persons succeed by inheritance to the same land, or it is conveyed to them by the same instrument, without express direction to the contrary, their interests are those of tenants in common, and not of joint tenants.[1] The joint proprietors of water ditches in the mining districts, in the absence of any special facts constituting them something else, are tenants in common of real estate, and their rights in the ditches and sales of water are governed by the law of tenancy in common.[2] In California, the code defines an interest in common as one owned by several persons, not in joint ownership or partnership;[3] and a joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.[4] Deposit of money to a joint account is held in common.[5]

§ 3457. Legal actions by owners in common or joint owners of land.—The provisions of the codes of the various states provide that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided,"[6] and "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made

1 1 Washburn on Real Property, 409, and note.

2 Bradley v. Harkness, 26 Cal. 69; McConnell v. Denver, 35 Cal. 369, 95 Am. Dec. 107; Hayes v. Fine, 91 Cal. 391, 27 Pac. 772; Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. 451; Freeman on Cotenancy, § 88.

3 Cal. Civ. Code, § 685.

4 Cal. Civ. Code, § 683; Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390; Conde v. Dreisam etc. Co., 3 Cal. App. 583, 86 Pac. 825.

5 Robison v. Mutual Sav. Bank, 7 Cal. App. 642, 95 Pac. 533.

6 See Cal. Code Civ. Proc., §§ 378, 381.

a defendant, the reason thereof being stated in the complaint."[7] In a suit by the wife to quiet title to her separate property, upon which a homestead has been declared for herself and husband, the husband is not a necessary party.[8] In the interpretation of these provisions in reference to actions brought by tenants in common or joint tenants of land, it has been held that in an action to recover an entire rent from the lessee, or from one to whom it has been paid, all the tenants in common may join.[9] This, however, is unnecessary, as one may maintain an action to recover his moiety of the rent, although it may be entire.[10] To recover for torts done to the land, such as nuisances and trespasses, the rule is the same as it was at the common law, and all the tenants in common must join.[11] And the same rule applies in actions to recover for fraud in the sale of land to several tenants in common.[12] But, in California, cotenants are not necessary parties in an action in tort, for the wrongful diversion of water from lands owned in common by plaintiff and others as tenants in common.[13]

The several owners of the waters of a stream may unite as plaintiffs in an action to restrain a diversion of the waters by a third person, or to abate a nuisance therein, but they cannot for that reason unite in an action for damages. And if they join as plaintiffs in an action for damages, and for an injunction to restrain the defendants from the further diversion of the waters, the complaint is subject to demurrer, both for a misjoinder of parties plaintiff and for a misjoinder of causes of action.[14] In order to constitute a tenancy in common in a water-right, the right to a unity of possession must extend to the right of user.[15]

7 See Cal. Code Civ. Proc., §§ 382, 389 (as amended 1907).

8 Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

9 Marshall v. Moseley, 21 N. Y. 280.

10 Cruger v. McLaury, 41 N. Y. 219; Jones v. Felch, 3 Bosw. 63; Porter v. Bleiler, 17 Barb. 149.

11 De Puy v. Strong, 37 N. Y. 372; Hill v. Gibbs, 5 Hill, 56; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310; Wausau Boom Co. v. Plumer, 49 Wis. 112, 4 N. W. 1072; Schiffer v. Eau Claire, 51 Wis. 385, 8 N. W. 253; Seymour v. Carpenter, 51 Wis. 413, 8 N. W. 251; Van Deusen v. Young, 29 Barb. 9; Samuels v. Blanchard, 25 Wis. 329; Alford v. Dewin, 1 Nev. 207; May v. Slade, 24 Tex. 205; White v. Brooks, 43 N. H. 402; Bullock v. Hayward, 10 Allen (Mass.), 460; Mobley v. Bruner, 59 Pa. St. 481, 98 Am. Dec. 360.

12 Lawrence v. Montgomery, 37 Cal. 183; Foster v. Elliott, 33 Iowa, 216.

13 Himes v. Johnson, 61 Cal. 259.

14 Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94.

15 City of Telluride v. Davis, 33 Colo. 355, 108 Am. St. Rep. 101, 80 Pac. 1051.

A cotenant, in the absence of special authority, cannot transfer any greater interest in an appropriation of water for irrigating purposes appurtenant to the estate than is commensurate with his own interest.[16]

§ 3458. Actions to recover possession of land.—In actions to recover the possession of land, all the owners in common may join;[17] or each may sue to recover his undivided share.[18] Whether in such action one tenant in common can recover more than his undivided share, where the entire land is held adversely by the defendant, is a question on which the authorities materially differ. In some of the states, the recovery of the tenant in common is limited to the amount to which he can show title in himself; that is, to his own share.[19] On the other hand, the rule is equally well settled, in other states, that one tenant in common can recover possession of the entire premises as against a mere trespasser without joining his cotenants, either as plaintiffs or defendants.[20] The reasons for this rule are that one tenant in common has a right of enjoyment of and possession to the whole of the common property, and although he cannot possess in severalty before partition, still each and every one of them has a right to enter upon and occupy the whole of the common lands and every part thereof.[21] In most of the states, although their codes permit actions to be brought either by all the tenants in common, for the whole of the common property, or by one, for his undivided share, they do not permit actions to be brought by more than one and less than all.[22] In California, however, a special provision of the code permits any number of joint owners, or owners in common, either to com-

16 Beers v. Sharpe, 44 Or. 386, 75 Pac. 717.

17 Hasbrouck v. Bunce, 62 N. Y. 475; Cook v. Wardens of St. Paul's, 5 Hun, 293; Cruger v. McLaury, 41 N. Y. 219; Fisher v. Hall, 41 N. Y. 416.

18 Morenhaut v. Wilson, 52 Cal. 262; Goller v. Fett, 30 Cal. 481; Covillaud v. Tanner, 7 Cal. 38.

19 Mobley v. Bruner, 59 Pa. St. 481, 98 Am. Dec. 360; Minke v. McNamee, 30 Md. 294, 96 Am. Dec. 577; Gray v. Givens, 26 Mo. 291; Dewey v. Brown, 2 Pick. 387.

20 Treat v. Reilly, 35 Cal. 129; Hart v. Robertson, 21 Cal. 346; Winthrop v. Grimes, Wright, 330; Dolph v. Barney, 5 Or. 191; French v. Edwards, 5 Sawy. 266, Fed. Cas. No. 5098; Le Franc v. Richmond, 5 Sawy. 601, Fed. Cas. No. 8209; Sharon v. Davidson, 4 Nev. 416; Hibbard v. Foster, 24 Vt. 542; Robinson v. Roberts, 31 Conn. 145; Collier v. Corbett, 15 Cal. 183; Stark v. Barrett, 15 Cal. 361.

21 Tevis v. Hicks, 38 Cal. 234; Carpentier v. Webster, 27 Cal. 545.

22 Fisher v. Hall, 41 N. Y. 416;

mence or to defend such actions.[23] And the same is so in Missouri and Nevada.[24] Under this provision of the code, one tenant in common can recover possession of the entire premises as against a mere trespasser without joining his cotenants as plaintiffs.[25] He may, without joining the other cotenants, maintain an action of unlawful detainer;[26] and one tenant in common of water may sue alone to protect it or recover it from a trespasser.[27] The code of California also provides that "any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same."[28]

§ **3459. Action by tenant in common against cotenant.**—In an action by a tenant in common against his cotenant in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues, and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal, and that the rents, issues, and profits amount to eighty-four thousand dollars, is insufficient to support the action. The action is a common-law action of account; and viewed in this light, the complaint should aver that the defendant occupied the premises upon an agreement with the plaintiff, as receiver or bailee of his share of the rents and profits. It is essential to a recovery that it be alleged.[29] A tenant in common may maintain a bill in

Hubbell v. Lerch, 58 N. Y. 237; Hasbrouck v. Bunce, 62 N. Y. 475.

23 Cal. Code Civ. Proc., § 384; Goller v. Fett, 30 Cal. 481; Touchard v. Keyes, 21 Cal. 202; Reynolds v. Hosmer, 45 Cal. 616; Miller v. Kern County, 137 Cal. 516, 70 Pac. 549; Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 Pac. 45.

24 Wag. Stat. 558, § 3; Comp. Laws Nev. (1873), § 1077.

25 Moulton v. McDermott, 80 Cal. 629, 22 Pac. 296; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280.

26 Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 Pac. 45.

27 Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 Pac. 426; Himes v. Johnson, 61 Cal. 259; Spanish Fork City v. Hopper, 7 Utah, 235, 26 Pac. 293.

28 Cal. Code Civ. Proc., § 381.

29 Pico v. Columbet, 12 Cal. 414, 73 Am. Dec. 550. See Howard v.

equity against his cotenant who has exclusively occupied a salt well and works, and a coal mine, the common property, for an account of rents and profits. Under the English statute,[29a] the defendant in such case is liable for "receiving more than comes to his just share or proportion."[30] A tenant in common of lands, employed as agent, by common agreement between himself and cotenant, to take charge of the land, who makes sales thereof at certain prices, receiving a commission of five per cent on sales, may sue his cotenant for services in respect to the land outside of selling it.[31] Where a tenant in common occupies the whole estate, under an oral agreement to pay his cotenant for the occupancy, the latter may recover for the same in an action at law, and need not sue for an accounting.[32]

Several persons owning a tract of mining claims, as tenants in common, acting under a company name, cannot, in the name of the company, take or hold the interest of any one.

One tenant in common cannot maintain replevin for the possession of any of the common property against his cotenant, nor against one in possession of the property as the joint agent of the tenants in common.[33] Where one of several cotenants of a mining claim attempts to relocate the same, his act inures to the benefit of his cotenants.[34] A cotenant cannot by exclusive possession of property acquire title by adverse possession without notice indicating that the possession is hostile or adverse.[35] One who has committed a trespass on lands held by tenants in common cannot avoid liability to one of them by showing payment for the damage to the other without the knowledge or consent of the former. Under section 384 of the California Code of Civil Procedure, providing that all persons holding as tenants in common may jointly sue to enforce the rights of such party, a husband and wife may jointly sue for trespass on lands held in common.[36] In an action to recover real property, one tenant in common may recover possession of the entire tract as against

Throckmorton, 59 Cal. 79; McCord v. Oakland etc. Min. Co., 64 Cal. 135, 146, 49 Am. Rep. 686, 27 Pac. 863; Marx v. Goodnough, 16 Or. 26, 32, 16 Pac. 918.

29a 4 Anne, ch. 16, § 27.

30 Earley v. Friend, 16 Gratt. 21, 78 Am. Dec. 649.

31 Thompson v. Salmon, 18 Cal. 632.

32 Chapman v. Duffy, 20 Colo. App. 471, 79 Pac. 746.

33 Smith-McCord Dry Goods Co. v. Burke, 63 Kan. 740, 66 Pac. 1036.

34 Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123.

35 Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

36 Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

all except his cotenants.[37] In an action for conversion of personal property by one claiming a half interest in the property, a defense that defendants owned the other half, and had taken possession for a legitimate purpose, could not be availed of on demurrer to the complaint, where the complaint failed to show any such state of facts.[38]

FORMS.

§ 3460. Complaint by joint tenants and tenants in common.

Form No. 937.

[TITLE.]

The plaintiffs complain and allege:

I. That the property hereinafter mentioned and described is owned in common by the plaintiffs.

II. [State cause of action.]

§ 3461. Complaint by tenant or tenant in common against cotenant.

Form No. 938.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff and the defendant are seised in fee as tenants in common [or, joint tenants] of the following-described premises: [insert description], and have been so seised since the . . . day of . . ., 19..

II. That on or about the . . . day of . . ., 19.., and at various times thereafter, and prior to the commencement of this action, the said defendant committed acts of waste upon said premises, to the great injury of the plaintiff's estate therein, to-wit, said defendant [here allege acts of waste according to the facts].

III. That by reason of the premises, the plaintiff's estate in said lands has been damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

37 Field v. Tanner, 32 Colo. 278, 75 Pac. 916.

38 Boley v. Allred, 25 Utah, 402, 71 Pac. 869.

CHAPTER XCIX.

ACTION AGAINST JOINT DEBTORS.

§ 3462. In general.—Parties who were not originally served with the summons, and did not appear in the action, may be summoned after judgment, to show cause why they should not be bound in the same manner as though originally served.[1] The summons in such cases must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time, as the original summons.[2] It is not necessary to file a new complaint.[3] Demurrer to the original complaint by an incoming defendant is not provided for by the statute, and defendant is, by express terms, denied the right to plead the statute of limitations.[4] The only jurisdiction the court can acquire over defendant, and the only purpose for which he can be brought in by summons after the judgment, or voluntarily appear, is to show cause why he should not be bound to the same extent as his co-obligors by the judgment already entered against them. The mere fact that defendant appeared voluntarily in the action does not give the court jurisdiction to open up the original case upon which the judgment was rendered, to set the entire matter at large, and to permit amendment to the complaint which had been fixed by the judgment, and upon which the judgment was based.[5] The summons must be accompanied by an affidavit that the judgment or some part thereof remains unsatisfied, specifying the amount due.[6] A part payment of a demand by one of two debtors will not discharge such debtor, making the payment from the payment of the balance; his obligation is to pay the whole.[7] The defendant may answer denying the judgment, or setting up any defense which

1 Cal. Code Civ. Proc., § 989. See Waterman v. Lipman, 67 Cal. 26, 6 Pac. 875; Davidson v. Knox, 67 Cal. 143, 7 Pac. 413; Golden State etc. Iron Works v. Davidson, 73 Cal. 389, 15 Pac. 20; Stewart v. Spaulding, 72 Cal. 264, 13 Pac. 661; Feder v. Epstein, 69 Cal. 456, 10 Pac. 785; Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708.

2 Cal. Code Civ. Proc., § 990.

3 Id.

4 Cooper v. Burch, 140 Cal. 548, 74 Pac. 37.

5 Id.

6 Cal. Code Civ. Proc., § 991.

7 Griffith v. Grogan, 12 Cal. 317.

may have arisen subsequently, or he may deny his liability upon the original obligation by any defense he might have originally pleaded.[8] In Illinois, the remedy is by *scire facias*, under the common law.[9] And a *scire facias* may be issued after it is found that the judgment cannot be collected of the one against whom it was rendered.[10] Where in an action against two defendants as joint debtors the summons is served on one only, and no appearance is entered for the other, the judgment should be entered against both defendants, but directing the amount to be made of the joint property of both, and the individual property of the person served.[11] Property in which defendants are jointly interested may be taken under execution, under judgment against one of them, and, under this section,[12] the defendants not served may be brought in under the same judgment, so as to be personally liable.[13] Where the same judgment has passed in one action against two or more parties, they are, in respect to such judgment, joint debtors.[14] This remedy is not cumulative, but is substituted for the former practice allowing a new action.[15] It does not alter any fundamental principle of law as to the joint liability of contractors, but is merely intended to alter the common law in a point of practice.[16] The summons cannot be issued on a judgment of the marine or district court (in New York), although it has been docketed in the county clerk's office.[17]

§ 3463. Answer.—The party summoned may answer the complaint as he might have done had he been originally served, or

8 Cal. Code Civ. Proc., § 992.

9 For proceedings in such cases, consult Puterbaugh on Common Law Pleading and Practice, 685; Marshall v. Maury, 1. Scam. 231; McFadden v. Fortier, 20 Ill. 509; Berry v. Krone, 46 Ill. App. 82. That a scire facias is not an original action, consult Tiffany v. Breese, 3 Scam. 499, 547.

10 As to the mode of proceedings against joint debtors in the state of New York, see N. Y. Code of Civ. Proc., § 1932; Garrison v. Garrison, 67 How. Pr. 271; Produce Bank v. Morton, 52 How. Pr. 157. That a judgment against joint debtors may be enforced by supplementary proceedings, see Van Clief v. Sickles, 5 Paige, 505; Commercial Bank etc. v. Meach, 7 Paige, 448; Emery v. Emery, 9 How. Pr. 130; Jones v. Lawlin, 1 Sandf. 722.

11 Northern Bank of Kentucky v. Wright, 5 Rob. (N. Y.) 604. But, contra, see Tay v. Hawley, 39 Cal. 96.

12 Cal. Code Civ. Proc., § 989.

13 Kleinschmidt v. Freeman, 4 Mont. 400, 2 Pac. 275.

14 Barnes v. Smith, 16 Abb. Pr. 420.

15 Lane v. Salter, 4 Rob. (N. Y.) 239.

16 Niles v. Battershall, 2 Rob. (N. Y.) 146.

17 Ticknor v. Kennedy, 4 Abb. Pr. (N. S.) 417.

he may deny the judgment, or he may set up any defense that may have arisen subsequently to the judgment. The action is really an action on the original joint contract, and matters of defense with respect to the judgment are merely incidental to the action.[18] The party summoned may deny the judgment, or set up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, by reason of any defense existing at the commencement of the action.[19]

§ 3464. **Issues and verdict.**—The issues formed may be tried as in other cases; but when the defendant denies in his answer any liability upon the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.[20]

§ 3465. **Pleadings.**—If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer shall constitute such written allegations, subject to the right to amend.[21]

§ 3466. **Release.**—Prior to the code, the release of one joint debtor was a release as to all, but it was required to be a technical release under seal.[22] It is now provided, however, that "a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him."[23] Within ten days after payment of the whole judgment, or more than his share, a joint debtor should file with the clerk of the

18 Tay v. Hawley, 39 Cal. 98.

19 Cal. Code Civ. Proc., § 992; Berlin v. Hall, 48 Barb. 442.

20 Cal. Code Civ. Proc., § 994.

21 Cal. Code Civ. Proc., § 993.

22 See Armstrong v. Hayward, 6 Cal. 185; Rowley v. Stoddard, 7 Johns. 210; Cheatham v. Ward, 1 Bos. & Pul. 633; Nicholson v. Revill, 1 Ad. & E. 683; American Bank v. Doolittle, 14 Pick. 126; Tuckerman v. Newhall, 17 Mass. 583; Goodnow v. Smith, 18 Pick. 415, 29 Am. Dec. 600; cited in Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427.

23 Cal. Civ. Code, § 1543. See Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 Pac. 1165.

court notice of such payment and his claim to contribution or repayment. The clerk then makes an entry thereof in the margin of the docket.[24] If this is not done, the judgment is extinguished by such payment.[25] One of two joint debtors, who has been released under the insolvent act, is liable to contribution to his co-debtor for money paid to satisfy the joint obligation after the discharge.[26]

§ 3467. The new judgment.—The only judgment that can be rendered against an incoming defendant in these proceedings is for such amount as remains unsatisfied on the original judgment.[27]

FORMS IN ACTION AGAINST JOINT DEBTORS.

§ 3468. Affidavit against joint debtor not served.

Form No. 939.

[TITLE OF COURT.]

A. B., Plaintiff,

v.

C. D. and E. F., Defendants.

[VENUE.]

A. B., being duly sworn, says: That he is the plaintiff above named; that on the . . . day of . . ., 19.., he recovered a judgment in the superior court of the state of California, in and for the county of . . ., against the said defendants, C. D. and E. F., for the sum of . . . dollars damages, and . . . dollars costs of suit; which judgment was duly given and made by said court, and entered and docketed by the clerk thereof, to be enforced against the joint property of the said C. D. and E. F., and the separate property of the said E. F.; that afterwards, on the . . . day of . . ., 19.., an execution was issued thereon and delivered to the sheriff of said county of . . ., and upon which there was

24 Cal. Code Civ. Proc., § 709.

25 National Bank of California v. Los Angeles Iron etc. Co., 2 Cal. App. 659, 84 Pac. 466; March v. Barnet, 1 Cal. App. 583, 82 Pac. 697.

26 Ford v. Andrews, 9 Wend. 312; Frost v. Carter, 1 Johns. Cas. 74; Elsworth v. Caldwell, 18 Abb. Pr. 20.

27 Cooper v. Burch, 140 Cal. 548, 74 Pac. 37; Cal. Code Civ. Proc., § 994.

made the sum of . . . dollars [or that nothing was made thereon, as the case may be] over and above the costs and fees of the said sheriff upon said execution; that the said judgment remains in full force, and not vacated, annulled, or reversed, and there is now due and unpaid thereon the sum of . . . dollars, and interest on said sum from the . . . day of . . ., 19.., at the rate of . . . per cent per annum; that in said action, in which said judgment was obtained as aforesaid, service of the summons was made upon the said E. F., but not upon the said C. D., and he makes this affidavit in a proceeding against said C. D. under the statute in such case made and provided, to require him to show cause why he should not be bound by the said judgment.

[JURAT.] [SIGNATURE.]

§ 3469. Summons against joint debtor to show cause, etc.

Form No. 940.

[TITLE.]

The People of the State of California send greeting:

To C. D., defendant.

You are hereby summoned and required to show cause within ten days (exclusive of the day of service), after the service of this summons upon you, [if served within this county, or if served out of this county but in this district within twenty days, otherwise within forty days], why you should not be bound by a certain judgment duly given and made by the said superior court of the state of California, in and for the said county of . . ., on the . . . day of . . ., 19.., in favor of A. B., and against you and one E. F., for the sum of . . . dollars damages, and . . . dollars costs of suit, in the same manner as if you had been originally summoned therein, and upon which said judgment it is alleged there remains due and unpaid the sum of . . . dollars, and interest on said sum from the . . . day of . . ., 19.., at the rate of . . . per cent per annum, as more fully appears by the affidavit of the said plaintiff, A. B., hereto attached, and to which reference is here made.

And you are hereby notified that if you fail to appear and show cause as above required within the time above stated, the said plaintiff will apply to the said court for an order and judgment that you be bound thereby in all respects as though you had been originally summoned in said action, to the extent of

the said sum of . . . dollars, and interest as aforesaid, and the cost of this proceeding, and that execution issue against you accordingly.

[ATTESTATION, DATE, AND SIGNATURE.]

§ 3470. Summons against joint debtor not served in original action.

Form No. 941.

[TITLE.]

The State of . . . to the above-named defendant, G. H.

You are hereby summoned to show cause within twenty days after the service of this summons on you, exclusive of the day of service, why you should not be bound by a certain judgment rendered in the above-entitled action in said court on the . . . day of . . ., 19.., in favor of the above-named plaintiff, and against said defendants above named, for the sum of . . . dollars, damages and costs, in the same manner as if you had been originally summoned.

[VENUE.]

A. B., being duly sworn, says: That he is the plaintiff above named, and that to his personal knowledge the judgment described in the foregoing summons has not been satisfied either in whole or in part, and that there is now actually due thereon the sum of . . . dollars, damages and costs, with interest thereon from . . ., 19..

[JURAT.] A. B.

§ 3471. Judgment in form against several joint debtors, one only being served.

Form No. 942.

[TITLE.]

The summons and complaint in this action having been personally served upon the defendant C. D. on the . . . day of . . ., 19.., and due proof of such personal service having been made and filed, and it appearing by proofs duly made that after due diligence the defendant E. F. cannot be found, and has not been served;

And said action having come on for trial upon the answer of the defendant C. D. alone, and having been tried by the court, trial by jury having been waived, and the court having made and filed its findings herein, which are of record, and having con-

cluded that the defendants are jointly indebted to the plaintiff herein, and that judgment should be entered in form against all of said defendants:

Now, on motion of G. H., attorney for the plaintiff,—

It is adjudged, that the said A. B., plaintiff, do have and recover of the said defendants, C. D. and E. F., the sum of . . . dollars damages, and . . . dollars costs, making in all the sum of . . . dollars; this judgment to be enforced only against the joint property of C. D. and E. F., and the separate property of C. D.

§ 3472. Judgment against joint debtor not originally served.

Form No. 943.

[TITLE.]

On reading and filing the summons issued herein, whereby the defendant G. H. was required to show cause why he should not be bound by the judgment herein rendered in form by this court against all the defendants above named on the . . . day of . . ., 19.., and upon reading and filing the affidavit of the plaintiff accompanying said summons that to his knowledge said judgment has not been satisfied in whole or in part, and that the amount actually due thereon is . . . dollars, with interest from the date of said judgment, and it appearing by due proof that said summons and affidavit have been duly and personally served on said G. H. on the . . . day of . . ., 19.., and no copy of an answer or demurrer thereto having been served on the plaintiff or his attorney, as appears by the affidavit of M. N. on file, and the said defendant not appearing to show cause pursuant to said summons, and the time for answering said summons having expired [or, if the judgment is after trial, recite the proceedings according to the facts];

And it appearing to the court that the plaintiff is entitled to judgment that said defendant G. H. be bound by the judgment heretofore rendered in form against all the defendants, in the same manner as if he had been originally summoned in this action, and that the sum of . . . dollars is still due and unpaid on said judgment:

Now, on motion of J. K., attorney for the plaintiff,—

It is adjudged, that the said judgment is a valid judgment against the said G. H., and that the defendant G. H. should be and is hereby adjudged to be bound by said judgment in the

same manner as if originally summoned, in the full sum of . . . dollars [name amount unpaid on the judgment], with interest from . . ., 19.., with costs of this proceeding, taxed at . . . dollars, and that the plaintiff have execution therefor.

By the Court: R. S., Clerk.

§ 3473. Execution on judgment for joint debt when some defendants were not served.

Form No. 944.

The State of . . . to the Sheriff of the County of . . ., greeting:

Whereas, judgment was rendered on the . . . day of . . ., 19.., in an action in the . . . court for . . . county, between A. B., plaintiff, and C. D., defendant, in favor of said plaintiff, and against said defendant, for the sum of . . . dollars, damages and costs, as appears by the judgment-roll filed in the office of the clerk of said court, in said county of . . .;

And whereas, the said judgment was docketed in your county on the . . . day of . . ., 19.., and the sum of . . . dollars is now actually due and unpaid thereon, besides interest:

Therefore, we command you, that you satisfy the said judgment with interest out of the joint personal property of all of the defendants and the separate personal property of the defendant C. D. [defendant served] within your county, or, if sufficient personal property cannot be found, then out of the real property in your county belonging jointly to all the defendants or separately to the defendant C. D., on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same be, and return this execution within sixty days after its receipt by you to the clerk of the . . . court of said county of . . .

Witness, the Hon. J. K., judge of said court, at . . ., in said county, the . . . day of . . ., 19..

[Seal of Court.]

Attest: L. M., Clerk.

CHAPTER C.

CORPORATIONS.

§ 3474. **Existence of foreign and domestic corporations.**—Although a corporate body may carry on business beyond the territorial limits of the state which created it, it has no corporate existence beyond those limits,[1] and a corporation which owes its existence to the laws of several states must be considered as a domestic corporation in each of such states.[2] In the latter case each charter creates a legal entity to be recognized within its own state.[3] The comity which recognizes the corporate existence of a foreign corporation, and enforces the contracts of that corporation made within the limits of the state affording the comity, will not be extended so as to recognize the existence of a corporation, and the exercise of its powers, when they are inimical to the interest, repugnant to the policy, or in contravention of the laws of such state.[4] In Washington, a corporation organized under the laws of the state, but a majority of whose stock is held by aliens, is a domestic corporation in all respects except as to the ownership of lands.[5] In the case of a foreign corporation, its existence is a question of fact, which it has been held is for the jury to determine.[6] The right of a domestic corporation to act as such cannot be questioned collaterally.[7] And where defendants are alleged to be a corporation doing business within the state, courts will not presume as a matter of law that it is a foreign corporation.[8] One who has contracted with another as a corporation cannot, by way of collateral attack, deny the other's corporate existence.[9] The national banks organized

1 Day v. Newark India Rubber Co., 1 Blatchf. 628, Fed. Cas. No. 3685; Bank of Augusta v. Earle, 13 Pet. 588, 10 L. Ed. 274; Ohio & M. R. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130. And see Colorado Iron Works v. Sierra Grande Mining Co., 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; Wilson v. Fire Alarm Co., 149 Mass. 24, 20 N. E. 318.

2 State v. Northern Central Ry. Co., 18 Md. 193; Sprague v. Hartford etc. R. R. Co., 5 R. I. 233.

3 Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130.

4 A. Booth & Co. v. Weigand, 28 Utah, 372, 79 Pac. 570.

5 Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

6 Lindaurer v. Delaware Ins. Co., 13 Ark. 461.

7 Dean v. Davis, 51 Cal. 407.

8 Acome v. American Mineral Co., 11 How. Pr. 24.

9 California Cured Fruit Assoc. v. Stelling, 141 Cal. 713, 75 Pac. 320.

and doing business under the acts of Congress are to be regarded as foreign corporations, within the provisions of the New York Code of Procedure authorizing actions to be brought and attachments to be issued against corporations.[10]

When the caption of the complaint gives the title of the corporation, with the addition, "a corporation under the laws of the state of Iowa," and the corporation was referred to in the allegations by the corporate name, the averment of a corporate capacity is sufficient.[11]

By complying with the requirements of the state laws, foreign corporations are accorded the same, and no other or greater, rights and privileges, and the same protection of the laws, as domestic corporations, and the making and enforcement of their contracts, are governed by the same rules.[12] It is indispensable that a corporation seeking to invoke the doctrine of comity must be possessed of some right or privilege in the country of its domicile, and unless it have both existence and some right or power there, it cannot be awarded any in a foreign state.[13] In California, a foreign corporation which has failed to designate some person in the state on whom process may be served shall not maintain or defend any action in the courts of the state until the provisions of the act of 1899 have been complied with.[14] Where the only business transacted in the state by a foreign corporation was the purchase of a mortgage, which was sent to its banking house in the state of its residence, and it had no purpose to do any other act within the state, it was not subject to the provisions of the Washington statutes,[14a] prohibiting foreign corporations from transacting business within the state without a license.[15] A license to fish in the waters of the state, and to locate and occupy a fishing site, does not constitute ownership of lands, within section 33 of article II of the constitution of Washington, forbidding the acquisition of lands in the state by foreign corporations.[16]

10 Bowen v. First Nat. Bank of Medina, 34 How. Pr. 408; Cooke v. State Nat. Bank of Boston, 3 Abb. Pr. (N. S.) 339.

11 Saunders v. Sioux City Nursery, 6 Utah, 431, 24 Pac. 532.

12 Hiskey v. Pacific States Savings, Loan & Bldg. Co., 27 Utah, 409, 76 Pac. 20.

13 Myatt v. Ponca City Land etc. Co., 14 Okla. 189, 78 Pac. 185, 68 L. R. A. 810.

14 Keystone Driller Co. v. Superior Court, 138 Cal. 738, 72 Pac. 398.

14a Bal. Annot. Codes & Stats., § 4289; Laws 1899, p. 100, ch. 58.

15 Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

16 Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

§ 3475. Rights and liabilities of foreign corporations.—When a foreign corporation comes, by its officers, within the jurisdiction of another state to engage in business, it becomes amenable to the laws of the latter state, and cannot escape the consequences of its illegal acts by setting up its existence under a foreign government.[17] A foreign corporation, acting in excess of its conferred authority, may be questioned as to such authority only by the state. But where, in an action by such corporation to acquire title to property vested in an individual, such individual may, under the Oklahoma statute,[17a] deny its corporate capacity as a defense to its right to recover.[18] Contracts of a foreign corporation made while doing business in a state, without complying with the laws of the state respecting such corporations, are invalid, and cannot be enforced in the courts of such state by the corporation.[19] Such corporations are deemed "persons," within the meaning of the statute relating to taxation, unless a different intent is indicated in the statute.[20]

In New York, one foreign corporation may sue another in the courts of that state, upon a cause of action arising in it.[21] But a complaint against a foreign corporation must either allege that the plaintiffs are residents of that state or that the cause of action arose, or the subject of the action is situated, within the state. If such allegations are omitted, the complaint may be dismissed on motion.[22] A corporation created by the laws of one state, and composed entirely of citizens of that state, is not entitled to all the privileges and immunities of citizens of another state in which it may be engaged in business.[23] Nor is it entitled to privileges which by the statutes of the latter are confined to corporations created by the laws of that state.[24] But a private citizen cannot as such, and through the medium of a civil action, try the issue as to whether a foreign corporation is doing business within the state in violation of law, as such

17 Austin v. New York etc. R. R. Co., 25 N. J. L. 381; People v. Cent. R. R. Co. of N. J., 48 Barb. 478; Warren Mfg. Co. v. Ætna Ins. Co., 2 Paine, 501, Fed. Cas. No. 17206.

17a Stats. 1893, ch. 66, §§ 89, 91.

18 Myatt v. Ponca City Land etc. Co., 14 Okla. 189, 78 Pac. 185, 68 L. R. A. 810.

19 A. Booth & Co. v. Weigand, 28 Utah, 372, 79 Pac. 570.

20 British Comm. Life Ins. Co. v. Commissioners of Taxes, 28 How. Pr. 41.

21 Bank of Commerce v. Rutland etc. R. R. Co., 10 How. Pr. 1.

22 House v. Cooper, 16 How. Pr. 292.

23 Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274.

24 Myers v. Manhattan Bank, 20 Ohio, 283.

question must be determined by or on behalf of the state through the attorney-general.[25] Nor does the provision of the United States constitution guaranteeing to citizens of each state all the privileges and immunities of citizens in the several states prevent a state from regulating or restricting the business of a corporation created by the laws of another state, and imposing terms on its right to carry on business within its boundaries.[26] In a case in the court of appeals of New York, the nature and extent of state jurisdiction, and the duty of the comity which one state owes to foreign states, were considered and explained.[27] A complaint in an action which states that the defendant is a corporation, and fails to state whether it is a domestic or foreign corporation, and, if the latter, under the laws of what sovereignty incorporated, is defective, as not complying with the requirements of section 1775 of the New York Code of Civil Procedure. Such defect is not, however, a ground of demurrer, but the subject of a motion to compel its correction.[28] The allegation that the defendant is a corporation is no part of the cause of action, but simply relates to the character or capacity of the defendant.[29]

§ 3476. **Actions against foreign corporations.**—Valid service cannot be had on a foreign corporation by serving one of its officers while on a train passing through the territory.[30] Foreign corporations are, for the purposes of jurisdiction, non-residents of the state, and may be sued in the district court in any county

25 MacGinniss v. Boston etc. Cons. etc. Min. Co., 29 Mont. 428, 75 Pac. 89.

26 Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 567, 19 L. Ed. 1029; Insurance Co. v. Morse, 20 Wall. 457, 22 L. Ed. 365; State v. Lathrop, 10 La. Ann. 398; Doyle v. Continental Ins. Co., 94 U. S. 540, 24 L. Ed. 148; Lamb v. Lamb, 6 Biss. 420, Fed. Cas. No. 8018; Hoffman v. Banks, 41 Ind. 1; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520; Washington Co. M. Ins. Co. v. Hasting, 2 Allen (84 Mass.) 398; Williams v. Cheney, 8 Gray (74 Mass.), 206; Insurance Co. v. New Orleans, 1 Woods, 89, Fed. Cas. No. 7052; Ex parte Robinson, 12 Nev. 263, 28 Am. Rep. 794; Ex parte Cohn, 13 Nev. 424.

27 Merrick v. Van Santvoord, 34 N. Y. 208. See, also, Commonwealth v. New York etc. R. R. Co., 129 Pa. St. 463, 15 Am. St. Rep. 724, 18 Atl. 412; Cowell v. Springs Co., 100 U. S. 55, 25 L. Ed. 547; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137, 5 Sup. Ct. 739.

28 Harmon v. Vanderbilt Hotel Co., 79 Hun, 392, 29 N. Y. Supp. 783.

29 Fox v. Erie Preserving Co., 93 N. Y. 54. See Phœnix Bank v. Donnell, 40 N. Y. 410.

30 Territory v. Baker, 12 N. Mex. 456, 78 Pac. 624.

in the state designated in plaintiff's complaint.[31] Under the California statute,[31a] requiring foreign corporations to designate an agent for the service of process, and to file such designation with the secretary of state, in which case process may be served on the agent, or, if no person is designated, on the secretary of state, a return reciting service on the secretary of state, but failing to state that there was no designation of an agent on file, is insufficient to confer jurisdiction over the corporation, and cannot be aided and rendered sufficient by a certificate of the secretary of state, attached to the summons as returned, showing that the corporation had not made the required designation.[32] A copy of such designation, duly certified by the secretary of state, is made sufficient evidence of incorporation thereof.[33]

As against domestic creditors of an insolvent foreign corporation who have attached funds and money thereof situate in the state, and seized the same under executions on judgments obtained by them, an ancillary receiver will not be appointed, in an action by a foreign receiver of the corporation, to collect the funds and turn them over to such foreign receiver.[34]

§ 3477. Service of process on corporation.—A sheriff's return of a summons that he had delivered a copy to W., as agent of defendant corporation, and W. acknowledged that he was its agent, is insufficient, as showing that the sheriff's only information that W. was agent was W.'s statement.[35] Where, under the by-laws of a corporation, an officer holds office until his successor is elected and qualified, service may be had on an officer who has resigned, until the corporation has elected his successor.[36] Service of summons on a corporation is sufficient where it is served upon one who had theretofore been served with process, and the corporation accepted such service by its appearance, where it is not shown that the corporation, through its attorney

31 Boyer v. Northern Pacific Ry. Co., 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691.

31a Cal. Civ. Code, § 405.

32 Willey v. Benedick Co., 145 Cal. 601, 79 Pac. 270.

33 Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

34 Clark v. Supreme Council Order of Chosen Friends, 146 Cal. 598, 80 Pac. 931.

35 White House Mountain Gold Min. Co. v. Powell, 30 Colo. 397, 70 Pac. 679.

36 Colorado Debenture Corp. v. Lombard Inv. Co., 66 Kan. 251, 97

or some one authorized to act for it, did not inform the party in interest how better service could be had.[37] In Oregon, where an action against a corporation is commenced in the county in which the cause accrued, as permitted by section 55 of the code, instead of in the county where defendant has its principal office and place of business, as provided by section 44, the return of the officer on the process must show the reason for making the service on the local agent.[38]

§ 3478. **Allegation of corporate existence.**—In the common-law system of pleading, in an action brought by a corporation, the rule was established by the weight of authority, that the declaration need not contain an allegation of corporate existence, although the plaintiff is not such a corporation that its existence will be judicially taken cognizance of.[39] Under such system the defendant might join issue on the fact of the plaintiff's corporate capacity, so as to compel it to give evidence thereof. How such issue was joined differed in the several states. In England, and in many of the states, pleading the general issue was sufficient.[40] On the contrary, other states established the rule that by pleading the general issue the plaintiff's corporate capacity was admitted, and if the defendant

Am. St. Rep. 373, 71 Pac. 584; Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

37 Hill v. Morgan, 9 Idaho, 718, 76 Pac. 323.

38 Hildebrand v. United Artisans, 46 Or. 134, 114 Am. St. Rep. 852, 79 Pac. 347.

39 Angell & Ames on Corporations, § 632, n. 2; Harris v. Muskingum Mfg. Co., 4 Blackf. 267, 29 Am. Dec. 372; Bennington Iron Co. v. Rutherford, 18 N. J. L. 107, 35 Am. Dec. 528; Rees v. Conococheague Bank, 5 Rand. 326, 16 Am. Dec. 755; Richardson v. St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460; Zion Church v. St. Peter's Church, 5 Watts & S. 215; Union Mutual Ins. Co. v. Osgood, 1 Duer, 707; Kennedy v. Cotton, 28 Barb. 59; La Fayette Ins. Co. v. Rogers, 30 Barb. 491; Phœnix Bank v. Donnell, 41 Barb. 571; Frye v. Bank of Illinois, 10 Ill. 332; Heasten v. Cincinnati etc. R. R. Co., 16 Ind. 275, 79 Am. Dec. 430; German Reformed Church v. Von Puechelstein, 27 N. J. Eq. 30; Gillett v. American etc. Ware Co., 29 Gratt. (Va.) 565; Odd Fellows' Bldg. Assoc. v. Hogan, 28 Ark. 261; Wilson v. Sprague M. M. Co., 55 Ga. 672; Adams Express Co. v. Hill, 43 Ind. 157.

40 Rees v. Conococheague Bank, 5 Rand. 326, 16 Am. Dec. 755; Hargrave v. Bank of Illinois, Breese, 122; Jones v. Bank of Illinois, Breese, 124; Lewis v. Bank of Kentucky, 12 Ohio, 132, 40 Am. Dec. 469; Henriques v. Dutch West India Co., 2 Ld. Raym. 1535; Jackson v. Plumbe, 8 Johns. 378; Dutchess Mfg. Co. v. Davis, 14 Johns. 245, 7 Am. Dec. 459; Bank of Auburn v. Weed, 19 Johns. 303; McDonald v. Neilson, 2 Cow. 139, 14 Am. Dec. 431.

wished to raise an issue to such fact it must be by a plea in abatement or a plea in bar,[41] or denial in the answer.[42]

In those states which have adopted codes of procedure, the question whether or not a corporation must allege its corporate existence in an action brought by it has been answered in so many ways that it is difficult, if not impossible, to reconcile the decisions. Some of the states have made special enactments which cover this question. Thus the code of Iowa provides that "a plaintiff, suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and when defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way."[43] In Minnesota, it is provided, that "in actions by or against corporations created by or under the laws of this state, it is sufficient to refer in the complaint or answer to the act of incorporation, or the proceeding by which such corporation was created." In that state it has been held that where the statute creating the corporation requires certain acts to be done before it can be considered *in esse*, the complaint must show that such acts have been done.[44] In California, the allegation that the plaintiff is a corporation, organized and existing under the laws of the state, has been held, on demurrer, a sufficient allegation of the plaintiff's corporate capacity.[45] An averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*.[46] If the fact of incorporation may be ascertained from the state and county records, it cannot be denied upon information and belief.[47] M. being made a defendant in an action to quiet title, and appearing under that name by attorney, the complaint is good and the proceedings

41 Society etc. v. Pawlet, 4 Pet. 480, 7 L. Ed. 927; Zion Church v. St. Peter's Church, 5 Watts & S. 215; Christian Society v. Macomber, 3 Metc. (Mass.) 235; School District v. Blaisdell, 6 N. H. 197; Langdon v. Potter, 11 Mass. 313; Boston Type Foundry v. Spooner, 5 Vt. 93.

42 Mont. Rev. Codes, § 6540; Milwaukee Gold Ex. Co. v. Gordon, 37 Mont. 209, 95 Pac. 995.

43 Iowa Code 1873, § 2716; Code Proc., § 98.

44 St. Paul Division No. 1 v. Brown, 9 Minn. 157.

45 California Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511.

46 Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

47 Nelson-Bennett Co. v. Twin Falls Land etc. Co., 14 Idaho, 5, 93 Pac. 789.

are valid as to M., whether the name be that of a corporation or a person, although the complaint says nothing as to this.[48] In Kansas, the common-law rule seems to have been adopted, and no allegation that the plaintiff is a corporation is essential.[49] And the same is true in Indiana.[50] In Wisconsin, it is provided by statute that the plaintiff need not prove its corporate existence, unless it has been specially denied, and that the allegation thereof may be made by reference to the title of the act of incorporation; and this rule applies to foreign as well as to domestic corporations.[51] In New York, in suits by a domestic corporation, it is not necessary to allege the plaintiff's incorporation, because by the provisions of the Revised Statutes, which have been held to be in force notwithstanding the enactment of the Code of Procedure, proof of such incorporation was not necessary, unless the defendant specially denied it.[52] In the case of a foreign corporation, however, there is no such statute applicable, and its existence must be alleged, and proved on the trial.[53] It is not necessary, however, to set forth the specific powers of the corporation to enter into the transaction under which the cause of action arose.[54] But where an officer of a foreign corporation sues in his own name on behalf of his company, his complaint must state facts showing his authority to sue on their behalf. Merely alleging authority is not enough.[55]

48 Butterfield v. Graves, 138 Cal. 155, 71 Pac. 510.

49 Ryan v. Farmers' Bank, 5 Kan. 658; Campbell v. Blanke, 13 Kan. 62.

50 O'Donald v. Evansville etc. R. R. Co., 14 Ind. 259.

51 Rev. Stats., ch. 148, §§ 3, 11; Farmers' Loan etc. Co. v. Fisher, 17 Wis. 114; Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109.

52 Shoe & Leather Bank v. Brown, 9 Abb. Pr. 218; Phœnix Bank v. Donnell, 40 N. Y. 410; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Union Marine Ins. Co. v. Osgood, 1 Duer, 707; Canandarqua Academy v. McKechnie, 19 Hun, 62; Acome v. American Min. Co., 11 How. Pr. 24; Lighte v. Everett Fire Ins. Co., 5 Bosw. 716; La Fayette Ins. Co. v. Rogers, 30 Barb. 491; Elizabethport Mfg. Co. v. Campbell, 13 Abb. Pr. 86; Canandarqua Academy v. McKechnie, 90 N. Y. 618. See, also, Union Cement Co. v. Nobel, 15 Fed. 502; Saunders v. Sioux City Nursery, 6 Utah, 431, 24 Pac. 532.

53 Waterville Mfg. Co. v. Bryan, 14 Barb. 182; Connecticut Bank v. Smith, 9 Abb. Pr. 175; Myers v. Machado, 14 How. Pr. 149; Loaners' Bank v. Jacoby, 10 Hun, 143.

54 Schenectady Dutch Church v. Veeder, 4 Wend. 494; Struver v. Ocean Ins. Co., 9 Abb. Pr. 23; Perkins v. Church, 31 Barb. 84; Marine etc. Bank v. Jauncey, 1 Barb. 486. Compare, however, Camden etc. Co. v. Remer, 4 Barb. 127; Bard v. Chamberlain, 3 Sandf. Ch. 31, where it is said that the power of a foreign corporation to make the contract which is sought to be enforced must be set forth.

55 Myers v. Machado, 6 Abb. Pr. 198.

And whenever it is necessary to aver the existence of a corporation, it may be done by referring to the title of the act incorporating it and the date of its passage. The substance thereof need not be set forth.[56] In pleading the performance of conditions precedent under such a statute or ordinance, or a right derived therefrom, a general statement that the party duly performed all the conditions on its part required thereby is sufficient; but if such allegation be controverted, then the facts showing such performance must be proved.[57] Where the original act is referred to in the complaint, a vague reference to other general statutes affecting it does not render the complaint demurrable;[58] but the title of the act must be set forth with accuracy.[59] In an action by a corporation in relation to its property, it is not essential to a statement of a complete cause of action that the complaint should show that the plaintiff has complied with the requirements of section 299 of the California Civil Code with respect to the filing of a copy of its articles of incorporation in the office of the county clerk.[60] Failure to comply with such requirements can only be made available by specially pleading it in the answer as matter of abatement to the action,[61] and not by demurrer.[62] But a corporation which has complied with the statutes, at the time of acquiring land in a certain county, may quiet title thereto without filing a copy of its articles of incorporation.[63] In an action against a private corporation, it is necessary to allege its corporate character, and without this averment the complaint does not state facts sufficient to constitute a cause of action.[64] An averment of the defendant's corporate existence is held to be necessary in every

56 Cal. Code Civ. Proc., § 459; N. Y. Code, § 163; United States Bank v. Haskins, 1 Johns. Cas. 132.

57 Cal. Code Civ. Proc., § 459, as amended 1907.

58 Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50.

59 Union Bank v. Dewey, 1 Sandf. 509. For form of averment, see New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer, 648.

60 Ontario State Bank v. Tibbits, 80 Cal. 68, 22 Pac. 66. See Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451. Compare Labory v. Orphan Asylum, 97 Cal. 270, 32 Pac. 231; Mora v. Murphy, 83 Cal. 12, 23 Pac. 63.

61 South Yuba etc. Water Co. v. Rosa, 80 Cal. 333, 22 Pac. 222. The provisions of section 299 of the Civil Code do not apply to or include foreign corporations. Id.

62 Northup v. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879; Sly v. Palo Alto Gold Min. Co., 28 Wash. 485, 68 Pac. 871.

63 San Diego Gas Co. v. Frame, 148 Cal. 252, 82 Pac. 1049.

64 Miller v. Pine Min. Co., 3 Idaho, 493, 35 Am. St. Rep. 289, 31 Pac. 803.

count of a complaint against a corporation.[65] And in an action to enforce the forfeiture of a corporate franchise on account of non-user and mis-user, the complaint must specifically allege that the defendant has a legal existence as a corporation.[66] Where the complaint alleges that the defendant is a corporation organized and existing under the laws of the state, and the only answer of the corporation is a general denial, it cannot afterwards complain that there was no affirmative proof of its corporate existence;[67] but the words "a corporation" appearing in a title of a case after the name of plaintiff, are descriptive of plaintiff, and cannot be construed to be an allegation of incorporation.[68]

§ 3479. **Collateral attack on corporate existence.**—Where the plaintiff enters into a contract with a defendant by a corporate name, and afterwards sues it as such corporation, the general rule established by the weight of authority is that the defendant is estopped to deny its corporate existence.[69] The Civil Code of California, which provides a general law for the formation of corporations, has enacted that "if a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, . . . its corporate power shall cease. . . . The due incorporation of any company, claiming in good faith to be a corporation under this part, and doing business as such, or its

65 Loup v. California Southern R. R. Co., 63 Cal. 99. See People v. Central Pacific R. R. Co., 83 Cal. 393, 23 Pac. 303.

66 People v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92. Compare People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

67 Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463; Jones v. Pacific Dredging Co., 9 Idaho, 186, 72 Pac. 956.

68 Boyce v. Augusta Camp No. 7429 M. W. A., 14 Okla. 642, 78 Pac. 322.

69 California Cured Fruit Assoc. v. Stelling, 141 Cal. 713, 75 Pac. 320; Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238; National Ins. Co. v. Bowman, 60 Mo. 252; Farmers' etc. Ins. Co. v. Needles, 52 Mo. 17; Congregational Soc. v. Perry, 6 N. H. 164, 25 Am. Dec. 455; Henriques v. Dutch West India Co., 2 Ld. Raym. 1535; People v. Ravenswood Turnpike Co., 20 Barb. 518; Connecticut Bank v. Smith, 17 How. Pr. 487; All Saints' Church v. Lovett, 1 Hall, 213; Ryan v. Vanlandingham, 7 Ind. 416; Brookville etc. Turnpike Co. v. McCarty, 8 Ind. 392, 65 Am. Dec. 768; Tar River Nav. Co. v. Neal, 10 N. C. (3 Hawks,) 520; Worcester Med. Inst. v. Harding, 11 Cush. 285; Snider etc. Co. v. Troy, 91 Ala. 224, 8 South. 658, 24 Am. St. Rep. 887, 11 L. R. A. 515; Gunther v. New Orleans etc. Assoc., 40 La. Ann. 776, 5 South. 65, 8 Am. St. Rep. 554, 2 L. R. A. 118. But

right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney-general."[70] The general rule thus reduced to statutory form in California has been adopted in many of the states, and may be considered as the correct statement of the law on this subject.[71] Where it appears from the articles of incorporation of a corporation that it is duly organized and existing under the laws of the state, its charter cannot be attacked in a collateral proceeding.[72]

In a California case,[72a] the court said: "This provision does not go to the extent of precluding a private person from denying the existence *de jure* or *de facto* of an alleged corporation. It cannot be true that the mere allegation that a party is a corporation puts the question whether it is such a corporation beyond the reach of inquiry in a suit with a private person. It must be a corporation either *de jure* or *de facto*, or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action brought by a corporation, that the plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation. . . . It is not contemplated that the allegation that the company was duly organized should put the fact beyond dispute and dispense with all evidence. The statute furnishes a rule of evidence. It is declared that the due incorporation of any company shall not be inquired into collaterally in any private suit, etc., in a certain case; that is, when the company claims in good faith to be a corporation under the laws of the state, and is

see, contra, Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51.

[70] Cal. Civ. Code, § 358; San Diego Co. Gas Co. v. Frame, 137 Cal. 441, 70 Pac. 295; Grand Rapids Furniture Co. v. Grand Hotel etc. Co., 11 Wyo. 128, 70 Pac. 838, 72 Pac. 687.

[71] Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 355; Dannebroge Min. Co. v. Allment, 26 Cal. 286; Stockton etc. Road Co. v. Stockton etc. R. R. Co., 45 Cal. 680; Bakersfield T. H. Assoc. v. Chester, 55 Cal. 98; Hughes v. Bank of Somerset, 5 Litt. 45; Scarsburg Turnpike Co. v. Cutler, 6 Vt. 315; Tar River Nav. Co. v. Neal, 10 N. C. (3 Hawks,) 520; Palmer v. Lawrence, 3 Sandf. 161; Brookville etc. Turnpike Co. v. McCarty, 8 Ind. 392, 65 Am. Dec. 768; John v. Farmers' Bank, 2 Blackf. 367, 20 Am. Dec. 119; Trumbull Mut. Fire Ins. Co. v. Horner, 17 Ohio, 407; Rice v. Rock Island etc. R. R. Co., 21 Ill. 93; Tarbell v. Page, 24 Ill. 46.

[72] Union Pacific R. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564.

[72a] Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 355.

doing business as such corporation. The alleged corporation must claim in good faith that it is such a corporation; and then its due incorporation cannot be inquired into collaterally. To say that the 'due incorporation' cannot be inquired into collaterally, does not mean that no inquiry can be made as to whether it is a corporation. Many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed, or some of them may have been entirely omitted, and the rule of the statute is, that such irregular or defective performance shall not defeat the incorporation when drawn in question collaterally. The omission of the names and number of the first trustees from the articles of association, the failure to file a duplicate of the articles of association with the secretary of state, an incorrect statement of the length of the road, and omission of the statement of the principal place of business, and many other irregularities of the kind mentioned,[72b] or the insufficient acknowledgment of the articles of incorporation,[73] are irregularities that will not defeat the corporation when its organization is collaterally called in question. A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure* in an action between the corporation and a private person."[74]

§ 3480. **Incorporation inferred, and how proved.**—Where, in an action brought against the directors of a corporation, facts are stated in the complaint which show that the defendants became a body corporate, no special averment to that effect is necessary. The fact of incorporation is, then, an inference of law.[75] Proof of the fact of incorporation may be made by evidence of the charter or general act, or by organization and user.[76] Evidence that an alleged corporation is a *de facto* corporation is sufficient proof of its corporate existence to sustain a prosecution against its treasurer for the embezzlement of its funds.[77] While

72b Spring Valley Water Works v. San Francisco, 22 Cal. 440.

73 Dannebroge Min. Co. v. Allment, 26 Cal. 286.

74 See, also, People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; Martin v. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368.

75 Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4620.

76 Waterville Mfg. Co. v. Bryan, 14 Barb. 182; Stoddard v. Onondaga Annual Conference, 12 Barb. 573.

77 People v. Ward, 134 Cal. 301, 66 Pac. 372; Goodale Lumber Co. v. Shaw, 41 Or. 544, 69 Pac. 546; United States Mortg. Co. v. McClure, 42 Or. 190, 70 Pac. 543.

the law provides that certified copies of certain instruments shall be *prima facie* evidence of the facts therein stated, there is no provision excluding other proof of the existence of a corporation, and proof of its *de facto* existence under the name alleged in the information is admissible.[78]

§ 3481. Contracts made for, but not in name of, corporation. —A corporation is recognized in law by its corporate name, and must sue and be sued by such name, under which it transacts its business.[79] The directors of a corporation are its chosen representatives, and constitute the corporation for all purposes of dealing with others. What they do as the representatives of the corporation, the corporation itself is deemed to do; and the manifested motives and intentions of such directors, when a material fact is in issue, are to be imputed to the corporation.[80]

As a corporation can contract only through the instrumentality of its chosen representatives, it follows that a corporation is the proper party plaintiff in an action founded on a contract made for its benefit, and the misnomer of a corporation in a grant, obligation, or other written contract does not prevent a recovery thereon by or against the corporation in its true name, provided its identity is sufficiently averred and proved.[81] Thus a contract not under seal, signed by the agents of a corporation, and showing upon its face that the agents intended to contract for the corporation, and not for themselves, may be declared upon as the contract of the corporation.[82] And where a deed is made to a corporation by a name varying from its true name, it may sue in its true name, and aver that the defendants made the deed to it by the name mentioned in the deed; and an allegation that the defendants acknowledged themselves to be bound unto the plaintiff by the description of, etc., is equivalent to such an averment.[83] So, also, an obligation given to the corporation, which is in terms payable to its agents or directors, is properly described,

78 State v. Pittam, 32 Wash. 137, 72 Pac. 1042; Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 Pac. 901.

79 Curtiss v. Murry, 26 Cal. 633; King v. Randlett, 33 Cal. 318; Bundy v. Birdsall, 29 Barb. 31.

80 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

81 Melledge v. Boston Iron Co., 5 Cush. 158, 176, 51 Am. Dec. 59; Minot v. Curtis, 7 Mass. 444; Medway Cotton Mfg. Co. v. Adams, 10 Mass. 360; Commercial Bank v. French, 21 Pick. 486, 32 Am. Dec. 280; Lowell v. Morse, 1 Mete. 473; Charitable Assoc. v. Baldwin, 1 Mete. 359.

82 Many v. Beekman Iron Co., 9 Paige, 188.

83 New York African Society v. Varick, 13 Johns. 38.

in declaring on it, as given to the corporation, by the name and description of the directors, etc.[84]

In California, in an action on a note executed by the defendant, payable to the "board of trustees of the Sonoma Academy, or their successors in office," and which specified that "no change in the name, character, or management of the said academy" should affect the liability of the payor, the complaint of the "Cumberland College" was held sufficient, which stated that the plaintiff was a corporation, and the same institution of learning formerly known as the "Sonoma Academy," that the academy was, after its establishment, changed to "Cumberland College," and that the note was the property of the plaintiff.[85] Upon the same principle, in an *assumpsit* against a bank, an averment that the defendant "promised through its president and cashier." without alleging their authority, is sufficient, as the bank could not have promised except through its agents duly authorized.[86]

At the common law, the officers of a corporation are not liable personally on a promissory note of the corporation,[87] and are not proper parties defendant to an action on a mere money demand against the corporation, except where statutes authorize suits against them.[88] In certain actions of an equitable character, where the members of a corporation are authorized to bring an action on behalf of the corporation, the complaint must allege that the officers whose duty it is to sue have been requested to institute proceedings for that purpose, and have refused to do so.[89] Where an obligation is executed to two corporations jointly, they may sue thereon jointly.[90] Under an allegation in a complaint for the foreclosure of a mortgage of due authority of corporate agents to execute the mortgage, proof of subsequent ratification is admissible, as it is equivalent to an original authority.[91] The omission in a complaint and proceedings upon attachment against a corporation defendant of the word "company" from its corporate name does not affect the attachment lien, and the

84 Bayley v. Onondaga Ins. Co., 6 Hill, 476, 41 Am. Dec. 759.

85 Cumberland College v. Ish, 22 Cal. 641.

86 Bank of Metropolis v. Guttschlick, 14 Pet. 19, 10 L. Ed. 335.

87 Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64.

88 Brahe v. Pythagoras Assoc., 4 Duer, 658.

89 Vanderbilt v. Garrison, 3 Abb. Pr. 361; House v. Cooper, 16 How. Pr. 292; 3 Pomeroy's Eq. Jur., § 1095.

90 Gathwright v. Calloway Co., 10 Mo. 663.

91 Seal v. Puget Sound Loan etc. Co., 5 Wash. 422, 32 Pac. 214.

error is waived by an appearance and answer of the corporation in its true name without objection.[92]

§ 3482. Corporation's liability for libel, slander, and malicious prosecution.—In California, it is held that a corporation has the power to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages by the person of and concerning whom the words are composed and published.[93] And on the same principle, in an action for a libel published by a corporation, acting through its directors in the discharge of their office, the malice of the directors is the malice of the corporation.[94] Where the officers of a corporation, who wielded the whole executive power, participate in and direct all that is done in the commission of a tort, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation, and it may be compelled to respond in punitive damages.[95] Conversely, a corporation may maintain an action for libel on it as such, for words affecting its business or property, if special damages be alleged and proved.[96] In Missouri, however, it has been held that an action for malicious prosecution, slander, false imprisonment, or assault and battery, cannot be maintained against a corporation aggregate, but must be brought against the individuals implicated personally.[97]

Where the evidence showed that the chief executive officials of a corporation either did or authorized all the acts constituting a tort, instructions regarding the liability of the corporation for punitive damages must be interpreted accordingly, and are not to be deemed erroneous because they may be broad enough to

92 Hammond v. Starr, 79 Cal. 556, 21 Pac. 971. As to sufficiency of complaint in action against an unincorporated endowment association, see Rebut v. Legion of the West, 96 Cal. 661, 31 Pac. 1118.

93 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672. See, also, Missouri etc. R. R. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280; Howe's Machine Co. v. Souder, 58 Ga. 64; Evening Journal Assoc. v. McDermott, 44 N. J. L. 431, 43 Am. Rep. 392; Fogg v. Boston etc. Corp. 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109.

94 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Philadelphia etc. R. R. Co. v. Quigley, 21 How. 204, 16 L. Ed. 73; Allen v. News Pub. Co., 81 Wis. 120, 50 N. W. 1093.

95 Bingham v. Lipman, Wolfe & Co., 40 Or. 363, 67 Pac. 98.

96 Shoe & Leather Bank v. Thompson, 18 Abb. Pr. 413; State v. Boogher, 3 Mo. App. 442.

97 Childs v. Bank of Missouri, 17 Mo. 213. That it is now held otherwise in Missouri, see Boogher v. Life Assoc., 75 Mo. 319, 42 Am. Rep. 413; Johnson v. St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293.

make the corporation liable in such damages for the acts of any of its officials regardless of rank.[98]

§ 3483. **Corporate existence, when commences.**—Under the general laws, and by statute, the word "person," in its legal signification, is intended to include artificial as well as natural persons.[99] Under the laws of California, corporations have a legal existence from the date of issuance of the certificate of the secretary of state showing that a copy of the articles of incorporation, as required, has been filed in his office.[100]

§ 3484. **Verification by corporation.**—When a corporation is a party, the verification of the pleading may be made by any officer thereof,[101] such as the manager,[102] and, in some states, by an agent or attorney thereof.[103] And this includes municipal as well as private corporations.[104] When the state, or any county thereof, or any officer of the state, or of any county thereof, in his official capacity is plaintiff, the complaint need not be verified.[105]

§ 3485. **Allegation of residence.**—In New York, in an action against a foreign corporation brought in the superior court of the city of New York, where the complaint states a cause of action of which the court has jurisdiction, it is unnecessary to aver that the plaintiff resides within the city of New York,[106] or that the defendant transacts its business or keeps an office within the city.[107]

§ 3486. **Liability of directors of turnpike company.**—In California, the directors of a corporation formed for the construction of plank or turnpike roads are not personally liable under the act creating such corporations on a contract made by them, which

98 Bingham v. Lipman, Wolfe & Co., 40 Or. 363, 67 Pac. 98.

99 Douglas v. Pacific Mail etc. Co., 4 Cal. 304; Cal. Code Civ. Proc., § 17.

100 Mokelumne Hill Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Cal. Civ. Code, § 296.

101 Cal. Code Civ. Proc., § 446; N. Y. Code, § 157; Ariz. Code Proc., § 55; Idaho Rev. Codes, § 4199.

102 Stockton Lumber Co. v. Blodget, 3 Cal. App. 94, 84 Pac. 441.

103 Oregon B. & C. Codes, § 82; Or. Decis. 79. See Macauley v. Printing Co., 14 Abb. N. C. 316.

104 Hixon v. George, 18 Kan. 253.

105 Cal. Code Civ. Proc., § 446.

106 Spencer v. Rogers Locomotive Works, 17 Abb. Pr. 110, 8 Bosw. 612.

107 Corn Exchange Bank v. Western Transportation Co., 15 Abb. Pr. 319,

by its terms binds the corporation, unless the stockholders have adopted by-laws, and the same have been filed in the recorder's office, and the contract is made in violation of the by-laws.[108]

§ 3487. Stockholder's liability for assessments, how enforced. —The liability of a stockholder for a valid assessment may be enforced by an action at law, upon his promise, express or implied, to pay the same, although the corporation is authorized to sell the delinquent shares of its stockholders for non-payment of assessments. The remedy of sale given to the corporation, under such circumstances, is merely cumulative, and may be waived by the corporation.[109] The statute of limitations does not commence to run against an action to enforce the liability of corporate stockholders on unpaid stock, under section 332 (subd. 1) of the California Civil Code, until the levy of an assessment.[110] Under section 333 of the same code, providing that no assessment must be levied while any portion of a previous one remains unpaid, unless the power of the corporation has been exercised for its collection, where a stockholder paid a previous assessment by offsetting his fraudulent salary as president, a subsequent assessment was void, as such offsetting was not a payment.[111] In some of the states, however, the remedy, in the first instance, is by a sale of the stock.

note; Koenig v. Nott, 2 Hilt. 323, 8 Abb. Pr. 384.

108 Hall v. Crandall, 29 Cal. 568, 89 Am. Dec. 64. See Blanchard v. Kaull, 44 Cal. 440.

109 Selma etc. R. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Worcester Turnpike Co. v. Willard, 5 Mass. 80, 4 Am. Dec. 39; Instone v. Frankfort Bridge Co., 2 Bibb. 576, 5 Am. Dec. 638; Taunton Turnpike Co. v. Whiting, 10 Mass. 327, 6 Am. Dec. 124; Goshen etc. Turnpike Road v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Conn. etc. R. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Troy etc. R. R. Co. v. Kerr, 17 Barb. 581; Northern R. R. Co. v. Miller, 10 Barb. 260; Eastern Plankroad Co. v. Vaughan, 20 Barb. 155; Spear v. Crawford, 14 Wend. 20, 28 Am. Dec. 513; Troy etc. R. R. Co. v. McChesney, 21 Wend. 296; Dayton v. Borst, 31 N. Y. 435; Carlisle v. Cahawba etc. R. R. Co., 4 Ala. 70; Rockville etc. Road v. Maxwell, 2 Cranch C. C. 451, Fed. Cas. No. 11985; Delaware etc. Canal Co. v. Sansom, 1 Binn. 70; Kirksey v. Florida etc. Road Co., 7 Fla. 23, 68 Am. Dec. 426; Inglis v. Great Northern Ry. Co., 1 Macq. 112; South Bay etc. Co. v. Gray, 30 Me. 547; Mann v. Cooke, 20 Conn. 178; Raymond v. Caton, 24 Ill. 123; City Hotel v. Dickinson, 6 Gray, 586. That the justices' courts in California have jurisdiction over actions to collect unpaid assessments, the liability therefor being founded on contract, see Alpers v. Superior Court (Cal.) 4 Pac. 504, 3 West Coast Rep. 326; Arroyo Ditch Co. v. Superior Court, 92 Cal. 47, 27 Am. St. Rep. 91, 28 Pac. 54.

110 Union Sav. Bank v. Leiter, 145 Cal. 696, 79 Pac. 441.

111 Strouse v. Sylvester, 134 Cal. xx, 66 Pac. 660.

In California, it has been decided that the stockholders of mining corporations organized under the laws of California incur no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payments of the debts of the company, the nominal par value of their shares; that unless stockholders of a corporation have subscribed for stock, or are the successors of subscribers, assessments levied on their stock can be enforced only by the sale of their shares, and that the provisions of the code defining the personal liability of stockholders only apply where, from the terms of the stockholder's subscription, such liability was incurred.[112] Where the par value of corporate stock was one hundred dollars per share, for which there was no written subscription, but the incorporators agreed orally before the incorporation that they were to purchase the stock for twenty dollars per share, fully paid, which was done, such stockholders are liable for the unpaid balance to creditors of the corporation after its insolvency, they being deemed subscribers, and not purchasers, no formal agreement, in writing or otherwise, to pay the par value of the stock being necessary, but their ownership of the stock fixing their liability.[113] In such state, also, it has been held that corporations organized and existing under the provisions of the code have authority to levy and collect assessments on stock for which the subscription price has been fully paid.[114]

§ 3488. **Averment of assessments, how made.**—In an action to collect an assessment, the complaint must aver a proper assessment, and state how it was ordered, so as to make it conform to the charter and by-laws or general act under which the corporation was organized.[115] Where a corporation becomes insolvent, and ceases to act under its charter, so that the prescribed mode of making assessments cannot be complied with, the debt will be considered as due without further demand.[116] But in an action brought by the receiver of an insolvent corporation, to recover

112 In re South Mountain Con. M. Co., 7 Sawy. 30, 5 Fed. 403.

113 Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728.

114 Santa Cruz R. R. Co. v. Spreckels, 65 Cal. 193, 3 Pac. 661, 802; Green v. Abietine Medical Co., 96 Cal. 322, 31 Pac. 100. See Sparks v. Lower Payette Ditch Co., 3 Idaho, 306, 29 Pac. 134.

115 Gebhart v. Junction R. R. Co., 12 Ind. 484; Atlantic etc. Ins. Co. v. Young, 38 N. H. 451, 75 Am. Dec. 200.

116 Henry v. Vermillion etc. R. R. Co., 17 Ohio, 187.

on a stock subscription, which provided that after twenty per cent had been paid the balance should be subject to the call of the directors, as they may be instructed by a majority of the stockholders, the complaint must show, by alleging losses or otherwise, the necessity for an assessment, and a call made on the stockholders.[117]

§ 3489. Averments in actions on stock subscription.—A corporation may, its charter permitting, dispose of its assets as it sees fit while it is a going concern; and if during that time it has collected the just demands arising from stock subscriptions, and in good faith disposed of the proceeds, no trust arises with reference to such subscriptions or their proceeds any more than in case of any other asset passing through its hands. Unpaid subscriptions for capital stock become impressed with a trust in favor of creditors only when the corporation is insolvent.[118] Where the par value of corporate stock was one hundred dollars per share, for which there was no written subscription, but the incorporators agreed orally before the incorporation that they were to purchase the stock for twenty dollars per share, fully paid, which was done, such stockholders are liable for the unpaid balance to creditors of the corporation after its insolvency, they being deemed subscribers, and not purchasers, no formal agreement in writing or otherwise, to pay the par value of the stock being necessary, but their ownership of stock fixing their liability.[119] Where stock is issued by directors for property taken at an overvaluation, it is competent at the instance of creditors, to compel the stockholder to respond for the difference between the actual value of such property and the par value of the stock.[120] A complaint on a subscription to be paid as assessed must aver a proper assessment.[121] Where the general law or

117 Chandler v. Keith, 42 Iowa, 99.

118 Macbeth v. Banfield, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

119 Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728.

120 Macbeth v. Banfield, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

121 Gebhart v. Junction R. R. Co., 12 Ind. 484. For a form of complaint under the statutes of New York, see Poughkeepsie Plankroad Co. v. Griffin, 21 Barb. 454; Oswego etc. Plankroad Co. v. Rust, 5 How. Pr. 390; Dutchess Cotton Mfg. Co. v. Davis, 14 Johns. 238, 7 Am. Dec. 459; First Baptist Soc. v. Rapalee, 16 Wend. 605; Buffalo etc. R. R. Co. v. Cary, 26 N. Y. 75; Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51, note 58.

charter under which the corporation was organized requires the whole or a certain part of the stock to be subscribed before the corporation can act, a complaint to collect an individual subscription must allege that such conditions have been complied with.[122] If there has been a different agreement between the subscribers, this rule does not apply.[123] Where the subscription was conditional, an allegation of the performance of the condition is essential. Under the code, it would seem that an allegation that the plaintiff had performed all the conditions on his part, is sufficient.[124] If the action is to recover the entire amount of the subscription, the complaint should allege a tender of the stock, or a readiness and willingness on the part of the corporation to deliver it to the defendant, where such acts are not conditions precedent.[125] In conformity with the practice of some of the states, the complaint must contain a copy of the subscription paper.[126] The company may assign its right to recover subscriptions,[127] but in such case the complaint, in an action by the assignee, must aver the assignment.[128] An action against the subscriber of stock upon his subscription, according to its terms, is not an action under the California statute [129] to recover assessments upon the subscribed capital stock, and the complaint need not aver an equal demand upon all of the subscribers, nor show a liability to an assessment under the statute, and any averments in regard to assessment or calls by the corporation upon the subscribers to its stock may be disregarded as surplusage.[130] In an action by the receiver of an insolvent corporation to recover upon unpaid subscriptions to its stock, the complaint does not

122 Jewett v. Valley Ry. Co., 34 Ohio St. 601; Topeka Bridge Co. v. Cummings, 3 Kan. 55; Fry v. Lexington etc. R. R. Co., 2 Metc. (Ky.) 314; Livesey v. Omaha Hotel, 5 Neb. 50.

123 Emmitt v. Springfield etc. R. R. Co., 31 Ohio St. 23; Lail v. Mt. Sterling Coal Co., 13 Bush. 32.

124 Trott v. Sarchett, 10 Ohio St. 241; Cal. Code Civ. Proc., § 457; Ohio Rev. Stats., § 5091. See McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.

125 St. Paul etc. Ry. Co. v. Robbins, 23 Minn. 439; James v. C. H. & D. R. R. Co., 2 Disn., 261; Minneapolis Harvester Works v. Libby, 24 Minn. 327.

126 Hudson v. Plankroad Co., 4 G. Greene, 152; Stockton v. Creager, 51 Ind. 262. But see Van Riper v. American Cent. Ins. Co., 60 Ind. 123.

127 Downie v. Hoover, 12 Wis. 174, 78 Am. Dec. 730; James v. C. H. & D. R. R. Co., 2 Disn. 261; Trott v. Sarchett, 10 Ohio St. 241; Marietta etc. R. R. Co. v. Elliott, 10 Ohio St. 57.

128 Minneapolis Harvester Works v. Libby, 24 Minn. 327.

129 Cal. Civ. Code, § 332.

130 Marysville Electric etc. Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

state a cause of action under the Washington statute,[131] if it fails to allege that the defendant had notice of the call for assessments upon his stock, made by the receiver under the order of the court.[132] A complaint upon a subscription to the stock of a proposed corporation which does not show upon its face that the articles of incorporation failed to state that the defendant was a subscriber to its stock is not liable to a general demurrer upon that ground.[133]

Where the secretary of a corporation testified that a person applied to have the shares of a stockholder transferred to a third person, saying that the stockholders had transferred such stock, but showed no authority from such third person to act, and there was no evidence that such third person ever accepted or consented to the transfer, which was never in fact made on the books, there was not such a transfer as would exempt the stockholders from liability for unpaid subscription after insolvency of the corporation.[134] Where defendant transferred her shares to an insolvent for the purpose of avoiding a stock liability, and he transferred the stock to another, who was also insolvent, the fact that defendant had no knowledge of the financial condition of such subsequent transferee did not exonerate her from liability on the stock.[135]

§ 3490. **Separate subscriptions.** — Where a defendant subscribed in his own name for fifty shares of railroad stock, and at the same time subscribed for fifty more, signing his own name again, adding thereto the letters "Exr.," to indicate that he took the additional fifty shares for an estate for which he was executor, it was held that these were separate contracts, upon which separate actions would lie, and that the pendency of an action to enforce payment of the first subscription formed no sufficient ground for abating the action to enforce the second subscription.[136] And where one guarantees the payment of a subscription, the subscriber and the guarantor may be sued in the same

131 Gen. Stats., § 1507.

132 Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089.

133 Marysville Electric etc. Co. v. Johnson, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126.

134 Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728.

135 People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

136 Erie etc. R. R. Co. v. Patrick, 2 Keyes, 256.

action.[137] A release of the guarantor, however, will not discharge the subscriber, as their liabilities are several.[138]

§ 3491. **Actions by religious corporations.**—Religious corporations may sue for subscription.[139] Trustees of such corporations must first establish their right, before they can use the corporate name.[140] Before the court can take notice of the regulations of particular religious denominations, or their nature or effect, their existence should be properly averred and proved as matter of fact.[141]

§ 3492. **Consideration for subscription.**—The general rule is settled by weight of authority, although there are many cases which seem to hold the contrary doctrine, that merely signing a subscription paper which has been signed by others for the purpose of raising funds for the accomplishment of a public object is not sufficient to render a subscriber liable. The reason of this rule is the want of consideration for the promise. If, however, the subscription paper contains a request to those who represent the object for which the subscription is made to do an act, or incur any expense, or submit to any inconvenience, and on the strength thereof such act is done, and expense or inconvenience incurred, this request and performance have uniformly been held to be a sufficient consideration to support the promise made in the subscription paper.[142]

§ 3493. **Suits to recover subscriptions.**—If subscriptions in aid of a college are made to a finance committee, and pass by operation of law to a corporation afterwards formed, the com-

137 Neil v. Trustees, 31 Ohio St. 15.

138 Deming v. Trustees, 31 Ohio St. 41.

139 Dansville Seminary v. Welch, 38 Barb. 221.

140 North Baptist Church v. Parker, 36 Barb. 171.

141 Youngs v. Ransom, 31 Barb. 49.

142 Farmington Academy v. Allen, 14 Mass. 172, 7 Am. Dec. 201; Phillips Limerick Academy v. Davis, 11 Mass. 113, 6 Am. Dec. 162; Trustees v. Garvey, 53 Ill. 401, 5 Am. Dec. 51; Bridgewater Academy v. Gilbert, 2 Pick. 579, 13 Am. Dec. 457, and note; McClure v. Wilson, 43 Ill. 356; Philomath College v. Hartless, 6 Or. 158, 25 Am. Rep. 510; Hamilton College v. Stewart, 1 N. Y. 581; Howard v. Williams, 2 Pick. 80; Barnes v. Perine, 12 N. Y. 18; McAuley v. Billenger, 20 Johns. 89; Thompson v. Mercer M. Co., 40 Ill. 379; Ohio Wes. Female College v. Higgins, 16 Ohio St. 20; Troy Academy v. Nelson, 24 Vt. 189; Gittings v. Mayhew, 6 Md. 113; Phipps v. Jones, 20 Pa. St. 260, 59 Am. Dec. 708; Wilson v. Baptist Ed. Soc., 10 Barb. 309; Galt's Exr. v. Swain, 9 Gratt. 633, 60 Am. Dec. 311; L'Amoreux v. Gould, 7 N. Y.

plaint in an action by the corporation to recover a subscription should aver that fact.[143]

An action for money due a church on a verbal contract with the trustees should be brought in the name of the corporation, and not in the name of the trustees.[144] The designated agent to whom a subscription for stock in a corporation to be formed is payable may sue therefor in his own name as the trustee of an express trust. He is the trustee of the subscribers to collect the subscription, and is not the trustee of the corporation in any sense.[145] Property of a religious corporation is held in trust for its members; but a majority of the members have no right or power to divert the property to the use of another and different church, and one member may sue for the benefit of himself and all other members of the association to prevent wrongful exchange of creed or denomination and diversion of property.[146]

§ 3494. Corporate character must be alleged.—It is an indispensable allegation, in an action brought by a corporation, that it is a corporation, and it results from the logic of pleading that the opposite party may deny the allegation. A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure*, in an action between it and a private person.[147] In an action to charge a defendant as a municipal corporation, in Iowa, it is sufficient to aver that the defendant is a city; and the same allegation has been held adequate in Ohio.[148] Where municipal corporations are divided into certain classes, in proportion to population, and it is sought to charge a defendant as belonging to one of such classes, an averment to that effect is necessary.[149] And a complaint against a municipal corporation existing under a new charter and name, for work and labor done for the same town under a former charter and name, must aver that the new corporation is liable for the debts of the old.[150]

349, 57 Am. Dec. 524; Foxcroft Academy v. Favor, 4 Greenl. 382.

143 Christian College v. Hadley, 49 Cal. 347.

144 Barnes v. Perine, 9 Barb. 202; Leftwick v. Thornton, 18 Iowa, 56.

145 West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

146 Baker v. Ducker, 79 Cal. 365, 21 Pac. 764; Watson v. Jones, 13 Wall. (80 U. S.) 679, 20 L. Ed. 666.

147 Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 354.

148 Stier v. City of Oskaloosa, 41 Iowa, 353; Mitchell v. Treasurer of Franklin County, 25 Ohio St. 143. See Carroll v. Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431.

149 Bolton v. Cleveland, 35 Ohio St. 319.

150 Lyles v. Common Council of Alexandria, 1 Cranch C. C. 473, Fed.

§ 3495. Parties to actions against municipal corporations.—In actions by or against municipal corporations, towns, counties, public boards, and other official bodies, who are the proper parties to bring the action, or against whom it should be brought, depends largely upon the local laws of each state, to which laws and the decisions thereunder reference must be had for the determination of the proper form of action. In California, counties are corporations, but not the people thereof, and as such are required to sue or to be sued in the name of the county.[151] A city which is a devisee in a will is not required to allege in a complaint filed to compel the trustee to execute the trust that the corporation counsel was authorized to commence the suit, since his authority will be presumed.[152] Thus, an action on a recognizance given in a criminal case should be brought in the name of the county.[153] So, also, in an action for the recovery of money from a defaulting treasurer;[154] or to recover money belonging to the general county fund.[155] So an action may be maintained in the name of the county to recover upon a note payable to the county, to the use of the state school fund.[156] For similar reasons the county is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail;[157] or to conduct proceedings by *mandamus* against county officials.[158] So, also, boards of supervisors cannot be sued in their official character in ordinary common-law actions for claims against the public, county, or village, without express statutory provision.[159] And in an action to enjoin a board of supervisors, when it consists of three members, at least two must be joined as defendants. But an action to abate a nuisance caused by the obstruction of a public highway must be brought in the name of the road overseer, and not in the name of the county.[160]

Cas. No. 8623; Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604.

151 Cal. Pol. Code, §§ 4000-4003; Price v. Sacramento County, 6 Cal. 254; People v. Supervisors, 28 Cal. 431; Smith v. Meyers, 15 Cal. 33; Placer County v. Astin, 8 Cal. 305.

152 City of Seattle v. McDonald, 26 Wash. 98, 66 Pac. 145.

153 Mendocino County v. Lamar, 30 Cal. 627.

154 Mendocino County v. Morris, 32 Cal. 145.

155 Solano County v. Neville, 27 Cal. 468; Sharp v. Contra Costa County, 34 Cal. 284.

156 Barry County v. McGlothlin, 19 Mo. 307.

157 Smith v. Myers, 15 Cal. 33.

158 Calaveras County v. Brockway, 30 Cal. 325.

159 Hastings v. San Francisco, 18 Cal. 49; Hedges v. Dam, 72 Cal. 520, 14 Pac. 133.

160 San Benito County v. Whitesides, 51 Cal. 416.

In California, an action against a county may be commenced and tried in such county unless such action is between counties, in which case it may be commenced and tried in any county not a party thereto.[161]

The right to sue a county is purely statutory, and the mode of instituting the suit must be strictly followed.[162] The Colorado statute[163] provides that the name in which a county shall sue or be sued shall be "The Board of County Commissioners of the County of . . ."[164] In New York, actions against counties should be brought against the supervisors as an official board, and not against them individually.[165]

§ 3496. Averment of demand and presentation of claim.— Whenever it is provided by statute that, in order to render liable a municipal corporation, the plaintiff's demand or claim must be presented to a certain board or official for allowance, the complaint must contain an allegation of the facts constituting such presentation, and aver the rejection of the demand or claim.[166] Unless such facts are alleged, the presentation cannot be proved.[167] In California, it is provided by statute that "the board of supervisors must not hear or consider any claim in favor of an individual against the county, unless an account properly made out, giving all the items of the claim, duly verified as to its correctness, and that the amount claimed is justly due, is presented to the board within a year after the last item of the account accrued."[168] In the construction of this statute it has been held that a substantial compliance therewith is essential

161 Cal. Code Civ. Proc., § 394.

162 Monroe County v. Flynt, 80 Ga. 489, 6 S. E. 173; Mayrhofer v. Board of Education, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. 646; Whitaker v. County of Tuolumne, 96 Cal. 100, 30 Pac. 1016; Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240.

163 Gen. Stats., 1883, § 525.

164 See Board of Commrs. of Phillips County v. Churning, 4 Colo. App. 321, 35 Pac. 918.

165 Wild v. Supervisors, 9 How. Pr. 315; People v. Supervisors, 24 How. Pr. 119.

166 Ernst v. Kunkle, 5 Ohio St. 523; Russell v. Mayor, 1 Daly, 263; Ellissen v. Halleck, 6 Cal. 386; McCann v. Sierra County, 7 Cal. 123. And see Reining v. City of Buffalo, 102 N. Y. 308, 6 N. E. 792; Jones v. Minneapolis, 31 Minn. 230, 17 N. W. 377; Thompson v. Milwaukee, 69 Wis. 492, 34 N. W. 402; First Nat. Bank of Billings v. Custer County, 7 Mont. 464, 17 Pac. 551.

167 City of Atchison v. King, 9 Kan. 550. But see Jaquish v. Town of Ithaca, 36 Wis. 108, where it is held that the failure to make such allegations must be taken advantage of by the defendant, either by motion for nonsuit or otherwise.

168 Cal. Pol. Code, § 4075; Stats. 1907, p. 379. See Rhoda v. Alameda County, 69 Cal. 523, 11 Pac. 57.

to render the county liable after the rejection of the claim;[169] and that the plaintiff must aver all the facts required by the statute in relation to the presentation of his claim and its rejection by the board of supervisors. Merely averring that the claim has been duly presented and rejected is not enough.[170] That a claim for damages has been presented to the city council of Los Angeles in accordance with its charter is a necessary allegation in a suit therefor against the city.[171] Where, in an action by a husband and wife against a city for injuries to the wife, the complaint alleges that plaintiffs filed their claim against the city, it is not error to receive the claim in evidence, though verified by the wife alone.[172] Where, however, a board of supervisors entered into a contract for the erection of a county jail, the work to be paid for in installments, on the certificate of the architect, an account giving the sum total of an installment, without "all the items of a claim," is sufficient.[173] The necessity of presentation of a claim is not confined to causes of action arising out of contract, but includes cases arising from torts,[174] and a money judgment.[175] Unless a claim is presented within the time limited, it is barred, and the supervisors have no power to allow it afterwards,[176] nor has the legislature power to legalize an illegal claim, so as to make it binding on the county.[177] After the final action of the board in rejecting a claim, the plaintiff must bring action thereon within six months, or his demand is barred, and failure for ninety days after filing to act upon the claim is equivalent to a rejection.[178] Limitations do not run in favor of municipal or quasi-municipal corporations upon its outstanding obligations, evidenced by warrants, until the corporation has provided a fund out of which payment of the sum may be made.[179] It is not requisite to present a claim for damages, caused by negligence of the city authorities in the repairing or

169 Babcock v. Goodrich, 47 Cal. 488.

170 Rhoda v. Alameda County, 52 Cal. 350.

171 Bigelow v. City of Los Angeles, 141 Cal. 503, 75 Pac. 111; City of Philomath v. Ingle, 41 Or. 289, 68 Pac. 803.

172 McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74.

173 Babcock v. Goodrich, 47 Cal. 488.

174 Price v. County of Sacramento, 6 Cal. 254; McCann v. Sierra County, 7 Cal. 121.

175 Alden v. County of Alameda, 43 Cal. 270.

176 Carroll v. Siebenthaler, 37 Cal. 193.

177 Domingos v. County of Sacramento, 51 Cal. 608.

178 Cal. Pol. Code, § 4078; Stats. 1907, p. 381.

179 Barnes v. Turner, 14 Okla. 284,

construction of a sewer, to the board of supervisors of the city and county of San Francisco before instituting a suit upon it.[180] No action can be maintained against the city of New York till such claim has been presented to the controller.[181]

§ 3497. **Venue.**—A transitory action must be brought against a domestic corporation either in the county where it has its principal place of business or in the county where the cause of action arose.[182] Corporation defendants have no absolute right to a change of venue on account of residence.[183] If an individual and a corporation are jointly liable for the same act, the action may properly be brought in the county of the residence of the individual.[184]

§ 3498. **Venue and limitations.**—An action against a county may be commenced and tried in such county, unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto. Whenever an action is brought by a county or city against residents of another county or city, or a corporation doing business in the latter, the action must be, on motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff is a county, and other than that in which the plaintiff is situated, if the plaintiff is a city.[185] A municipal corporation has a legal right to avail itself of the defense of the statute of limitations the same as any other litigant.[186] An action against a municipal corporation for damages or injuries to property caused by a mob or riot must be brought within one year.[187] Where a

78 Pac. 108; Board of Commrs. of Greer County v. Clarke & Courts, 12 Okla. 197, 70 Pac. 206.

180 Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; Lehn v. City etc. of San Francisco, 66 Cal. 76, 4 Pac. 965; Bloom v. City etc. San Francisco, 64 Cal. 503, 3 Pac. 129.

181 Laws New York 1860, ch. 379, § 2; Russell v. Mayor of New York, 1 Daly, 263. For somewhat similar statutes as to the necessary demand before a suit against the cities of Brooklyn and Buffalo, respectively, see Howell v. City of Buffalo, 15 N. Y. 512; Hart v. City of Brooklyn, 36 Barb. 226.

182 Winter v. Union Packing Co. 51 Or. 97, 93 Pac. 930; Cal. Const., art. 12, § 16.

183 Eddy v. Houghton, 6 Cal. App. 85, 91 Pac. 397; but see Grocers' etc. Union v. Kern County Land Co., 150 Cal. 466, 89 Pac. 120.

184 Harrison v. Carbon Timber Co., 14 Wyo. 246, 83 Pac. 215.

185 Cal. Code Civ. Proc., § 394.

186 Bates v. Gregory, 89 Cal. 387, 26 Pac. 891.

187 Cal. Code Civ. Proc., § 340.

contractor undertakes to make certain improvements, to be paid for by assessment of benefits, and the supreme court decides that there can be no valid assessment of benefits levied under the ordinance authorizing and under which the improvement was made, if the city is personally liable therefor at all, an action to recover therefor will be barred in three years after the date of such decision of the supreme court.[188] Any action to contest an assessment levied by the legislative body of any municipality under the terms of the "local improvement act of 1901" must be commenced within thirty days after the entry upon the minutes of such legislative body of the resolution provided for in section 8 of said "local improvement act of 1901."[189]

§ 3499. **Service of process on public corporation.**—The summons must be served by delivering a copy thereof as follows: If the suit is against a county, city, or town—to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof; if against a corporation formed under the laws of this state—to the president or other head of the corporation, secretary, cashier, or managing agent thereof; or if against a foreign corporation, or a non-resident joint-stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state—to such agent, cashier, or secretary.[190]

§ 3500. **Trespass.**—A complaint not averring that trespass was willful, but only that entry and cutting of timber was wrongful and without plaintiff's leave, does not come within the purview of the code section, and, although stating an action good at common law entitling plaintiff to recover his actual damages, does not state a case in which damages can be trebled.[191]

§ 3501. **Instances of necessary allegations in actions by or against municipal corporations—Authority to enact by-laws.**—The authority to enact may be averred in general terms. Where a corporation is authorized to pass a by-law if they find it necessary, and they pass it, a declaration on the by-law need not aver

188 Connolly v. City etc. of San Francisco (Cal.), 33 Pac. 1109.

189 Cal. Code Civ. Proc., § 349.

190 Cal. Code Civ. Proc., § 411.

191 Cal. Code Civ. Proc., § 733; Barnes v. Jones, 51 Cal. 303; Stewart v. Sefton, 108 Cal. 197, 41 Pac. 293.

the necessity.[192] It is sufficient in pleading to aver generally that a contract sought to be enforced is in violation of some municipal ordinance or enactment. When such ordinance or enactment is founded upon a statute, it is not necessary to plead the statute specially.[193]

§ 3502. Actions on bonds and contracts.—In a suit against a municipal corporation on its bonds, where the complaint sets out the bonds, avers the defendant to be a corporation, that the corporation made and delivered the bonds on good consideration, under an ordinance passed by the proper agents of the corporation, having authority for that purpose, and that defendant has failed to pay, it was held that the complaint shows, *prima facie*, a liability on the part of the corporation; and it was not necessary to set out the ordinance, nor the vote or other proceedings of the corporate agents, or give any further description of the agents of the corporation.[194]

Where a suit is brought on a contract made by a city, where the laws regulating it require the consent of two thirds of its electors to validate debts for the borrowed money, such consent need not be averred on the plaintiff's part. If with such sanction the debt would be obligatory, the sanction will, primarily, be presumed. Its non-existence, if it does not exist, is matter of defense, to be shown by the defendant.[195] In an action against the city of St. Paul, on a contract for grading streets, it is not necessary to allege that an estimate of the expenses was filed by the commissioner, nor that the contract was made with the lowest bidder.[196]

The municipal improvement-bond act of 1901 expressly empowers the authorities to issue bonds for "street work."[197] The charter of San Francisco providing that, except as otherwise provided in the charter, every ordinance for the purchase of land of more than fifty thousand dollars in value must be submitted to the electors at the election next ensuing after the adoption of

192 Stuyvesant v. Mayor etc. of New York, 7 Cow. 588.

193 Beman v. Tugnot, 5 Sandf. 153. See County of San Diego v. Seifert, 97 Cal. 594, 32 Pac. 644.

194 Underhill v. Trustees of the City of Sonora, 17 Cal. 172. As to actions on bonds issued in aid of public improvements, see Toothaker v. City of Boulder, 13 Colo. 219, 22 Pac. 468.

195 Gelpcke v. City of Dubuque, 1 Wall. 221, 17 L. Ed. 531.

196 Nash v. St. Paul, 8 Minn. 172.

197 Town of Mill Valley v. House 142 Cal. 698, 76 Pac. 658.

such ordinance, and section 29 of article 16, providing that when the supervisors shall determine that the public interest requires the acquisition of any land or lands, the acquisition of which, in addition to other expenses, will exceed the income and revenue provided for in any one year, they must by ordinance submit a proposition to incur a bonded indebtedness for such purpose to the electors, at a special election to be held for that purpose, are *in pari materia*.[198] Where a town council has power to pass an ordinance by a two-thirds vote over the mayor's veto, a contract for the sale of bonds of the town, otherwise legal, made by the council by a two-thirds vote, after a veto by the mayor, is valid, assuming that the mayor had the veto power in such case.[199]

In California, a complaint which alleges that the plaintiff, as a justice of the peace, performed services at the request of the district attorney for the county, in cases wherein the people of the state were plaintiffs, to the amount of thirty-two hundred dollars, and that defendant thereby became and is liable to pay the said sum, does not state facts sufficient to constitute a cause of action against said county.[200] A complaint in an action against a county for damages sustained by the location of a public highway over plaintiff's land, laid out under the act of 1861, fails to state a cause of action unless it avers that the plaintiff had attempted to come to an agreement with the board of supervisors as to the amount of damages sustained, and could not agree with the board as to such amount.[201] So a complaint in an action against a city for a sum of money claimed to be due from it on account of the construction of a sewer, which alleges a promise of the city to pay for the same, but shows that the contract under which the work was done did not bind the city to pay for the work, and expressly provided that the city should not be liable for any portion of the expense incurred in the performance of the contract, except as otherwise provided in the act of March 18, 1885,[202] and does not allege that in order to collect sufficient money to pay for the cost of the work it would have been necessary to assess any lot, properly chargeable with such cost, an amount exceeding one half of its last assessed valuation, does

198 Law v. City etc. of San Francisco, 144 Cal. 384, 77 Pac. 1014.

199 Diefenderfer v. State, 13 Wyo. 387, 30 Pac. 667.

200 Miner v. Solano County, 26 Cal. 115.

201 Lincoln v. Colusa County, 28 Cal. 662.

202 Stats. 1885, p. 147.

not state a cause of action. An allegation in such complaint that a sum specified is "chargeable to the city, and payable out of its municipal treasury," where the other facts alleged do not disclose a liability upon the part of the city, is to be regarded simply as a statement of a conclusion of law, which is not admitted by a demurrer.[203] In an action against a county for services in doing the county printing, a complaint is demurrable for want of facts when it does not allege that the work was done by the plaintiff, or that he had any interest in the newspaper in which the official notices were published.[204] And in an action by a publisher to recover from a county compensation for the publication of matter furnished to him by a county clerk under a statute requiring county clerks to cause certain matters to be published in one or more county newspapers, a complaint which states that such matter was furnished by the county clerk for publication, but does not aver that such clerk caused it to be published, or that the newspaper named in the complaint was designated by the clerk as the one in which publication was to be made, is bad on demurrer.[205] A complaint against the board of education of a city, averring that at the defendant's request the plaintiff made and delivered to the defendant certain plans and specifications for public school buildings, to be built in the city, which were duly approved, accepted, and adopted by the defendant, and that the services of the plaintiff in preparing and furnishing the same to the defendant were reasonably worth a certain stated sum of money, payment of which the plaintiff has demanded of the defendant, and that the defendant has paid no part thereof, states a sufficient cause of action upon an implied *assumpsit*. The common counts may be used in an action of *assumpsit* against a municipal corporation.[206]

§ 3503. **Actions for medical care of sick.**—A complaint in an action against a county to recover for medical care and treatment of sick persons fails to state a cause of action if it does not aver that the sick persons treated were indigent persons and residents of the county.[207]

203 McBean v. City of San Bernardino, 96 Cal. 183, 31 Pac. 49.

204 Rathbun v. Thurston County, 8 Wash. 238, 35 Pac. 1102.

205 Becker v. Commissioners etc., 11 Mont. 490, 28 Pac. 1116.

206 Brown v. Board of Education of City of Pomona, 103 Cal. 531, 37 Pac. 503.

207 Johnson v. Santa Clara County, 28 Cal. 545.

When in an action against a corporation for the value of medical services rendered its employees, the petition did not allege any promise by the defendant, or any fact by which the law would imply a promise, it was held defective. An allegation that the services were rendered at the instance and request of the agent of the defendant is not an averment that they were rendered at the instance and request of the defendant.[208]

§ 3504. Action for injury by negligence.—The person or persons upon whom the law may impose the duty either to repair a defect or to guard the public from an excavation, embankment, or grading, and also the officer or officers through whose official neglect such defect continues, are jointly and severally liable for injuries occasioned by their negligence.[209] Incorporated cities are not liable, in California, for injuries sustained by private individuals caused by the neglect of the city officers in keeping its streets in repair, unless made so liable by the acts under which they are incorporated;[210] nor for personal injuries caused by the acts of its officers at a public hospital;[211] nor for injuries to property occasioned by the overflow of water by reason of the abutment of a bridge being wrongfully built by the road overseer in the channel of the stream.[212] In Illinois, if a city, in the exercise of its right to grade highways, creates a stagnant pond on a man's land close to his house, it is liable in damages.[213] A municipal corporation has the same right to maintain an action to prevent the unlawful obstruction of a street as would the people of the state, and has the right to maintain an action to abate a public nuisance upon a public square.[214]

Where two municipalities are jointly chargeable with the duty of maintaining a bridge or highway, an action will lie

208 Wells v. Pacific R. R. Co., 35 Mo. 164.

209 Eustace v. Jahns, 38 Cal. 3; Barrett v. Railroad Co., 45 N. Y. 631.

210 Winbigler v. City of Los Angeles, 45 Cal. 36; O'Hale v. Sacramento, 48 Cal. 212; Krause v. Sacramento, 48 Cal. 221; Huffman v. San Joaquin County, 21 Cal. 426; Tranter v. City of Sacramento, 61 Cal. 271. In what cases an action lies against a village for neglect to maintain sidewalks, see Herrington v. Village of Corning, 51 Barb. 396.

211 Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151.

212 Crowell v. Sonoma County, 25 Cal. 313.

213 Nevins v. City of Peoria, 41 Ill. 503, 89 Am. Dec. 392.

214 People v. Holladay, 93 Cal 241, 27 Am. St. Rep. 186, 29 Pac. 54.

against either on an allegation of the joint duty and joint negligence.[215]

§ 3505. **Corporation as executor, trustee, etc.**—If a corporation brings suit or makes application to the courts to act as executor, administrator, guardian, assignee, receiver, depositary, or trustee, it must allege a compliance with the statutory requirements as to receiving authority to qualify and act as such by its articles of incorporation, issued to it by the secretary of state, upon affidavit of the first directors of such corporation to the effect that at least two hundred thousand dollars of the capital stock has been subscribed and paid in to a person named in such affidavit, for the benefit of such corporation.[216]

Corporations organized to act as executors, administrators, trustees, etc., incorporate under the general incorporation laws, but must have a paid-up capital of two hundred and fifty thousand dollars, of which one hundred thousand dollars must be paid in, in cash. The usual oaths required shall be taken for said corporation, by the president, secretary, manager, or trust officer of the corporation, and the corporation shall be liable to the full amount of its capital stock. The corporation receives proper compensation, but not in excess of the fees allowed to natural persons.[217]

§ 3506. **Writ to suspend business of corporation.**—An injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding.[218]

After proper publication of notice, and upon five days' notice to the persons who have filed objections, or without further notice if no objections have been filed, the court may hear an application for voluntary dissolution; and the decree of dissolution must thereafter be filed in the office of secretary of state.[219]

§ 3507. **Change of name.**—A certified copy of the decree of the court, changing the name of a corporation, shall within

215 Hawxhurst v. Mayor etc., 15 Abb. (N. C.) 181.

216 Cal. Civ. Code, § 290a, as amended 1909; Stats. 1909, p. 300.

217 Cal. Stats. 1907, p. 562.

218 Cal. Code Civ. Proc., § 531.

219 Cal. Code Civ. Proc., § 1232.

thirty days from the date of such decree be filed in the office of the secretary of state,[220] and in the office of county clerk of each county in which the original articles of incorporation, or certified copies thereof, are required by law to be filed.[221]

§ 3508. **Dissolution by surrender by trustees.**—That the trustees have the power to surrender the franchise, after its debts are paid, is a proposition which admits of no doubt; and if they should do so without having made any disposition of its property, there being no stockholders or creditors, the personal property of the corporation would vest in the state.[222] Chancellor Kent says: "The better opinion seems to be that a corporation aggregate may surrender, and in that way dissolve itself; but then the surrender must be accepted by the government, and be made by some solemn act to render it complete.[223]

§ 3509. **Trustees, appointment of, in California.**—Upon the dissolution of a corporation, unless other persons are appointed by the legislature, or by a court of competent authority, the directors or managers of the corporation shall be trustees of the creditors and stockholders.[224]

§ 3510. **Powers and liabilities of trustees.**—In California, the trustees or receivers of a dissolved corporation are jointly and severally responsible to the creditors and stockholders to the extent of the property and effects of the corporation in their hands.[225] Such trustees or receivers may sue and recover the debts and property of the dissolved corporation. And where a common-law receiver sues in the name of the corporation, the declaration must aver that the suit is brought by the direction of the receiver.[226] So when a receiver is appointed, and the assets are assigned to him, even if the corporation is still in being.[227]

220 Cal. Code Civ. Proc., § 1279.

221 Cal. Civ. Code, § 300a, as amended 1909; Stats. 1909, p. 973.

222 2 Kent. Com. 386; Angell & Ames on Corporations, § 195; People v. President etc. College of California, 38 Cal. 166.

223 Id.; Sullivan v. Triunfo M. Co., 39 Cal. 459.

224 Cal. Civ. Code, § 400. See Clark v. City of San Francisco, 53 Cal. 306.

225 Cal. Civ. Code, § 400.

226 Bank of Niagara v. Johnson, 8 Wend. 645.

227 Bank of Lyons v. Demmon, Hill & D. Supp. 398.

The appointment of a receiver is an exception, to be made only in cases of neglect of duty or abuse of power by the directors, when required for the protection of the rights of a creditor or stockholder.[228]

§ 3511. **Grounds of action.**—The complaint may set forth several grounds, on either of which the defendants would be liable.[229] The statutes of the several states differ so much in regard to the acts which make directors or trustees of corporations individually liable to stockholders or creditors, and the grounds under each statute are so numerous, that we can only give the foregoing as suggestions to the pleader, who will, in all cases, be required to examine with great care the statute under which he is pleading.[229] The directors of a mining corporation, which has become indebted by acquiring its property incumbered with debt and by making permanent improvements thereon, are not liable to the corporation merely because they declare and pay dividends out of the net proceeds of the mine without first paying the whole of such debts, and are not thereby guilty of any infraction of section 309 of the California Civil Code, prohibiting the making of dividends except from the surplus profits arising from the business of the corporation.[230] But when two different statutes severally authorize an action upon a certain state of facts, the arising of such state of facts constitutes but one cause of action; and a plaintiff must elect which statute he will proceed under; and cannot complain upon the same facts in two counts, one under each statute.[231]

§ 3512. **Nature of stockholder's liability for corporate debts.**—At the common law, a stockholder was not individually liable for the debts of the corporation, but such liability has been very generally created by statute in the several states. These statutes differ largely in their details, and in the extent of the liability which they impose upon the stockholder. Some of the statutes make a stockholder liable for the debts of the corporation to the extent of the value of the stock held by him. By others the liability is limited to such a proportion of the

228 Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627. See State Investment etc. Co. v. Superior Court, 101 Cal. 135, 35 Pac. 549.

229 Durant v. Gardner, 10 Abb. Pr. 445, 19 How. Pr. 94.

230 Excelsior etc. Min. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

231 Sipperly v. Troy etc. R. R. Co.,

debt or claim against the corporation contracted during the time he was a stockholder as the amount of stock or shares owned by the stockholder bears to the whole of the subscribed capital stock or shares. This latter is the limit of the liability imposed on the stockholders in California.[232] In that state the constitution leaves to the legislature the power to regulate the liabilities of stockholders, and to prescribe the rule by which each stockholder's proportion of such debts shall be ascertained.[233] The stockholder's liability in California is not that of a mere surety. It is primary and original. And the identical act which casts the liability on the corporation also casts it on the stockholder.[234] Consequently, such liability is not contingent upon a recovery against the corporation,[235] and is not affected by a suspension of the remedy against the corporation.[236] Where, however, the corporate debt is satisfied in part, there is also a *pro tanto* discharge of the liability of the stockholders. Accordingly, in an action against a stockholder for his proportion of a corporation debt which had been partially satisfied by a sale of mortgaged and pledged property, the defendant is only liable for his proportion of indebtedness after the payments have been credited.[237] Such liability is not in the nature of a penalty or forfeiture, but a liability arising from contract.[238] It is not, therefore, barred by the provision of the statute of limitations providing that an action to enforce a penalty or forfeiture must be brought within two years after the cause of action accrued.[239]

9 How. Pr. 83; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

232 Const. 1879, art. 12, § 3; Cal. Civ. Code, § 322; French v. Teschemaker, 24 Cal. 543; Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265; Bidwell v. Babcock, 87 Cal. 29, 25 Pac. 752.

233 Larrabee v. Baldwin, 35 Cal. 155; French v. Teschemaker, 24 Cal. 539.

234 Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427; Young v. Rosenbaum, 39 Cal. 646; Sonoma Valley Bank v. Hill, 59 Cal. 107.

235 Davidson v. Rankin, 34 Cal. 503; Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62.

236 Young v. Rosenbaum, 39 Cal. 646; Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427.

237 San Jose Savings Bank v. Pharis, 58 Cal. 380.

238 Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Norris v. Wrenschall, 34 Md. 492; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797; Erickson v. Nesmith, 46 N. H. 371; Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 1031; Kennedy v. California Sav. Bank, 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846. As to the nature of this liability, see, also, Coffee v. Williams, 103 Cal. 550, 37 Pac. 504; Hunt v. Ward, 99 Cal. 612, 37 Am. St. Rep. 87, 34 Pac. 335; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

239 Green v. Beckman, 59 Cal. 545; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Hyman v. Coleman, 82 Cal. 650, 16 Am. St. Rep. 178, 23 Pac. 62.

In New York, however, it has been held that the liability of stockholders is in general an original liability, and an action against them is upon a contract made by them in a qualified corporate capacity. Where, however, the corporate capacity is not thus qualified, the members or officers are not thus liable as original or principal debtors, by reason of something imposed on them by the statute, and the action must be upon the statute to recover a debt in the nature of a forfeiture.[240] The present constitution of California limits the stockholder's liability to debts contracted by the corporation while he occupied such relation.[241] This is also the construction that the courts had put upon the old constitution, in holding that a stockholder did not render himself liable by becoming such for the pre-existing debts of the corporation; that to determine how much any one stockholder is liable to pay to a corporate creditor, it is necessary to find the whole amount of the indebtedness of the corporation created while he was a stockholder; and any one creditor whose demand is large enough may have judgment for the stockholder's proportion of such corporate debts.[242] Such liability is not released by the stockholder subsequently assigning his stock.[243]

In New York, in conformity with the statutory provisions, any separate creditor may maintain an action for the enforcement of his demand, although it seems to be conceded in that state that a joint action may be brought against all the stockholders, for the benefit of all the creditors.[244] In Ohio, on the other hand, it is provided by statute, in conformity with prior decisions, that the action must be against all the stockholders, and by all the creditors, or by one suing in behalf of all;[245] while in Missouri it has been held that if the statute makes the stockholders liable for an amount equal to the amount of their stock, their liability is not joint, but each must be sued separately.[246] If the state is a holder of stock, it cannot be made a party defendant.[247] And where any stockholder pays his proportion of any debt due from the corporation, incurred while

240 Bird v. Hayden, 2 Abb. Pr. (N. S.) 61.

241 Const., art. 12, § 3.

242 Larrabee v. Baldwin, 35 Cal. 156.

243 Cal. Civ. Code, § 322.

244 Weeks v. Love, 50 N. Y. 568; Mann v. Pentz, 3 N. Y. 415; Garrison v. Howe, 17 N. Y. 458; Briggs v. Penniman, 8 Cow. 387, 18 Am. Dec. 454; Osgood v. Laytin, 5 Abb. Pr. (N. S.) 1.

245 Rev. Stats., § 3260; Umsted v. Buskirk, 17 Ohio St. 113.

246 Perry v. Turner, 55 Mo. 418.

247 Miers v. Zanesville etc. Turnpike Co., 11 Ohio, 273.

he was a stockholder, he is relieved from any further liability for such debt; and if an action has been brought against him upon such debt, it must be dismissed as to him.[248] One stockholder, however, cannot recover against another a debt due him from the company.[249] And, as between the corporation and its stockholders, the corporate property is the fund primarily liable for the corporate debts.[250]

§ 3513. **The same — Essential averments.** — An action to enforce the personal liability of stockholders is, in many cases, to be considered as founded on that vestige of the relation of partnership between the members of the company which the charter or general act failed to remove.[251] The individual liability of a stockholder for his proportionate share is created by statute, within the meaning of section 338 of the California Code of Civil Procedure, requiring action on such a liability to be brought within three years after the cause of action accrues.[252] Creditors of a corporation cannot enforce the liability of stockholders for unpaid subscriptions to capital stock after the corporation's right to collect such subscriptions has become barred by the statute of limitations.[253] In such action, the complaint must show that the defendant was a stockholder at the time the debt was contracted,[254] and an averment to this effect in the words of the charter is sufficient;[255] otherwise, a judgment which has been rendered by default will be set aside.[256] So, also, the grounds on which they are individually liable must be shown.[257] And in pleading the amount of the stockholder's liability, it must be averred that such stockholder held an amount of stock equal to the amount for which he is sought to be held liable.[258]

248 Cal. Civ. Code, § 322; Larrabee v. Baldwin, 35 Cal. 156.

249 Bailey v. Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625.

250 Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427.

251 Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Conant v. Van Schaick, 24 Barb. 87; Bailey v. Bancker, 3 Hill, 188, 38 Am. Dec. 625; Witherhead v. Allen, 28 Barb. 661; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

252 Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939.

253 Hawkins v. Donnerberg, 40 Or. 97, 66 Pac. 691, 908.

254 Young v. New York etc. S. S. Co., 15 Abb. Pr. 69; Larrabee v. Baldwin, 35 Cal. 155. See Partridge v. Butler, 113 Cal. 326, 45 Pac. 678.

255 Freeland v. McCullough, 1 Denio, 414, 43 Am. Dec. 685.

256 Hooker v. Kilgour, 2 C. S. C. R. 550; Kearny v. Buttles, 1 Ohio St. 362.

257 Geery v. New York etc. S. S. Co., 12 Abb. Pr. 268.

258 Chambers v. Lewis, 16 Abb. Pr. 443.

It is not necessary, however, to aver that the corporation is insolvent.[259] Nor in an action to enforce a promissory note is it necessary to aver the facts showing for what the note was given.[260] In many of the states, before a creditor can proceed against a stockholder, he must have recovered judgment against the corporation, and the execution issued thereon must have been returned unsatisfied. Where such facts are necessary to fix the stockholder's liability, the complaint must allege their performance.[261] Where, however, the performance of such conditions precedent would plainly be of no avail, as where the corporation is insolvent, or in the hands of a receiver, or dissolved, the necessity of averring a recovery of judgment no longer exists, if the complaint contains other facts sufficient to excuse it.[262] Such rule does not prevail in California, as in that state the stockholder's liability is created at the same time as the liability against the corporation.[263] Although a stockholder is individually liable for debts contracted while he was a stockholder, yet a judgment recovered against the corporation while he is a stockholder, upon a contract entered into before he became such stockholder, is not a contract within the meaning of the act rendering such stockholder liable. And proof of a judgment against a corporation does not show when the debt was contracted.[264]

In California, the complaint must state the proportion which the stock owned by the defendant at the time the debt sued for was incurred bears to the whole subscribed stock at that time, or facts from which such proportion may be deduced; otherwise, it is insufficient.[265] It is incumbent upon the plaintiff to

259 Perkins v. Church, 31 Barb. 84; Davidson v. Rankin, 34 Cal. 503.

260 Gebhard v. Eastman, 7 Minn. 56.

261 Conant v. Van Schaick, 24 Barb. 87; Wright v. McCormack, 17 Ohio St. 86; Blake v. Hinkle, 10 Yerg. 218; Cowles v. Bartell, 2 West. Law Month. 41; Hays v. New Baltimore etc. Turnpike Co., 1 Handy, 281.

262 Shellington v. Howland, 53 N. Y. 371; Lovett v. Cornwell, 6 Wend. 369; People v. Bartlett, 3 Hill, 570; Loomis v. Tifft, 16 Barb. 541; Dryden v. Kellogg, 2 Mo. App. 87; State Savings Assoc. v. Kellogg, 52 Mo. 583; Paine v. Stewart, 33 Conn. 516; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Hetzel v. Tannehill Silver Min. Co., 4 Abb. N. C. 40; Warner v. Callender, 20 Ohio St. 190.

263 Davidson v. Rankin, 34 Cal. 503; Prince v. Lynch, 38 Cal. 528; 99 Am. Dec. 427; Cal. Civ. Code, § 322; Bailey v. Bancker, 3 Hill (N. Y.), 188, 38 Am. Dec. 625; Andrews v. Murray, 9 Abb. Pr. 8.

264 Larrabee v. Baldwin, 35 Cal. 156; Miller v. White, 50 N. Y. 137. But see Hastings v. Drew, 76 N. Y. 9; Corse v. Sandford, 14 Iowa, 235; Thayer v. New England etc. Print. Co., 108 Mass. 523; Milliken v. Whitehouse, 49 Me. 527; Tyng v. Clarke, 9 Hun, 269.

265 Bidwell v. Babcock, 87 Cal. 29,

prove the whole amount of the stock outstanding to enable the court to determine the liability.[266]

§ 3514. **Who liable as stockholders in such action.**—The Civil Code of California provides that not only shall those whose names appear on the books of the corporation be liable as stockholders, but also every equitable owner of stock, although the same appears on the books in the name of another; and also every person who has advanced the installments or purchase money on stock in the name of a minor; and also any guardian, or other trustee, who voluntarily invests any trust funds in the stock. The pledgee of stock is not liable as a stockholder within the meaning of such code. In corporations having no capital stock, each member is individually and personally liable for his proportion of the debts, and actions may be brought against him, either alone or jointly with other members, to enforce such liability. The liability of stockholders of foreign corporations doing business in California is the same as that of stockholders of domestic corporations.[267] Prior to the enactment of such statute it was held that one who never accepts, but refuses to accept, any stock in a corporation, is not a stockholder, even though the secretary enters his name in the books as such; and the stock-book of the corporation is not admissible in evidence in an action by a creditor of the corporation against one claimed to be a stockholder for the purpose of proving that he is such stockholder.[268] In Ohio, parties whose names are nominally on the corporation books, but who never were actually owners of stock, their contracts not having been fulfilled, are not liable as stockholders.[269]

Where shares of the stock of a corporation are transferred in pledge as collateral security for the indebtedness of a stockholder, the pledgee is not to be deemed a stockholder as respects personal liability for the indebtedness of the corporation.[270]

25 Pac. 752. See, also, as to sufficiency of complaint in such action, Winona Wagon Co. v. Bull, 108 Cal. 1, 40 Pac. 1077; Partridge v. Butler, 113 Cal. 326, 45 Pac. 678.

266 Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047.

267 Cal. Civ. Code, § 322.

268 Mudgett v. Horrell, 33 Cal. 25.

269 Wehrman v. Reakirt, 1 C. S. C. R. 230.

270 Borland v. Nevada Bank, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737. See Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

§ 3515. **Suit by creditors to reach unpaid subscriptions.**—A judgment creditor who has exhausted his legal remedies against a corporation may maintain an action against its stockholders to recover, for the benefit of all the creditors who may desire to come in and be made parties, the amount due upon unpaid subscriptions for stock, when the corporation neglects or refuses to collect such subscriptions.[271] Nor is this equitable remedy affected by any remedy which may be given creditors against stockholders by constitutions, charters, general acts of incorporation, or other statutes, unless it be taken away expressly or by necessary implication.[272] It is not necessary to make all the stockholders defendants in such action. Any individual stockholder may be sued for the amount of his unpaid subscription, and if he is required to pay more than his proportionate share of the debts of the corporation his remedy is against the other stockholders owing unpaid subscriptions for contribution.[273] The corporation should be made a party defendant, but is not an indispensable party, unless the object of the action is to secure an adjudication of the rights and liabilities of all the parties, and a final settlement of all the affairs of the company. And when the action is against a single stockholder, objection to the nonjoinder of the corporation is waived, if not made by demurrer or answer.[274] A complaint in such action, which alleges the existence of the judgment debt, the insolvency of the corporation, that the subscribers owe on their unpaid subscriptions, and that the execution issuing on the judgment has been returned wholly unsatisfied, but which does not show upon its face that there are any other creditors of the corporation, states a cause of action, although it does not state that the proceedings are for the benefit of all the creditors.[275] And where the complaint in an action of contribution to recover a stockholder's proportionate share of a corporate debt paid by the plaintiff, after sufficiently alleging the payment of the whole indebtedness by the plaintiff, adds as a conclusion from those facts, "that thereby all of the indebtedness of said corporation then subsisting" to the creditor, and all

271 Barnes v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776.

272 Harmon v. Page, 62 Cal. 448; Holmes v. Sherwood, 16 Fed. 725, 3 McCrary, 405.

273 Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

274 Potter v. Dear, 95 Cal. 578, 30 Pac. 777.

275 Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

claims and demands of the creditor, "were fully paid and extinguished," but does not allege that the debt of the defendant or of the other stockholders was "thereby extinguished," it is not liable to the objections that the allegations show that the debt of the corporation and of the stockholders was extinguished.[276]

A stockholder in an insolvent corporation cannot avoid his liability for an unpaid subscription upon stock held by him, by assigning it without consideration to an insolvent person.[277]

Where defendant transferred her shares to an insolvent for the purpose of avoiding a stock liability, and he transferred the stock to another, who was also insolvent, the fact that defendant had no knowledge of the financial condition of such subsequent transferee did not exonerate her from liability on the stock.[278] A transaction by which directors of a corporation receive property in exchange for capital stock may be impeached by creditors for fraud in law, a presumption of which arises from a gross overvaluation of property, the value of which is well known, or can be easily learned, as well as from fraud in fact, which must be established by affirmatively showing that the property was overvalued with the fraudulent intent of evading the law.[279] Where the secretary of a corporation testified that a person applied to have the shares of a stockholder transferred to a third person, saying that the stockholder had transferred such stock, but showed no authority from such third person to act, and there was no evidence that such third person ever accepted or consented to the transfer, which was never in fact made on the books, there was not such a transfer as would exempt the stockholder from liability for unpaid subscription after insolvency of the corporation.[280]

§ 3516. Suit by stockholder.—The interest of a stockholder, as such, entitles him to relief against a fraudulent judgment against it.[281] For a stockholder to sue for the corporation, there must appear some actual or contemplated act of the directors or man-

276 Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40.

277 National etc. Manufacturing Co. v. Story etc. Co., 111 Cal. 531, 44 Pac. 157.

278 People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 Pac. 858.

279 Macbeth v. Banfield, 45 Or. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

280 Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 67 Pac. 1057, 56 L. R. A. 728.

281 Paxton v. Heron, 41 Colo. 147, 124 Am. St. Rep. 123, 92 Pac. 15.

agers, or a majority of the stockholders, beyond their lawful power, or fraudulent.[282] Suit must be brought promptly upon discovery of a fraud making the acts of the corporation voidable.[283]

FORMS—CORPORATIONS.

§ 3517. Complaint by foreign corporation.

Form No. 945.

[TITLE.]

The L. M. Company,
Plaintiff,
v.
John Doe,
Defendant.

The plaintiff complains, and alleges:

I. That it is a corporation organized and existing under the laws of the state of Nevada, for the purpose of [here state the purpose], and is doing business as such in its said corporate name.

II. [State the cause of action.]

[DEMAND OF JUDGMENT.]

§ 3518. Verification by foreign corporation.

Form No. 946.

[VENUE.]

A. B., being duly sworn, says:

That he is the agent [or, attorney] for the L. M. Company, the corporation plaintiff [or, defendant] above named, which is a foreign corporation, created and existing under the laws of the state of . . ., [or, under the laws of the United States], and makes this affidavit in its behalf, and that the foregoing complaint [or other pleading] is true to the knowledge of deponent [except as to those matters therein stated on information and belief, and as to those matters he believes it to be true];

That the reason why this verification is not made by the party is that said party is a foreign corporation, and that deponent is

282 Clark v. Apex Gold Min. Co., 12 N. Mex. 416, 85 Pac. 968; Williams v. Erie Mountain Cons. Min. Co., 47 Wash. 360, 91 Pac. 1091.

283 Boldenweck v. Bullis, 40 Colo. 253, 90 Pac. 634.

such officer, and is acquainted with the facts. [If any allegations are made on information and belief, continue thus: and that the sources of deponent's information and the grounds of his belief are, etc.]

§ 3519. Complaint by or against domestic corporation.

Form No. 947.

[TITLE.]

The plaintiff complains, and alleges:

I. That it is a corporation organized and existing under the laws of this state, and as such doing business in its corporate name of [insert name of corporation].

[Or, That the defendant is a corporation created by and existing under the laws of this state.]

II. [State cause of action, etc.]

[DEMAND OF JUDGMENT.]

§ 3520. Complaint against corporations formed under the act in relation to roads and highways.

Form No. 948.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation created by and under the laws of this state, organized pursuant to an act of the legislature entitled [title of action in full], passed . . ., 19.., and the acts amendatory thereof and supplementary thereto.

II. [State a cause of action.]

[DEMAND OF JUDGMENT.]

§ 3521. By corporation on stock assessments.

Form No. 949.

[TITLE.]

The plaintiff complains, and alleges:

I. That in pursuance of an act of the legislature of the state of California, entitled "an act" [give the title of the act], passed . . ., 19.., and of the acts amendatory thereof and supplementary thereto, the above-named company was organized and formed into a corporation under the name of the . . . Company, and ever since its said organization has had its principal office and place of business at the city of . . .

II. That on the . . . day of . . ., 19.., at . . ., defendant and certain other persons, being desirous of associating themselves together for the purpose of constructing a toll-road [or state the actual purpose] from the village of R. to the village of S. in said county, in consideration thereof and of the mutual promises each to the other and of the benefits to be derived from being members of said association, made and subscribed a certain agreement in writing, as follows, to-wit:

[Copy subscription paper, with subscriber's names, and add]: and other persons whose names are here omitted.

III. That the said defendant did, at the time of subscribing said agreement, set opposite to his name thereto subscribed the number of ten shares, and that the par value of each share is fifty dollars, and that said defendant agreed to take and pay for the same.

IV. That afterwards, to-wit, on the . . . day of . . ., 19.., at a regular meeting of the trustees of said company, an assessment of five per cent of the par value of each share of the capital stock of the said corporation was duly levied; that at the time of the levy of such assessment, defendant was a subscriber to the capital stock of said corporation in the amount of . . . shares, of the par value of . . . dollars, and was the owner of such stock.

V. That afterwards, etc. [Allege the number of assessments defendant has failed to pay, each as above.]

VI. That the defendant had due notice of each of the said assessments, made by the trustees of said company as aforesaid, and that the same were duly published in the daily . . ., a newspaper printed and published in the city of . . ., for at least . . . days, and in every respect according to law.

VII. That the whole sum of . . . dollars is now due plaintiff from defendant thereon, and no part thereof has been paid.

[Demand of Judgment.]

§ 3522. Complaint by a corporation, on stock subscription.

Form No. 950.

[Title.]

The plaintiff complains, and alleges:

I. [Aver incorporation, as in No. 949.]

II. That in contemplation of the incorporation of these plaintiffs, and for the purpose of constructing, owning, and maintaining the [toll-road], then contemplated, the defendant, with others,

on the . . . day of . . ., 19.., at . . . became a subscriber to the stock of the said company by [severally] signing and delivering an agreement in writing, of which the following is a copy: [Copy subscription paper.]

III. That, among other persons, the defendant signed and executed said agreement, and set opposite to his name the sum of . . . dollars, which he thereby agreed to pay to said company.

IV. That after the defendant had thus subscribed, and on or about the . . . day of . . ., 19.., he subscribed to the articles of association of said company his name and his place of residence, to-wit, . . ., and the number of shares of stock taken by him, to-wit, . . . shares, amounting to . . . dollars, the shares of stock being . . . dollars each.

V. That the plaintiff, by its directors, on the . . . day of . . ., 19.., at . . ., tendered to the defendant the shares of stock, so subscribed for by him, and demanded the defendant to pay thereon the sum of . . ., agreeably to said subscription and the charter and by-laws of the company.

VI. That the plaintiff has performed all the conditions thereof on its part.

VII. That the defendant has not paid the said subscription, or any part thereof.

[Demand of Judgment.]

§ 3523. Complaint on subscription to expense of public object.

Form No. 951.

[Title.]

The plaintiff complains, and alleges:

I. [Aver incorporation.]

II. That the plaintiff, in the month of . . ., 19.., was erecting a building at . . ., for the purpose of public worship.

III. That the defendants and others requested the plaintiff to complete the same, and for the purpose of enabling the plaintiff to do so, they subscribed and agreed to pay to the plaintiff the sum of . . . dollars, in consideration of the premises, and of the like subscription and agreement of other persons.

IV. That upon the faith of said subscription the plaintiff proceeded with the erection of the building, and expended thereon large sums of money, and incurred large liabilities, and completed said building, and otherwise duly performed all the conditions on its part.

V. That the defendant has not paid said subscription, or any part thereof [except, etc.].

[DEMAND OF JUDGMENT.]

§ 3524. Complaint against municipal corporation.

Form No. 952.

[TITLE.]

A. B., Plaintiff,
v.
The County of . . ., Defendant.

The plaintiff complains, and alleges:

I. That the defendant is a municipal corporation, created by the laws of this state.

II. [State cause of action.]

III. That on the . . . day of . . ., at . . ., the plaintiff presented in writing the claim or demand hereinbefore set forth to the board of supervisors of the county of . . ., for allowance, and that they failed and refused to allow the same or any part thereof.

IV. That a copy of said claim as presented to the said board of supervisors is hereunto attached and made a part of this complaint.

V. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 3525. Complaint against county for temporarily guarding jail.

Form No. 953.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege defendant's corporate existence.]

II. That the plaintiff performed services for the said defendant in guarding the jail of said county, from the . . . day of . . ., 19.., to and including the . . . day of . . ., 19..

III. That the sheriff, with the assent, in writing, of the superior judge of said county, employed plaintiff to perform said service as a temporary guard for the protection of the county

jail, and for the safe-keeping of prisoners, and that said employment was necessary.

IV. That said sheriff at the time of employing said plaintiff promised plaintiff that the defendant would pay plaintiff for said services what they were reasonably worth, and that said services were reasonably worth the sum of . . . dollars.

V. [Allege presentation, rejection, and non-payment of claim as in preceding form.]

VI. [If there are other claims for similar services, performed at different dates, allege them as separate causes of action.]

[DEMAND OF JUDGMENT.]

§ 3526. Complaint by county.

Form No. 954.

[TITLE.]

The County of . . .,
Plaintiff,
v.
A. B.,
Defendant.

The plaintiff, a corporation, existing by [or under] the laws of this state, complains and alleges:

I. [State cause of action.]

[DEMAND OF JUDGMENT.]

§ 3527. Complaint against trustees of dissolved corporation for accounting.

Form No. 955.

[TITLE.]

The plaintiff, on behalf of himself, as well as of all other creditors of the . . . company who may come in and contribute to the expenses of this action, complains and alleges:

I. That the . . . company was incorporated on the . . . day of . . ., 19.., under the act entitled [title of act], passed . . ., 19.., and the acts amending the same.

II. [State cause of action.]

III. That on the . . . day of . . ., 19.., the said corporation was dissolved by the judgment of the . . . court, on that day duly given and made in a certain proceeding in said court then pending, wherein the people of the state of California, upon information of the attorney-general of said state, was plaintiff, and

the said corporation was defendant. [Or that it was dissolved on its own petition to the county judge, or otherwise, as the case may be.]

IV. That the defendants above named were, at and preceding the date of the dissolution of said corporation, the [trustees, directors, or managers, etc., according to the fact] of said corporation, and upon its said dissolution became the trustees of the creditors [or, stockholders] thereof.

V. That the defendants, as such trustees, have received a large amount of money and other property belonging to the said company, but have refused to pay the claim of the plaintiff.

Wherefore, the plaintiff demands judgment:

1. That the defendants account, under the direction of the court, for the property received by them, as aforesaid.

2. For the payment to him of . . . dollars, with interest from the . . . day of . . ., 19.., and costs, out of the funds in possession of the defendants, or which they may collect.

3. That the defendants, without delay, proceed to the discharge of the trusts devolved upon them in the premises.

§ 3528. Complaint against director of insurance company—Grounds of unlawful dividends and transfers of assets.

Form No. 956.

[TITLE.]

The plaintiff complains, and alleges:

I. That from the . . . day of . . ., 19.., to the . . . day of . . ., 19.., the . . . company was a corporation existing by virtue of the laws of this state, and authorized by law to make insurances.

II. That during the said time the said corporation made insurances for plaintiff, in the sum of . . . dollars, on two vessels, viz. . . . dollars on a vessel named the "Brother Jonathan," and . . . dollars on a vessel named the "Central America," both of which vessels became total losses, within the meaning of said policies of insurance, and during the voyages for which such insurances were made. And that the amounts of such insurance have not been paid.

III. That at a meeting of the board of trustees of said corporation, at which defendant was present, during the time aforesaid, the defendant with the other trustees made dividends to the stockholders of the said corporation to a large amount, to-

wit, to the sum of . . . dollars, which dividends were not made from the surplus profits arising from the business of said corporation.

IV. That at a meeting of the board of trustees of said corporation, at which the defendant was present, and when the said corporation was insolvent and in contemplation of insolvency, the defendant, with the other trustee, made conveyances, assignments, and transfers of the assets and property of said corporation, with the intent of giving a preference to particular creditors of said corporation over other creditors of said company.

V. That the plaintiff is, and was at the times of the aforesaid acts, a creditor of said corporation for the sum of . . . dollars, as aforesaid, and the defendant then was a trustee of said company.

VI. That in consequence of the wrongful acts and violations of law by the defendant, with the other directors of said corporation hereinbefore mentioned, the said corporation, prior to said . . . day of . . ., and while the plaintiff was such creditor, and the defendant such trustee, became, and now is, wholly insolvent; that plaintiff has sustained loss by reason thereof in the sum of . . . dollars.

[Demand of Judgment.]

§ 3529. Complaint against directors of incorporated company for making unlawful dividends, and distribution of stock, adapted to section 309 of the Civil Code of California—Naming the defendants as individuals, not as directors.

Form No. 957.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , and from that day until the . . . day of . . ., 19. . , the . . . company was a corporation existing under the laws of the state of California, and doing business as such, in its said corporate name.

II. That on the . . . day of . . ., 19. . , said . . . company made and delivered to the plaintiff its promissory note, of which the following is a copy [insert copy of note]; and that said promissory note remains wholly unpaid, and there is due to the plaintiff thereon the said sum of . . . dollars, and interest thereon from the . . . day of . . ., 19. . , at the rate of . . . per cent per annum, all in gold coin of the United States.

III. That the directors of the said corporation on the . . . day of . . ., 19.., and while the said corporation was so indebted to the plaintiff, made and declared a dividend to the stockholders thereof of . . . dollars per share, amounting in all to the sum of . . . dollars, and afterwards paid the dividend aforesaid to its stockholders aforesaid, and the plaintiff avers that said dividend was not made from the surplus profits arising from the business of said corporation.

IV. That on the . . . day of . . ., 19.., the said directors of said corporation divided among and paid the stockholders thereof, the whole of the capital stock of said corporation, to-wit, the sum of . . . dollars.

V. That the defendants, A. B., C. D., and E. F., and each of them, were, at and during all the times aforesaid, directors of said corporation, and assented to the making of said dividend, and the division and payment of said capital stock as aforesaid.

[Demand of Judgment.]

§ 3530. Complaint by individual creditor against individual stockholder.

Form No. 958.*

[Title.]

The plaintiff complains, and alleges:

I. That the . . . company is now, and since the . . . day of . . ., 19.., has been, a corporation existing under and by virtue of the laws of this state, for the purpose of mining for silver and other precious metals, and that the principal place of business of the said corporation is, and since the said . . . day of . . ., 19.., has been, in the city and county of San Francisco, and state of California.

II. That the capital stock of said . . . corporation is, and since the said . . . day of . . ., 19.., has been, limited to . . . shares, of the par value of . . . dollars per share, making a total capital of . . . dollars.

III. That the whole of said capital stock of said corporation was and is issued to and owned by various persons, who are now and have been such owners of said stock since the . . . day of . . ., 19.., and that the full amount thereof has been paid

* Paragraphs viii to xii inclusive may be omitted in California. See Civ. Code, § 322.

into said corporation by said stockholders, and that all amounts paid in by said stockholders have been expended, and that nothing now remains to pay the claims of the creditors of the said corporation, and that said corporation is insolvent.

IV. That on the . . . day of . . . , 19 . . , the said corporation gave its promissory note to one A. B., for the sum of . . . dollars, payable in gold coin, with interest at . . . per cent per month, a copy of which is hereby annexed, marked "Exhibit A."

V. That said note was afterwards indorsed to the plaintiff by the said A. B.

VI. That on the . . . day of . . . , 19 . . , at . . . , the defendant made its acceptance in writing for the sum of . . . dollars, in gold, with interest from date, also payable in gold, for supplies then furnished by the plaintiff to said corporation, at its special instance and request, and delivered the same to the plaintiff.

VII. That on the . . . day of . . . , 19 . . , at . . . , the defendant made its certain other acceptance in writing for the sum of . . . dollars, payable to the plaintiff, in gold coin, with interest at the rate of . . . per cent per month, from date, payable in gold coin, for supplies and money then and there furnished by the plaintiff to said corporation, at its special instance and request.

VIII. That on or about the . . . day of . . . , 19 . . , in the superior court, in and for the county of . . . , in this state, the plaintiff commenced an action against the said corporation, for the sum of . . . dollars principal and interest due upon said note and acceptances, and for costs and damages, all in gold coin.

IX. That afterwards, on the . . . day of . . . , 19 . . , personal service of summons and certified copy of complaint in said action was made on the said . . . company.

X. That afterwards, to-wit, on the . . . day of . . . , 19. . , judgment was rendered in the said action against the said company, the defendant therein, and in favor of this plaintiff, for the full amount of . . . dollars, in United States gold coin.

XI. That afterwards, to-wit, on the . . . day of . . . , 19. . , execution was issued in the said action upon said judgment by the clerk of the said court, and addressed to the sheriff of the said city and county of San Francisco, and which execution was thereupon delivered to said sheriff, and on the . . . day of . . . ,

19 . . , he returned the same wholly unsatisfied, and that no property could be found within the said county belonging to said . . . company.

XII. That the said . . . company has not paid the said judgment, and that it still remains in full force and effect unsatisfied, unreversed, and not appealed from; and that the plaintiff is the owner thereof.

XIII. That ever since the . . . day of . . . , 19 . . , and also at and during the time when the said debts and liabilities, for said moneys advanced and supplies furnished, accrued and were contracted and incurred by said corporation, and the said note given and acceptance made, the defendant was a stockholder in the said corporation to the amount of . . . shares of the capital stock of said corporation.

XIV. That the total amount of indebtedness of the said corporation is . . . dollars.

XV. That the proportion of said indebtedness, for which defendant is liable to plaintiff, is . . . dollars per share, in United States gold coin, amounting to the full sum of . . . dollars in gold coin, with interest at the rate of . . . per cent per month, and payable in gold coin, on . . . dollars of the above amount sued for, and interest at the rate of . . . per cent per month, in gold coin, upon the sum of . . . dollars, the remainder of the above amount sued for.

XVI. That although often requested, still defendant has failed, neglected, and refused to pay the same, or any part thereof.

Wherefore, plaintiff demands judgment against the defendant for the sum of . . . dollars in United States gold coin, and interest on the sum of . . . dollars, at the rate of . . . per cent per month, compounded monthly, payable in like gold coin, and interest on the sum of . . . dollars, at the rate of . . . per cent per month, in United States gold coin, and for costs of suit.

[Exhibit A annexed.]

§ 3531. The same—Shorter form.

Form No. 959.*

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the . . . company was a corporation created by and under the laws of this state,

* Paragraphs iii and iv may be omitted in California. See Civ. Code, § 322.

organized pursuant to an act entitled [title of act], passed . . . , 19 . . , and the acts amending the same, and supplementary thereto.

II. That on the . . . day of . . . , 19 . . , said company, by its agent duly authorized thereto, made its promissory note dated on that day, a copy of which is hereto annexed, and marked "Exhibit A."

III. That on the . . . day of . . . , 19 . . , in an action in the superior court, in and for the county of . . . , to recover the same from said company, judgment was rendered by said court against said company, in favor of the plaintiff for . . . dollars, being . . . dollars, the amount due thereon, with interest, amounting to . . . dollars, and costs.

IV. That execution thereon was thereafter issued against said company, and returned wholly unsatisfied.

V. That at the time said debt was contracted, the total number of shares of the capital stock of said corporation subscribed was . . . shares, and at that time the defendant was a stockholder of said company, holding stock therein to the amount of . . . shares; and that he still is such stockholder therein.

[Demand of Judgment.]

[Exhibit A annexed.]

§ 3532. Complaint in action by stockholder in interest of corporation, directors refusing to sue.

Form No. 960.

A. B.,
Plaintiff,
v.
The X. Y. Company, a corporation, C. D., E. F., and G. H., directors of said corporation, and M. N.,
Defendants.

The plaintiff, complaining of the defendants, alleges:

I. [Allege incorporation of the defendant corporation.]

II. That the plaintiff is a stockholder of the said corporation, owning and holding . . . shares of the capital stock thereof.

III. [Set forth cause of action against the defendant M. N. in favor of the corporation.]

IV. That the reason this action is not brought by said corporation itself is that the defendants C. D., E. F., and G. H., who constitute the board of directors of said corporation, have refused and neglected to bring or prosecute the same, though requested by this plaintiff so to do, on or about the . . . day of . . . , 19 . . .

[DEMAND OF JUDGMENT.]

§ 3533. Stipulation in action against corporation, on expiration of its charter, to continue in name of new corporation.

Form No. 961.

[TITLE.]

The act of incorporation by which the defendants, the president, directors, and company of the Bank of A. were incorporated, having expired by its own limitation since this action was commenced, and the Bank of A. having succeeded to the rights and liabilities of the defendants touching the subject-matter of this action:

It is therefore stipulated, that the action be continued against the Bank of A., without prejudice to the rights of either party on the merits, and that an order of the court may at any time be entered by either party to this effect.

[DATE.] [SIGNATURES.]

§ 3534. Complaint by corporation against legatees of a deceased stockholder.

Form No. 962.

[TITLE.]

The plaintiff complains, and alleges:

I. That said plaintiff is now, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the state of . . .

II. That at and prior to the making of the subscription to the capital stock of said plaintiff hereinafter mentioned, the articles of incorporation of said company were duly filed and recorded with the county clerk of the county of . . . , in which county said company is, and ever since its organization has been, located, and a duly verified copy of said articles duly filed with the secretary of state of the state of . . .

III. That in and by said articles the capital stock of said plaintiff is fixed at the sum of . . . dollars, divided into . . . shares, of . . . dollars each.

IV. That before the transaction of any business by the said corporation with persons other than its members, more than . . . per cent of its capital stock was duly subscribed in writing by sundry and divers persons, and more than . . . per cent of said capital stock was paid in cash by said subscribers.

V. That among other subscribers to the capital stock of said plaintiff company, one X. Y., now deceased, duly subscribed, on or about the . . . day of . . ., 19.., for . . . shares of such stock, of the face value of . . . dollars per share, and in and by such subscription agreed to pay . . . dollars on each share in cash, and the balance of such subscription as the same should be called by the plaintiff.

VI. That on or about the . . . day of . . ., 19.., said X. Y. died in the city and county of . . ., testate, being at the time of his death a resident of and freeholder in said county; that thereafter such proceedings were had in the matter of the estate of said X. Y., deceased, in the superior court of said county, that the last will of said deceased was duly probated, letters testamentary issued to the executors named in said will, the debts of said deceased and legacies provided for in said will fully paid, the accounts of the executors allowed, and final distribution made of the residue of said estate to the heirs of said deceased, in equal undivided shares, and said executors were fully discharged; that the final decree in said estate, and the final order of distribution therein, were duly made by said superior court on or about the . . . day of . . ., 19.., and that thereby all of the residue of said estate of X. Y., deceased, was duly assigned to his children, in equal undivided fifths, to-wit, [name the legatees, defendants], who were his heirs and the residuary legatees under said will; that the amount of the property bequeathed and left to said defendants by said last will of said X. Y., deceased, and the amount actually received by them from the estate of their said ancestor, as this plaintiff is informed and verily believes, exceeded the sum of . . . dollars.

VII. That subsequent to the death of said X. Y., and subsequent to the making of the final order of distribution in the matter of said estate, and the assignment of the residue thereof to the

defendants, a call was duly made, pursuant to resolutions of the stockholders of said plaintiff company, and in pursuance of the by-laws of said company theretofore duly made and adopted, upon all of the subscribers to the capital stock of said plaintiff, for . . . per cent of the face of each share, payable on the . . . day of . . ., 19.., and . . . per cent of the face of each share, payable on the . . . day of . . ., 19..

VIII. That at the time of the making of said calls the by-laws of said plaintiff duly provided the manner in which each subscriber, and his representatives and successors in interest, should be notified of said calls, and due notice was given to each of said defendants of said calls, pursuant to said by-laws, and due demand made for the payment thereof; but notwithstanding said demand, the said defendants have hitherto failed and neglected to pay the same or any part thereof, except the sum of . . . dollars.

Wherefore, plaintiff demands judgment against the defendants for the sum of . . . dollars and interest, together with the costs and disbursements of this action.

§ 3535. Complaint against a railroad corporation for exacting an illegal rate of fare.

Form No. 963.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is now, and was at the times hereinafter named, a domestic railroad corporation organized and existing under the laws of this state, and maintaining and operating a line of railroad between the city of . . . and the city of . . ., in said state, and elsewhere.

II. [That on and prior to the . . . day of . . ., 19 . . ., the gross receipts of the defendant corporation resulting from the operation of its said railroad exceeded the sum of three thousand five hundred dollars per mile per annum, and the said defendant was not entitled to demand, collect, or receive a greater compensation for the transportation of persons over its said railroad than three cents per mile.]

III. That the distance between said cities of . . . and . . . upon defendant's said railroad line is . . . miles, and no more, and defendant is entitled to demand and receive from each pas-

senger, for transportation between said cities, the sum of . . . dollars, and no more.

IV. That on or about the date above mentioned, the plaintiff applied at defendant's office, at said . . ., to purchase a ticket entitling him to passage between said . . . and . . ., and was ready and willing, and offered, to pay for the same the sum of . . . dollars; but defendant's agent refused to sell said ticket for said sum, but willfully demanded and received of plaintiff the sum of . . . dollars for said ticket, and plaintiff was compelled to pay said sum, whereby defendant demanded and received from plaintiff . . . cents in excess of the lawful rate of fare as aforesaid.

V. That by reason of the premises the plaintiff has been actually damaged in the sum of . . . dollars.

Wherefore, the plaintiff demands judgment against the defendant for the sum of . . . dollars, besides the costs of this action.

§ 3536. Denial that defendant was an officer or stockholder of corporation.

Form No. 964.

[TITLE.]

The defendant denies that at the times named in the complaint, or at any time since the . . . day of . . ., 19.., he was a director [or, stockholder] in the [name corporation], or has in any way managed or taken part in the management of the affairs of said corporation.

§ 3537. Ultra vires of corporation.

Form No. 965.

[TITLE.]

I. That the plaintiff [or, said company] was not authorized by law to take, hold, and convey real property, except for the following purposes, and in the following manner: [Here set forth the power of the corporation.]

II. That the deed alleged in the complaint was executed [and accepted] on the part of said corporation for the purpose of [here state purposes and manner not within the power].

CHAPTER CI.

HUSBAND AND WIFE.

§ 3538. Against husband for goods furnished to wife.—To sue a husband for goods furnished to his wife, it should be alleged that the goods were sold and delivered to him. If she were authorized by the relationship, by the nature and character of the goods, and by his circumstances to buy them, they were in law sold to him; and averring they were sold to her states no cause against him, and such averments may be omitted as mere evidence and not ultimate facts.[1] Where the complaint sets out such facts, it is sufficient, notwithstanding the failure to allege that the articles were sold and delivered to the defendant.[2] The complaint should allege that the articles were "necessary for her support," and that defendant had neglected to make adequate provision therefor, the allegation of their being necessaries of life being insufficient.[3] The implied power of a wife to bind her husband for necessaries is for her own benefit, and not for the benefit of those with whom she deals.[4]

§ 3539. The same—Husband, when liable.—If a husband fails or refuses to provide a support for his wife, the law authorizes her to purchase from others, on the credit of her husband, whatever is necessary for her maintenance and suitable to her station in life,[5] and that includes medical attendance.[6] It is not necessary to allege that the wife acted as the husband's agent, or with his consent. In nine cases out of ten, these averments would be fictions of law, which must never be pleaded under the code. The husband is liable in the proper cases, although he had expressly forbidden the plaintiff to trust his wife,[7] or credit was given upon

1 Jacobs v. Scott, 53 Cal. 74. The complaint in this case did not allege the facts declared by §§ 174, 175 of the Civil Code, to give a cause of action against the husband.

2 Nissen v. Beudixsen, 69 Cal. 521, 11 Pac. 29.

3 Hoey v. Hechtman, 2 Cal. App. 120, 83 Pac. 85.

4 Zant v. Sullivan, 47 Wash. 315, 91 Pac. 1088, 13 L. R. A. (N. S.) 244.

5 Galland v. Galland, 38 Cal. 265; Thill v. Pohlman, 76 Iowa, 638, 41 N. W. 385; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362; In re Weringer, 100 Cal. 345, 34 Pac. 825.

6 Howell v. Blesh, 19 Okla. 260, 91 Pac. 893.

7 Kent Com. 148; Sykes v. Hal-

her promise alone.[8] A husband cannot be presumed to be the agent of his wife in the management of her interest in lands held by them as cotenants, from the mere fact of the marriage relation.[9]

§ 3540. **The same—Husband, when not liable.**—A wife who, without cause, and against her husband's will, refuses to live with him, cannot bind him for necessaries to a third party, who knows that she is not living with her husband, and who sells to her without further inquiry.[10]

§ 3541. **Charging separate estate.**—A complaint, under the New York practice, which directly alleges that the note was given by her for the express purpose of charging her separate estate with its payment, is sufficient on demurrer.[11] So it seems a complaint seeking to charge the separate estate of the wife is bad, if it does not set forth the property and the nature of her interest.[12] On a joint note of the husband and wife a personal judgment may be had against both, and be satisfied out of the separate estate of either or out of the community property.[13] To make the wife liable for goods sold for family use, the complaint must affirmatively show that the goods were for the benefit of the family.[14]

§ 3542. **Expenses of the family.**—A personal judgment may be rendered against both husband and wife for the wearing apparel purchased by him. The term "expenses of the family" is not limited to necessaries; but the articles must have been purchased for, and used in or by, the family or some member thereof.[15] Domestic servants employed in the family are a part thereof.[16]

stead, 1 Sandf. 483; Cal. Civ. Code, § 174.

8 Edminston v. Smith, 13 Idaho, 645, 121 Am. St. Rep. 294, 92 Pac. 842, 14 L. R. A. (N. S.) 871.

9 Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

10 McKee v. Cunningham, 2 Cal. App. 684, 84 Pac. 260; Brown v. Mudgett, 40 Vt. 68; Cal. Civ. Code, § 175.

11 Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503; Francis v. Ross, 17 How. Pr. 561; Phillips v. Hagadon, 12 How. Pr. 17.

12 Mallory v. Vanderheyden, 3 Barb. Ch. 9; Dyett v. North American Coal Co., 20 Wend. 570, 32 Am. Dec. 598; Sexton v. Fleet, 6 Abb. Pr. 8.

13 Lumberman's Nat. Bank v. Gross Co., 37 Wash. 18, 79 Pac. 470.

14 Smith v. Sherwin, 11 Or. 269, 3 Pac. 686.

15 Colo. Mill's Annot. Stats. Rev. Supp., § 3021a; Gilman v. Matthews, 20 Colo. App. 170, 77 Pac. 366.

16 Perkins v. Morgan, 36 Colo. 366, 85 Pac. 640.

§ 3543. **Torts of the wife.**—A husband's liability for tort of his wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, is not changed by the fact that under the statutes she may have a separate estate, and may manage it.[17]

§ 3544. **Earnings of wife.**—Under the Washington statutes,[17a] as construed by the court, making the earnings of the wife while living with her husband community property, a mere general agreement between the husband and wife that whatever the wife earns shall belong to her, not having reference to any particular business or employment, is insufficient to impress on her earnings the character of separate property.[18] When the interest of a married woman in partnership with her husband and another was easily ascertainable, and there had never been such a commingling of the funds as to prevent an easy separation thereof, the wife's share was not liable for her husband's debts on the ground that it had been commingled with the husband's funds.[19] The issue and profits arising from the investment of the separate property of the wife are not liable on execution against her husband.[20] The complaint in an action by a married woman for her personal services, alleging that defendant was indebted to her therefor, authorizes evidence of an agreement between her and her husband that her earnings should be her separate property.[21]

§ 3545. **Common and separate property equally liable.**—The separate property of the wife, and the common property of both husband and wife, are equally liable for the debts of the wife contracted before marriage.[22] The statute changes the common-law rule on this subject. In an action against the husband and wife, on the sole debt of the wife contracted by her before marriage, a judgment may be rendered to be collected out of the common property of both husband and wife.[23]

17 Henley v. Wilson, 137 Cal. 273, 92 Am. St. Rep. 160, 70 Pac. 21, 58 L. R. A. 941.

17a Bal. Codes & Stats., §§ 4493, 4494.

18 Sherlock v. Denny, 28 Wash. 170, 68 Pac. 452.

19 Elliot v. Hawley, 34 Wash. 585, 101 Am. St. Rep. 1116, 76 Pac. 93.

20 Evans v. Kroutinger, 9 Idaho, 153, 72 Pac. 882.

21 Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272.

22 Van Maren v. Johnson, 15 Cal. 313.

23 Vlautin v. Bumpus, 35 Cal. 214. See Civ. Code, §§ 158, 167, 171. Contra, see Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240.

§ 3546. **Consideration.**—If the debt is contracted for the benefit of the wife, or of her estate, no allegation of an intent to charge it on the estate is necessary.[24] Thus, where the wife executes a note, although as surety, such intent need not be averred; it is presumed from her signing an express contract in writing.[25] The statute requiring a wife, on sale of her separate property, to have her husband join in the instrument, was enacted to protect the wife against fraud and duress, and was not intended as a shield for the defense of those who would cheat her.[26] In New York, if the consideration were not for the benefit of the wife or her estate, this allegation is necessary.[27] The agreement charging her estate must be in writing; but this is not necessary to be alleged.[28]

§ 3547. **Alleging coverture.**—The fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman in respect to her separate property, and the allegation of coverture in the complaint is not necessary.[29] She need not in her complaint allege the coverture; but when that fact appears upon the trial, she may show that the property demanded is her separate property.[30]

§ 3548. **Demand and form of judgment.**—In New York, to charge the separate estate of a wife in an equitable action, the demand must be as in form No. 970 herein.[31] But there is no difference in the form of judgment, though the execution is restricted.[32]

24 Yale v. Dederer, 18 N. Y. 273, 284, 285, 72 Am. Dec. 503.

25 Williams v. Urmston, 35 Ohio St. 296, 35 Am. Rep. 611; Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Avery v. Vansickle, 35 Ohio St. 270; Lillard v. Turner, 16 B. Mon. 374; Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Patton v. Kinsman, 17 Iowa, 428; Boarman v. Groves, 23 Miss. 280; Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480; Metropolitan Bank v. Taylor, 62 Mo. 338.

26 Karlson v. Hanson etc. Sawmill Co., 10 Idaho, 361, 78 Pac. 1080.

27 Yale v. Dederer, 18 N. Y. 281, 72 Am. Dec. 503.

28 Yale v. Dederer, 22 N. Y. 450, 78 Am. Dec. 216.

29 Peters v. Fowler, 41 Barb. 467; Evans v. De Lay, 81 Cal. 103, 22 Pac. 408.

30 Shumway v. Leakey, 67 Cal. 458, 8 Pac. 12; Hester v. Stine, 46 Wash. 469, 90 Pac. 594.

31 Cobine v. St. John, 12 How. Pr. 333; Coon v. Brook, 21 Barb. 546.

32 Laws New York 1853, p. 1057. For form of complaint on a note indorsed by the wife, while sole, before the delivery of the note to the payee, see Sexton v. Fleet, 6 Abb. Pr. 8, 15 How. Pr. 106.

§ 3549. Estate must be shown.—The complaint must show what the estate is, and what is its value.[33] But such is not the practice in California; for in this state the complaint need not set out any separate property of the defendant, because the wife was liable *in personam* before coverture, and under our statute continues so after marriage.[34]

§ 3550. Husband must be joined as party defendant.—In a suit against the wife, while the husband has no interest, he is joined for her protection; and in an action to foreclose a chattel mortgage on property of the wife, the husband is a necessary party defendant, and must not only be named in the complaint, but also served.[35] A judgment for damages from a personal injury to the wife is community property, and is properly rendered in favor of both husband and wife.[36] Jurisdiction of both the husband and the wife is necessary to jurisdiction of community property on foreclosure of a mechanic's lien.[37]

§ 3551. For benefit of her separate lands.—In New York, the weight of the decisions is that the acts relative to the rights and liabilities of married women enlarged only the power of married women to hold and convey their separate estate, but did not operate to subject them to new remedies on their personal contracts.[38] Under the California code, she may make herself liable without specially charging her separate estate.[39] Where a married woman signs deeds of trust, authorizing payment by the grantee of incumbrances on her land, and thereafter receives the benefits of such payment, she is estopped to say that she did not, in writing, authorize the payment of the incumbrances.[40]

33 Sexton v. Fleet, 6 Abb. Pr. 9, 15 How. Pr. 106; Cobine v. St. John, 12 How. Pr. 336.

34 Bostic v. Love, 16 Cal. 69. See, also, Foote v. Morris, 12 N. Y. Leg. Obs. 61.

35 McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817.

36 Paine v. San Bernardino V. Tr. Co., 143 Cal. 654, 77 Pac. 659; Gomez v. Scanlan, 2 Cal. App. 579, 84 Pac. 50.

37 Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

38 Francis v. Ross, 17 How. Pr. 561; Gates v. Brower, 9 N. Y. 205, 59 Am. Dec. 530; Switzer v. Valentine, 4 Duer, 96; Cobine v. St. John, 12 How. Pr. 333; Coon v. Brook, 21 Barb. 546. For other modes of pleading, see Coster v. Isaacs, 16 Abb. Pr. 328; Baldwin v. Kimmel, 16 Abb. Pr. 353; Young v. Gori, 13 Abb. Pr. 13, note; Thompson v. Sargent, 15 Abb. Pr. 452; Aitken v. Clark, 16 Abb. Pr. 328, note.

39 See Civ. Code, §§ 155-181.

40 Continental Bldg. etc. Assoc. v. Wilson, 144 Cal. 776, 78 Pac. 254.

§ 3552. **Homestead.**—A complaint by husband and wife to recover the homestead conveyed away by the deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the conveyance or that they had not been previously abandoned.[41] So a married woman cannot alone convey away the homestead;[42] but in a suit by a wife to quiet title in respect to her separate property upon which the homestead has been declared for the joint benefit of herself and husband, the husband is not a necessary party.[43]

§ 3553. **Marriage.**—A marriage *de facto*, although not legally solemnized, is sufficient at common law to render the husband liable for the previously contracted debts of the wife.[44] In California, it has been held that it is not material whether the marriage was solemnized, if the parties afterwards, and after the passage of the act of 1850, resided and acquired the property in that state.[45]

§ 3554. **Misjoinder of causes of action.**—A claim for personal judgment against the husband, and enforcement of a lien against the wife's separate estate, are incompatible.[46]

§ 3555. **Promise of married woman.**—In New York, in an action to charge the separate estate of a married woman upon her promise, it is necessary that the complaint allege either that the consideration of the promise was for the benefit of the estate, or that she intended to charge such estate.[47]

§ 3556. **Property liable for debts of wife.**—The separate property of the wife is liable for her debts contracted before marriage, and the separate property of her husband is not.[48] The interest of the wife in the common property is a mere expectancy, like the

41 Harper v. Forbes, 15 Cal. 202.

42 Poole v. Gerard, 6 Cal. 73, 65 Am. Dec. 481; Flege v. Garvey, 47 Cal. 371.

43 Prey v. Stanley, 110 Cal. 423, 42 Pac. 908.

44 Norwood v. Stevenson, Andr. 227, 228; Robinson v. Nahon, 1 Camp. 245; Watson v. Threlkeld, 2 Esp. 637.

45 Dye v. Dye, 11 Cal. 163. See People v. Anderson, 26 Cal. 129; Graham v. Bennett, 2 Cal. 503; Letters v. Cady, 10 Cal. 533.

46 Palen v. Lent, 5 Bosw. 713; Sexton v. Fleet, 2 Hilt. 477.

47 Palen v. Lent, 5 Bosw. 713; Francis v. Ross, 17 How. Pr. 561. See Conlin v. Cantrell, 64 N. Y. 217; Treadwell v. Archer, 76 N. Y. 196.

48 Cal. Civ. Code, § 170; Van Maren v. Johnson, 15 Cal. 311; Vanderheyden v. Mallory, 1 N. Y. 452.

interest which an heir may possess in the property of his ancestors.[49]

§ 3557. **The same—Property owned before marriage.**—The complaint is not demurrable for omitting to designate the wife's separate property, which, by the statute law of New York of 1853, is alone bound by the judgment in such case.[50]

§ 3558. **Rent.**—Where husband and wife are sued for rent claimed on a lease made by plaintiff to the wife, plaintiff and the wife being tenants in common of the property, it was held that the wife can be liable only as sole trader under the statute, and that the complaint must aver facts requisite to establish her liability in that character, and that the allegation that she "was doing business as a *feme sole*, with the consent of her husband," is insufficient.[51]

§ 3559. **Sale and delivery.**—The complaint must allege a sale for the benefit of such estate.[52] Alleging a sale and delivery to the husband, instead of alleging a sale and delivery to the wife on the faith of, or for the benefit of, her separate estate, is not sufficient.[53] Merely alleging a sale on the credit of her estate is insufficient on demurrer.[54]

§ 3560. **Separate property.**—In an action against husband and wife to recover antenuptial debts, the complaint need not designate wife's separate property.[55] Where the complaint does not aver that the purchase money paid for land bought in the name of the wife was community property, the presumption is that it was her separate property.[56] The fact that a woman's husband is liable for necessary services rendered her does not preclude her from contracting for services as a companion, nurse, etc., to be compensated out of her own estate.[57] A deed made by a third

49 Van Maren v. Johnson, 15 Cal. 311; Guice v. Lawrence, 2 La. Ann. 226. See, also, Packard v. Arellanes, 17 Cal. 525; Vlautin v. Bumpus, 35 Cal. 214.

50 Foote v. Morris, 12 N. Y. Leg. Obs. 61.

51 Aiken v. Davis, 17 Cal. 119.

52 Bass v. Bean, 16 How. Pr. 93.

53 Arnold v. Rignold, 16 How. Pr. 158.

54 Bass v. Bean, 16 How. Pr. 93.

55 Foote v. Morris, 12 N. Y. Leg. Obs. 61.

56 Cal. Civ. Code, § 164.

57 Bonebrake v. Tauer, 67 Kan. 827, 72 Pac. 521.

person to a wife at the husband's request vests in her the property as her separate property, in the absence of evidence of a contrary intention.[58]

Where the complaint in an action upon the contract of a married woman alleged that the property sold was for the use and benefit of the wife; that it was purchased at her special instance and request, and used in and about her premises, it is a sufficient averment of a contract made with the wife in relation to her separate property.[59] In an action against a married woman, as indorser, an allegation that she had a separate estate, and that, by indorsing the note as alleged, she intended to and did charge her separate estate with the payment thereof, and that the consideration of the note went for the benefit of her separate estate, is sufficient.[60]

§ 3561. **Division of common property.**—In an action for the division of the common property of husband and wife, after a decree of divorce, the plaintiff, to bring herself within the provisions of the act "defining the rights of husband and wife," passed April 17, 1850, must affirmatively state such facts as give her the right to the property under the act.[61] By forming a new community, in a second marriage, the rights in the first community and its property are abandoned.[62] In New Mexico, the Spanish-Mexican law as to community property has been the law of the territory from the time of the cession, and is still in force, except as abrogated by statute.[63] The laws of the state determine that patented land, where the patent is received after death of the husband, is community property.[64]

A locator of a mining claim has no such interest in the same, after conveyance and abandonment, that the community interest of the wife attaches.[65] Where a husband makes a homestead entry during the life of his wife, who dies prior to the making of the final proof and issuance of patent, the children succeed

58 Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657.

59 Musser v. Hobart, 14 Iowa, 248.

60 Gfroehner v. McCarty, 2 Abb. N. C. 76.

61 Dye v. Dye, 11 Cal. 163. See Johnson v. Johnson, 11 Cal. 200, 70 Am. Dec. 774.

62 Bedal v. Sake, 10 Idaho, 270, 77 Pac. 638, 66 L. R. A. 60.

63 Strong v. Eakin, 11 N. Mex. 107, 66 Pac. 539.

64 Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023.

65 McAlister v. Hutchinson, 12 N. Mex. 111, 75 Pac. 41.

to the title which their mother would have received as a member of the community.[66]

Land purchased with proceeds of sale of land owned by the husband in Kansas prior to marriage is separate property.[67] And lands purchased with community funds and the joint note of husband and wife is community property, though deeded to both of them; and section 164 of the Civil Code provides that the presumption is that she takes the part conveyed to her as a tenant in common, no other intention being expressed.[68] The character of the estate of a decedent is determined from the mode of its acquisition, and is not affected by any declaration made in his will.[69] The determination of the *status* of the real estate of the husband and wife, which, under the statute, may be had in an action brought for that purpose, may be made in an action for separate maintenance.[70]

§ 3562. **Presumptions.**—The presumptions attending the possession of property by either husband or wife that it is community property may be overcome by evidence.[71] The presumption of law is that every debt contracted during the existence of the marriage is a community debt.[72] Community property, though in possession of the husband, is not subject to his separate debts.[73]

§ 3563. **Marriage, averment of.**—Where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife, and that, in accordance with his wishes, she henceforth lived and cohabited with him as his wife, always conducting herself as a true, faith-

66 Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005.

67 In re Burrows' Estate, 136 Cal. 113, 68 Pac. 488.

68 Bollinger v. Wright, 143 Cal. 292, 76 Pac. 1108.

69 In re Grannis Estate, 142 Cal. 1, 75 Pac. 324.

70 Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812.

71 Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 Pac. 172; Hoeck v. Grief, 142 Cal. 119, 75 Pac. 670; Strong v. Eakin, 11 N. Mex. 107, 66 Pac. 539; Brown v. Lockhart, 12 N. Mex. 10, 71 Pac. 1086; O'Sullivan v. O'Sullivan, 35 Wash. 481, 77 Pac. 806; Hill v. Gardner, 35 Wash. 529, 77 Pac. 808.

72 Strong v. Eakin, 11 N. Mex. 107, 66 Pac. 539; Brown v. Lockhart, 12 N. Mex. 10, 71 Pac. 1086.

73 Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

ful, and affectionate wife should do, it was held that these were insufficient averments of the existence of a marriage, and that the facts averred were only *prima facie* evidence of a marriage.[74]

§ 3564. **Mortgage.**—It is immaterial whether a conveyance to the wife was made with or without a fraudulent intent; in either case it is unavailing against the mortgage, because the inference from the language of the complaint that the conveyance was upon purchase and during marriage, and, consequently, that the property was common property, is not negatived by any averment that the property was transferred to her before marriage, or was a gift to her, or in exchange for her separate property.[75] If defendant in a suit by a married woman to foreclose a mortgage sets up a counterclaim against the husband, and alleges that the note and mortgage is community property, then the husband should be made a party plaintiff;[76] or he may be required to interplead.[77]

§ 3565. **Mortgage of separate property.**—Where a wife sought relief by a bill in chancery from a mortgage of her separate property, it was no objection to the bill, as a rule of pleading, that a husband was made a party to it with the wife. He acts only as her *prochein ami*.[78]

§ 3566. **Separate property of wife.**—The law of California provides that all property owned by the wife before her marriage, or after marriage, acquired by gift, bequest, devise, or descent, shall be her separate estate;[79] the law in this respect being similar to that of Texas and Louisiana.[80] A general averment that the property is the separate property of the married woman is not bad on demurrer.[81]

74 Letters v. Cady, 10 Cal. 533. See People v. Anderson, 26 Cal. 129; Kelly v. Murphy, 70 Cal. 564, 12 Pac. 467.

75 Kohner v. Ashenauer, 17 Cal. 578.

76 Campbell v. Kerns, 13 Idaho, 287, 90 Pac. 108.

77 Brenneke v. Smallman, 2 Cal. App. 306, 83 Pac. 302.

78 Bein v. Heath, 6 How. 228, 12 L. Ed. 416.

79 Civ. Code, § 162; Meyer v. Kinzer, 12 Cal. 251, 73 Am. Dec. 538; Smith v. Smith, 12 Cal. 224, 73 Am. Dec. 533.

80 Huston v. Curl, 8 Tex. 242, 58 Am. Dec. 110; Chapman v. Allen, 15 Tex. 278; Claiborne v. Tanner, 18 Tex. 69; Dominguez v. Lee, 17 La. 295; Fisher v. Gordy, 2 La. Ann. 763; Webb v. Peet, 7 La. Ann. 92.

81 Spies v. Accessory Transit Co., 5 Duer, 662; Lippman v. Petersburgh, 10 Abb. Pr. 254.

§ 3567. **Services of wife before marriage.**—The husband is properly joined with the wife in an action for services performed by her, and the action brought therefor, previous to marriage.[82]

§ 3568. **When husband may join.**—When a married woman is a party, her husband must be joined with her, except in special cases.[83] And even in these special cases it is not obligatory on the wife to sue alone.[84] In an action for trespass, husband and wife may sue jointly as tenants in common.[85] The right of damages for her false imprisonment is community property, and she may join her husband in an action therefor.[86]

§ 3569. **When wife may sue alone.**—By the express provisions of section 370 (subd. 3) of the California Code of Civil Procedure, a married woman, living separate and apart from her husband by reason of his desertion of her, may sue alone,[87] although the results of her suit may be community property.[88] In Oklahoma, a married woman living with her husband may recover damages in her own name and right for an assault upon her by a third person.[89] In an action by a married woman to recover possession of land, it is necessary that the complaint should show that the land sued for is covered by a valid declaration of homestead, as otherwise, under section 370 of the California Code of Civil Procedure, the right of action is in her husband.[90] In actions concerning her separate estate, the wife may sue alone, as if she were a *feme sole*.[91] But the husband may be joined with the wife in such action.[92] So, in Illinois, under the act of 1861.[93] Under section 450 of the new Code of Civil Procedure of New York, a married woman appears, prosecutes, or

82 Van Maren v. Johnson, 15 Cal. 310.

83 Cal. Code Civ. Proc., § 370.

84 Van Maren v. Johnson, 15 Cal. 310.

85 Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

86 Gomez v. Scanlan, 2 Cal. App. 579, 84 Pac. 50.

87 Muller v. Hale, 138 Cal. 168, 71 Pac. 81.

88 Duncan v. Duncan, 6 Cal. App. 404, 92 Pac. 310; Colorado Springs etc. Ry. v. Nichols, 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215.

89 Long v. McWilliams, 11 Okla. 562, 69 Pac. 882.

90 Tappendorff v. Moranda, 134 Cal. 419, 66 Pac. 491.

91 Cal. Code Civ. Proc., § 370; Evans v. De Lay, 81 Cal. 103, 22 Pac. 408; Schwarze v. Mahoney, 97 Cal. 131, 31 Pac. 908; Duncan v. Duncan, 6 Cal. App. 404, 92 Pac. 310; Harvey v. Sparks Bros., 45 Wash. 578, 88 Pac. 1108.

92 Spargur v. Heard, 90 Cal. 221, 27 Pac. 198.

93 See Emerson v. Clayton, 32 Ill. 493.

defends alone or joined with other parties, as if she were single. So, also, by the laws of Pennsylvania.[94] So, also, under the laws of Texas.[95] In California, a married woman may sue alone in action against her husband.[96]

§ 3570. **When wife cannot sue alone.**—The wife cannot bring suit in her own name on a contract which the law does not authorize her to make;[97] nor to recover the homestead;[98] nor for damages for a personal injury.[99] The wife is entitled to join herself, as the husband's executrix in a suit brought by her after his death to recover for injuries to herself prior to his death.[100] Since a married woman does not receive compensation for the performance of household duties, she alone cannot recover for loss therein;[101] but she is entitled to recover for expenses of medical treatment incurred by her and charged to her, whether paid by her or not.[102] The question of the rights of married women is regulated by the statutes of the several states. Hence the authorities referred to have little application, except in the states where such laws are in force, or the decisions were made. In Illinois, whenever a wife joins with her husband, her interest must appear.[103]

§ 3571. **Separate property.**—The letters received by a married woman from her first and second husband, before her marriage with the latter, are her separate property,—like jewels,—and her gift of them to her daughter is valid as against her husband.[104]

§ 3571a. **Sole trader.**—A complaint in an action to recover a debt from a married woman, which charges that she is a sole

94 See Goodyear v. Rumbaugh, 13 Pa. St. 480; Cummings' Appeal, 11 Pa. St. 275; Sheidle v. Weishlee, 16 Pa. St. 134; Long's Admr. v. White's Admr., 5 J. J. Marsh. 230.

95 McIntire v. Chappell, 2 Tex. 378; O'Brien v. Hilburn, 9 Tex. 297.

96 Kashaw v. Kashaw, 3 Cal. 312.

97 Snyder v. Webb, 3 Cal. 83.

98 Poole v. Gerrard, 6 Cal. 71, 65 Am. Dec. 481; Guiod v. Guiod, 14 Cal. 506, 76 Am. Dec. 440. But see Cal. Code Civ. Proc., § 370, subd. 1.

99 Sheldon v. Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193; McFadden v. Santa Ana etc. Railway Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Lindsay v. Oregon S. L. Ry., 13 Idaho, 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184.

100 O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975.

101 Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688.

102 Adams Ex. Co. v. Aldrich, 20 Colo. App. 74, 77 Pac. 6.

103 2 Black, 1236.

104 Grigsby v. Breckinridge, 2 Bush (Ky.), 480, 92 Am. Dec. 509.

trader under the statute, is sufficient, without any averment of facts showing that the debt was contracted in the particular business which she had declared her intention to carry on.[105] A married woman cannot engage in business, or recover prospective profits by reason of loss of business, though the money invested therein was her separate property before marriage unless she be adjudged and declared a sole trader.[106] A married woman is entitled to contract to work an Alaska mining claim with another on shares.[107] Where a married woman engages in trade it is presumed to be with the funds of the community, and the fact that the husband permits her to use his money or property as her own, upon the faith of which she obtains credit does not estop the husband from claiming the property as against her creditors.[108]

An averment in the complaint that the defendant, a married woman, who carried on a separate business, represented at the time of making the contract that it was for the use of such business, is sufficient on demurrer.[109] If the contract was not in fact for the use of such business, it should appear by way of defense.[110]

§ 3572. Facts to be alleged.—By the decisions of the court, in New York, it seems that it is still necessary, in an action against a married woman, to allege in the complaint the facts creating her peculiar liability for an act relating to her separate estate, or relating to trade carried on by her for her own benefit.[111]

§ 3573. Complaint against wife as trustee of husband.—In an action by a creditor of the husband against the wife, as trustee of the former's interest in land held in her name, to compel a conveyance to the husband of his interest therein, in order that it may be subjected to the payment of his debts to the plaintiff, an allegation of the husband's insolvency is not necessary.[112]

105 Melcher v. Kuhland, 22 Cal. 523.

106 McDonald v. Rozen, 8 Idaho, 352, 69 Pac. 125.

107 Elliott v. Hawley, 34 Wash. 585, 76 Pac. 93.

108 Bashore v. Parker, 146 Cal. 525, 80 Pac. 707.

109 Coster v. Isaacs, 16 Abb. Pr. 328.

110 Id.

111 Dickerman v. Abrahams, 21 Barb. 551; Baldwin v. Kimmel, 16 Abb. Pr. 353.

112 O'Connell v. Taney, 16 Colo. 353, 25 Am. St. Rep. 275, 27 Pac. 888.

§ 3574. **When wife may defend.**—If a husband and wife be sued together, the wife may defend for her own right; and if the husband neglect to defend, she may defend for his right also.[113] Where the defense of the wife is a special one, she can defend for her own right as well when sued jointly with her husband as if the trial were separate.[114] Although the husband may appear, and thereafter make default, it is of no avail to plaintiff if the wife defends; and he must prove his case on trial, or have judgment entered against him in favor of both husband and wife.[115]

§ 3575. **Sole trader—Petition to become.**—A married woman may become a sole trader by a judgment of the superior court of the county in which she has lived for the preceding six months; and her husband is not liable for debts contracted by her in the course of her sole trader's business, unless upon his written consent.[116] Notice of the time and place of hearing of the petition, and the nature and place of the business proposed to be conducted, must be published once a week for four successive weeks.[117] The petition must show good faith in the application; the names and relationship of those dependent upon her, if any; the fact of insufficient support by her husband, and the cause thereof, if known; any other grounds which are good causes for a divorce, with the reason why a divorce is not sought; the nature of the business proposed, the capital invested, if any, and the source from which it comes.[118] Upon entry of the decree, the sole trader must make and file her affidavit of the principal facts set out in the petition, and this, with a copy of the decree, must be recorded in the office of county recorder of the county in which she expects to engage in business.[119]

§ 3576. **Conflict of laws.**—In an action against a husband and wife to recover a balance due on a mortgage indebtedness incurred while the defendants were non-residents, the liability of the

113 Cal. Code Civ. Proc., § 371; Idaho Rev. Codes, § 4094; Larson v. Carter, 14 Idaho, 511, 94 Pac. 825.

114 Duprez v. Duprez, 5 Cal. 387.

115 Glass v. Buttner, 39 Wash. 296, 81 Pac. 699.

116 Cal. Code Civ. Proc., §§ 1811, 1821.

117 Cal. Code Civ. Proc., § 1812; Idaho Rev. Codes, § 5851; Mont. Rev. Codes, § 7376; Nev. Comp. Laws, §§ 545-549.

118 Cal. Code Civ. Proc., § 1813.

119 Cal. Code Civ. Proc., § 1818; Idaho Rev. Codes, § 5857; Mont. Rev. Codes, § 7377; Nev. Comp. Laws, §§ 546-549.

wife depends on the law of the state of their residence as it existed at the time the debt was created.[120] In an action against a husband and wife, in Washington, on a note given in Montana by the husband alone, for the price of a lot on which he and his wife resided, it was held that the burden was on her to show that such lot was not necessary, under section 227 of the Civil Code of Montana, as construed by the courts of that state, and that she had filed the inventory required in order to rebut the presumption arising under the laws of Washington, that certain of her property was liable, as community property, for such debt.[121]

§ 3577. Husband as agent of wife.—The wife of one executing a note is a proper party defendant for the purpose of determining whether the judgment can be executed as one for a community debt.[122] Where a man acted as his wife's agent in selling a tract of land belonging to her, and signed the contract of sale with her, as a party thereto, she was responsible for his false and fraudulent statements to the purchaser as to the number of acres contained in the tract.[123] His authority should be in writing, or his acts be ratified, as in case of any agent to sell land.[124] A husband cannot be presumed to be the agent of his wife in the management of her interest in lands held by them as cotenants from the mere fact of the marriage relation.[125] Nor is he her agent as a stockholder in a corporation meeting.[126]

FORMS—HUSBAND AND WIFE.

§ 3578. Husband and wife suing together.

Form No. 966.

[TITLE OF COURT AND CAUSE.]

[COMMENCEMENT.]

I. That the plaintiffs are husband and wife, and were duly married on or about the . . . day of . . . , 19. . , at . . .

120 Clark v. Eltinge, 38 Wash. 376, 107 Am. St. Rep. 858, 80 Pac. 556.

121 Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866.

122 Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736.

123 Quarg v. Scher, 136 Cal. 406, 69 Pac. 96.

124 Shanks & March v. Michael, 4 Cal. App. 553, 88 Pac. 596; Cal. Civ. Code, §§ 2309, 2310.

125 Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

126 Steele v. Gold Fissure Gold Min. Co., 42 Colo. 529, 126 Am. St. Rep. 177, 95 Pac. 349.

§ 3579. Husband and wife answering jointly.

Form No. 967.

E. F., one of the above-named defendants, and G. F., his wife, answering the plaintiff's complaint in this action, jointly allege [or, deny]:

§ 3580. Complaint against husband for necessaries furnished to defendant's family, without his express request, at reasonable price.

Form No. 968.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he furnished to Mary Smith, the wife of defendant, at her request, sundry articles of [food or clothing, etc.], to-wit:

II. That the same were necessary to her maintenance, and suitable to her station in life.

III. That the same were reasonably worth . . . dollars.

IV. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 3581. Complaint against husband and wife for goods sold, for her separate estate.

Form No. 969.*

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19... at . . ., the plaintiff sold and delivered to the defendant A. B., who was then, and still is, the wife of defendant C. B., materials used for the building of a house for her, upon and for the benefit of her separate lands and premises, situated in the town of . . ., in the county of . . ., bounded and described as follows: [Describe the premises.]

II. That the said defendant A. B., in consideration thereof, then and there promised the plaintiff that she would pay for the same . . . dollars, out of her separate property, and did agree and intend that the same should be paid for out of her separate property.

* See § 3548 ante.

III. That said materials are reasonably worth the said sum of . . . dollars, and that no part thereof has been paid.

IV. That plaintiff further alleges, on information and belief, that the premises above mentioned and described were, at and before the . . . day of . . ., 19.., [date of marriage], since have been, and now are, her sole and separate property, and the same are worth about . . . dollars.

Wherefore, the plaintiff demands judgment:

1. That the separate property aforesaid be charged with the payment of the said sum of . . . dollars, with interest from . . ., together with the costs of this action.

2. That the said property be applied to the payment of the same.

§ 3582. Complaint against husband and wife for goods sold to wife for her separate estate.

Form No. 970.

[TITLE.]

The plaintiff complains of the defendants, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . . , 19 . . , at . . . , the plaintiff sold and delivered to the defendant A. B., who then was, and still is, the wife of C. B., at her request, materials used for the building of a house for her, upon and for the benefit of her separate lands and property.

II. That said materials were of the agreed price and value [or, were reasonably worth the sum] of . . . dollars, and that no part thereof has been paid.

Wherefore, the plaintiff demands judgment against the defendants for the said sum of . . . dollars, and interest thereon from the . . . day of . . ., 19.., and costs of suit.

§ 3583. Complaint against husband and wife on note by wife while sole.

Form No. 971.

[TITLE.]

The plaintiff complains of the said C. D., and E., his wife, the defendants, for that the said E., heretofore, whilst she was sole and unmarried, on the . . . day of . . ., 19.., at [naming place], made her certain promissory note in writing of that date, and then and there delivered the same to the said plaintiff, and thereby

promised, by her then name of E. F., to pay to the said plaintiff, or order, the sum of . . . dollars in . . . after the date thereof; and the said E. F. has since intermarried with the said C. D.; yet the said defendants have not, nor hath either of them, paid the said sum of money, or any part thereof, to the said plaintiff.

Wherefore, the said plaintiff prays judgment against the said defendants for the said sum of . . . dollars, together with interest thereon from the . . . day of . . ., 19.., and costs of suit.

§ 3584. By a married woman.

Form No. 972.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff intermarried with one A. B., whose wife she now is.

II. That on the . . . day of . . . , 19.., at . . ., the defendant made his promissory note payable to the plaintiff for the sum of . . . dollars, and which note is in words and figures as follows: [Copy note.]

III. That the consideration of the said note was the payment by this plaintiff to the maker thereof of the sum of . . . dollars, which said sum was at and before the time of her marriage owned by her, and thereafter was her sole and separate property, and so continued until the date the said note became due, and that said note thereupon became and ever since has remained her sole and separate property [or otherwise, according to the circumstances, showing it to be her separate estate].

[DEMAND OF JUDGMENT.]

§ 3585. Complaint against married woman, as sole trader.

Form No. 973.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is the wife of one A. B.

II. That on the . . . day of . . ., by a decree of the superior court, in and for the county of . . ., in this state, the defendant was decreed a sole trader; and at the time of making the note hereinafter mentioned, the defendant was, and still is, a sole trader, carrying on business as . . . at . . .

III. That on the . . . day of . . ., 19. . , at . . ., the plaintiff sold and delivered to the defendant, at her request . . . of the value of . . . dollars, which were used by the defendant in her said business, as sole trader.

IV. That in consideration thereof, the defendant, as sole trader, made her promissory note, of which the following is a copy: [Copy note.]

V. That she has not paid the same.

[Demand of Judgment.]

§ 3586. The same—On contract generally.

Form No. 974.

[Title.]

The plaintiff complains, and alleges:

I. [State marriage as in previous form.]

II. [State cause of action.]

III. That the property hereinbefore mentioned was acquired by her as sole trader, and has ever since been her sole property.

[Demand of Judgment.]

§ 3587. Complaint by husband for injury by railroad to wife.

Form No. 975.

[Title.]

The plaintiff complains, and alleges:

[Allege that plaintiff is the husband of the injured person, the incorporation of the defendant, its business as a carrier, the purchase of a ticket, the transportation of the injured person, the negligence of the company, and the resulting injuries, showing that plaintiff's wife was the injured person, and continue:]

V. That by reason of the premises the plaintiff has been put to great expense, and will continue to be subjected to great expense in procuring necessary medical and surgical attendance, care, and suitable nursing for his said wife, and has been, and will be, hereafter put to great loss and expense in money by the loss of her services, by reason of her permanent injuries and physical disabilities caused by such injuries, and has lost the comfort of the society and health of his said wife, in all to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 3588. Complaint for alienating affections of plaintiff's husband.

Form No. 976.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is now, and for ten years last past has been, the wife of one E. F.

II. That in or about the month of . . ., 19.., and while this plaintiff was living, cohabiting with, and being supported by her said husband at . . ., and was so living with him happily as his wedded wife, and enjoying his affection, support, protection, and respect, the defendant, well knowing the said E. F. to be the husband of the plaintiff, and wrongfully intending to injure this plaintiff and deprive her of her said husband's protection, society, aid, and support, willfully, wickedly, and maliciously gained the affections of said E. F., and induced him to have carnal intercourse with her, and sought to persuade him and entice him by offers of money and otherwise to leave plaintiff without support and go with the defendant to the city of . . .

III. That thereafter, and at various times between the time aforesaid and the . . . day of . . ., 19.., the defendant continued her unlawful and wrongful intercourse with said E. F., and on or about said last-mentioned day induced, and unlawfully and maliciously enticed, said E. F. to desert plaintiff, and to leave her without means of support or protection, and to go with said defendant to the said city of . . ., at which place the said defendant has ever since harbored and detained the said E. F. against the will of the plaintiff, and willfully and maliciously debauched him.

IV. That, by reason of the premises, the said E. F. has become estranged from plaintiff, and his affections and regard for plaintiff have been destroyed; and plaintiff has been, and still is, wrongfully deprived by the defendant of the comfort, society, support, and protection of her said husband, and the happiness and benefits she otherwise would have received at his hands, and has suffered great distress of mind, body, and estate, to her damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3589. Complaint by wife against saloonkeeper for damages resulting from sale of liquors to husband, an habitual drunkard.

Form No. 977.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is, and since the . . . day of . . . , 19. . , has been, the wife of one E. F., and that the said E. F. became and was, prior to the . . . day of . . . , 19 . . , an habitual drunkard, so that by the excessive drinking of intoxicating liquors the said E. F. did misspend, waste, and lessen his estate so as to expose his family to want and injure his health and endanger the personal safety and comfort of this plaintiff.

II. That from the . . . day of . . . , 19 . . , up to the time of the commencement of this action, the defendant has been a saloonkeeper within the town [or, city] of . . . , duly licensed under the laws of this state to keep a saloon within said town [or, city] for the sale of strong spirituous, malt, ardent, or intoxicating liquors.

III. That on the . . . day of . . . , 19. . , the supervisors of the town [or, city] of . . . , in said county of . . . , being the town [or, city] wherein the said E. F. then resided, [or, this plaintiff] did, by a notice in writing, signed by them [or, by her], and served upon the defendant on that day, forbid the defendant and all other persons in said town [or, city] licensed in accordance with the laws of this state to sell or give away to said E. F. any ardent, spirituous, or intoxicating liquors or drinks for the space of one year from said last-named date.

IV. That after the giving of such notice to the defendant, and notwithstanding the same, and on or about the . . . day of . . . , 19 . . , and at various times thereafter, and prior to the expiration of one year from the giving of such notice, the defendant did knowingly sell and give away to the said E. F. intoxicating liquors and drinks, thereby causing the intoxication of the said E. F., which intoxication so caused became and was continuous [or, very frequent] during the said last-named period, whereby the said E. F. wasted and misspent his property, and became sick and incapacitated from labor, and unable to support his family, and the plaintiff was reduced to poverty.

V. That the plaintiff was and is entirely dependent upon the said E. F. for her support; that the said E. F. was capable of earning, and did earn, large sums of money when not intoxicat-

ed, to-wit, about the sum of . . . dollars per week, which he applied to the support of this plaintiff; that by reason of his intoxication, so caused by the defendant, his health has been ruined, his property wasted, and he has neither earned nor contributed anything to plaintiff's support; and the personal safety and comfort of this plaintiff have been destroyed, and she has been reduced to a state of permanent sickness and ill-health, in all to her damage in the sum of . . . dollars.

[Or, V. That theretofore the said E. F. had been and was industrious and healthy, and was earning . . . dollars per month in his business as a carpenter, and had provided for plaintiff and their said family a comfortable support; that upon the earnings of her said husband plaintiff was dependent for her means of support.

VI. That in consequence of said continuous intoxication so caused by said defendant, said E. F. neglected his said business and failed to properly care for and provide a subsistence for plaintiff and their said family, and became frequently disabled and sick, and plaintiff was compelled to nurse and take care of him, and he became and was unable to provide a proper support for his said family, whereby the plaintiff has suffered damage in the sum of . . . dollars.]

Wherefore, plaintiff demands judgment against the defendant for the sum of . . . dollars, with the costs of this action.

§ 3590. Complaint by wife, on life policy issued to husband in her favor.

Form No. 978.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation and business of defendant.]

II. That on the . . . day of . . ., 19. . , the defendant, in consideration of the payment to it of a premium of . . . dollars, made and delivered to one E. F. its policy of insurance, and thereby insured the life of the said E. F. in the sum of . . . dollars, payable to plaintiff within . . . days after notice and proof of the death of the said E. F., a copy of which policy is hereto annexed and made part of this complaint and marked "Exhibit A."

III. That on the . . . day of . . ., 19. . , in the city of . . ., the said E. F. died.

IV. That plaintiff was the wife of the said E. F. at the time said policy was issued to him, and so remained at the time of his said death.

V. That up to the time of the death of the said E. F. all premiums which accrued on said policy were paid at the time they accrued, and that in all other respects the said E. F. duly performed all the agreements and conditions of said policy on his part.

VI. That on the . . . day of . . . , 19. . , plaintiff furnished defendant with due notice and proof of the death of the said E. F., and in all other respects duly performed the conditions of said policy on her part.

VII. That no part of said sum has been paid by the defendant, though payment thereof has been demanded by this plaintiff, and that there is now due and owing from the defendant to the plaintiff upon said policy the sum of . . . dollars, with interest from . . . , 19. .

[Demand of Judgment.]

§ 3591. Allegation that defendant was a married woman, and signed the note as surety only for her husband.

Form No. 979.

That at the time this defendant signed the said note described in the complaint she was, and still is, a married woman, and the wife of C. D., and that the said C. D. executed said notes as principal maker in payment of a debt then owing by him individually to the plaintiff, and for no other consideration, and that this defendant thereupon signed said note at the request of and as surety for her said husband, and not otherwise, and this defendant received no consideration for said note, nor did the same in any way concern her separate property or business.

CHAPTER CII.

DIVORCE.

§ 3592. Nature of divorce action.—The state is an interested party in all matters affecting the stability of the family, and where plaintiff sought divorce on grounds of desertion, but her own evidence showed her guilty of misconduct amounting to cause for divorce, the state being a party defendant to the suit, the court rightfully refused relief, notwithstanding default by the husband.[1] The "church divorce" of the Mormon church, whereby parties who have been sealed as husband and wife under the Mormon sealing ordinance agree, under the authority and with the consent of the church, to dissolve their marital relations, is not a valid divorce, though the parties believe it to be valid, and thereafter go through a marriage ceremony with other parties.[2]

Where, in an action for divorce, the defendant appears and joins issue by answer, the nature of the proceeding is thereby changed from a proceeding *in rem* to one *in personam*.[3] It is not the policy of the law to encourage divorce.[4]

§ 3593. Residence.—In California, the plaintiff must aver and prove—though it is not denied—that he (or she) has been a *bona fide* resident of the state one year and of the county in which the action is brought three months, next preceding the commencement of the action.[5] Without such proof the court has no jurisdiction to grant a divorce.[6] A man's residence is that place where his family dwells, or which he makes the chief seat of his affairs and interests.[7] By section 129 of the California Civil Code, it is provided that in actions for divorce the presumption of law that the domicile of the husband is the domicile

1 Earle v. Earle, 43 Or. 293, 72 Pac. 976.

2 Hilton v. Roylance, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723.

3 Gibbs v. Gibbs, 26 Utah, 382, 73 Pac. 641.

4 Locke v. Locke, 153 Cal. 56, 94 Pac. 244.

5 Cal. Civ. Code, § 128.

6 Bennett v. Bennett, 28 Cal. 599.

7 Matter of Hawley, 1 Daly, 531.

of the wife does not apply. After separation, each may have a separate domicile, depending upon actual residence. To constitute a residence, within the legal meaning of the term, there must be a settled fixed abode, an intention to remain permanently, at least for a time, for business or other purposes.[8] In New Hampshire, an offense committed when both parties were out of the jurisdiction of the court is not a ground for divorce.[9]

§ 3594. **Recrimination.**—The doctrine of recrimination, or *compensatio criminum*, is applicable in suits for divorce, and the several offenses which, by the statute, constitute grounds for divorce are pleadable in bar to such suits, the one to the other, within the principles of the doctrine.[10] To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant;[11] as where it is proven that plaintiff had frequently struck defendant.[12] Where it is shown that each party to an action for divorce has been guilty of an offense which the statute has made a ground for divorce, they will be deemed to be in equal wrong. The right to set up in divorce one matrimonial offense in bar of another is an application of the rule that one who invokes the aid of the court must come into it with clean hands.[13] Plaintiff, in a suit for divorce on grounds of desertion, was not entitled to relief, her own evidence showing that she lived in prostitution.[14]

§ 3595. **Second action.**—A plaintiff may bring a second action for divorce for subsequent acts of adultery. The practice for resorting to supplemental complaint is not compulsory.[14a]

8 Frost v. Brisban, 19 Wend. 11, 32 Am. Dec. 423; Matter of Hale, 2 N. Y. Leg. Obs. 139.

9 Frost v. Frost, 17 N. H. 251. Jurisdiction for divorce as dependent upon domicile, see Hunt v. Hunt, 72 N. Y. 218, 28 Am. Rep. 129; Watkins v. Watkins, 125 Ind. 163, 21 Am. St. Rep. 217, 25 N. E. 175; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Rigney v. Rigney, 127 N. Y. 408, 24 Am. St. Rep. 462, 28 N. E. 405.

10 Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

11 Id.; Cal. Civ. Code, §§ 122, 123. As to recrimination, see Burke v. Burke, 44 Kan. 307, 21 Am. St. Rep. 283, 24 Pac. 466; Wheeler v. Wheeler, 18 Or. 261, 24 Pac. 900; Morrison v. Morrison, 142 Mass. 361, 56 Am. Rep. 688, 8 N. E. 59.

12 Hartwell v. Hartwell, 25 Utah, 41, 69 Pac. 265.

13 Day v. Day, 71 Kan. 385, 80 Pac. 974.

14 Earle v. Earle, 43 Or. 293, 72 Pac. 976.

14a Cordier v. Cordier, 26 How. Pr. 187.

§ 3596. **Grounds.**—In California, divorces may be granted for any of the following causes: 1. Adultery; 2. Extreme cruelty; 3. Willful desertion; 4. Willful neglect; 5. Habitual intemperance; 6. Conviction of felony.[14b]

§ 3597. **Adultery defined.**—Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.[15] It can only be committed by a married person; but it is immaterial whether the *particeps criminis* is married or single.[16] Such co-respondent must, in California, be served with any pleading in which he is named, and may appear and plead as a party to the action.[16a]

§ 3598. **Adultery, how alleged.**—The allegation of adultery must not be too general.[17] But a failure to demur is a waiver of such objection.[18] The words "committed adultery" are sufficiently descriptive of the act. The name of the person with whom the adultery is charged to have been committed must be given; if it is not known, that fact must be stated.[19] Time and place should be stated with reasonable certainty, so as to enable the defendant to meet it on the trial.[20] A defect in this particular should be taken advantage of by demurrer, and if no demurrer be interposed, the objection of the want of certainty is held to be waived.[21] In a Massachusetts case, [21a] the respondent moved to quash the libel for uncertainty in this respect, or that libelant file a bill of particulars within a reasonable time. The court ordered the bill of particulars to be filed.[22] The better course would be to amend. There are cases, however, when neither person, time, nor place can be alleged, as where the wife discovers that the husband, since the marriage, has contracted venereal disease; or the husband has been absent for a year, and

14b Civ. Code, § 92.

15 Cal. Civ. Code, § 93; 2 Bishop on Marriage and Divorce, § 703.

16 Id.; Commonwealth v. Call, 21 Pick. 509, 32 Am. Dec. 284.

16a Cal. Code Civ. Proc., § 1019, Stats. 1909, p. 974.

17 Wood v. Wood, 2 Paige, 108; Kane v. Kane, 3 Edw. Ch. 389.

18 Consult Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717. See, also, Ingersoll v. Ingersoll, 1 Code Rep. 102.

19 Germond v. Germond, 6 Johns. Ch. 347, 10 Am. Dec. 335.

20 Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Heyde v. Heyde, 4 Sandf. Ch. 692; Farr v. Farr, 34 Miss. 597, 69 Am. Dec. 406; Wood v. Wood, 2 Paige, 108, 113.

21 Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

21a Adams v. Adams, 16 Pick. 254.

22 See, also, Garratt v. Garratt, 4 Yeates, 244.

upon his return finds his wife pregnant. In these cases, besides stating the adultery in general terms, the peculiar nature of the proof should be referred to, for the double purpose of excusing the want of a more specific allegation, and of notifying the defendant of the nature of the charge and the proof by which it will be supported.[23] Under the Washington statute, [23a] a complaint for divorce on the ground of adultery is insufficient when it fails to allege that the last act of adultery was committed within one year before the commencement of the action, and that it was unforgiven; but such defect is cured by judgment, where proof showing such facts has been admitted without objection.[24]

§ 3599. **Foreign divorces.**—As to the grounds for granting a divorce, the *lex fori* governs, and not the law of the place where the marriage was contracted.[25] After a decree of divorce was rendered in Kentucky in favor of the husband, the wife brought a bill for alimony in Ohio; it was held that a decree for alimony of a court of Ohio having jurisdiction of the subject-matter was a valid decree, and enforceable in Kentucky.[26] A decree of divorce granted by the courts of a state having jurisdiction over the petitioning party as a citizen of the state is by article 4 (§ 1) of the constitution of the United States valid in all the states. By statute, in Rhode Island, the jurisdiction of the court depends upon the residence of the petitioner.[27] The divorce of an Indian woman from her former husband in accordance with the custom of her tribe may be sufficient.[28]

§ 3600. **Improper familiarities.**—In a case of adultery, proof of improper familiarities, not amounting to criminality, was received to characterize the conduct of the party charged; and such proof was allowed of facts which occurred before the time in which the offense was alleged to have been committed.[29]

23 2 Bishop on Marriage and Divorce, § 610. As to pleading habitual adultery, see 2 Bishop on Marriage and Divorce, § 611; Marble v. Marble, 36 Mich. 386.

23a Code Proc., § 764, subd. 2.

24 Burdick v. Burdick, 7 Wash. 533, 35 Pac. 415.

25 Standridge v. Standridge, 31 Ga. 223; Thompson v. State, 28 Ala. 12.

26 Rogers v. Rogers, 15 B. Mon. 364.

27 Ditson v. Ditson, 4 R. I. 87.

28 Kalyton v. Kalyton, 45 Or. 116 74 Pac. 491, 78 Pac. 332.

29 Lockyer v. Lockyer, 1 Edw. Ch. 107.

§ 3601. **Injunction.**—In an action for divorce brought by a wife, an injunction was allowed upon the complaint to restrain the defendant from removing his property out of the state.[30] And where the husband fraudulently assigned his property, both he and his assignee were enjoined from disposing of it.[31]

§ 3602. **Joinder of counts.**—In California, two or more of the grounds of divorce may be united in the same complaint; but they should be separately stated, and the demand of judgment should be framed accordingly. But it seems that in New York charges of adultery and cruel usage, being distinct and independent, and leading to distinct issues and decrees, cannot be united. And the same rule is applied under the Code of Procedure.[32] In an action for a divorce, each count of the complaint setting forth a cause of action must be complete, though it is sufficient to adopt in one count the allegations made in another.[33]

§ 3603. **Desertion, what is.**—Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.[34] Persistent refusal to have matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.[35] Unexplained refusal of plaintiff's wife to have intercourse with plaintiff for three or four weeks after marriage to plaintiff, in absence of evidence as to her health and physical condition, was insufficient to entitle plaintiff to divorce on that ground.[36] Where one of the parties is induced, through the stratagem or fraud of the other, to be absent, and during such absence the other departs with intent to desert, it is desertion by the latter.[37] Departure or absence caused by cruelty or by threats of bodily harm, from which danger would be rea-

30 Vermilyea v. Vermilyea, 14 How. Pr. 470; Rose v. Rose, 11 Paige, 169; Laurie v. Laurie, 9 Paige, 234.

31 Questel v. Questel, Wright, 492. See, also, De Godey v. De Godey, 39 Cal. 157.

32 McIntosh v. McIntosh, 12 How. Pr. 289.

33 Reading v. Reading, 96 Cal. 4, 30 Pac. 803.

34 Cal. Civ. Code, § 95.

35 Cal. Civ. Code, § 96; Fink v. Fink, 137 Cal. 559, 70 Pac. 628.

36 Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19.

37 Cal. Civ. Code, § 97.

sonably apprehended, is not desertion by the absent party, but is by the other.[38] Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.[39] Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.[40] Desertion may be cured within the statutory period (one year) by a return and offer in good faith to fulfill the marriage contract, and solicitation of condonation; and if the other refuse such offer and condonation, it is desertion from the time of such refusal;[41] but after the year of desertion such an offer may be refused without making the refuser a deserter.[42]

The wife must abide by the husband's selection of a home, or it is desertion on her part.[43] But if the place or mode of living selected by the husband is unreasonably and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her objections are made known to him.[44] A wife is not guilty of desertion within section 103 of the California Civil Code, providing that "the husband may choose any reasonable place or mode of living, and, if the wife does not conform thereto, it is desertion," though she refuses to agree with her husband as to the selection of a new home, and though he may be satisfied, if he does choose a new home, she will refuse to go to it, until he actually acquires the home, offers it to her, and she, without sufficient cause, refuses to comply with his selection.[45] Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with the intent to desert in the mind of the offending party.[46] The intent is presumed from proof of the fact of prolonged abandonment without apparent cause.[47] Absence of a wife may con-

38 Cal. Civ. Code, § 98.

39 Cal. Civ. Code, § 99.

40 Cal. Civ. Code, § 101.

41 Cal. Civ. Code, § 102; Andrews v. Runyon, 65 Cal. 629, 4 Pac. 669.

42 Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938.

43 Cal. Civ. Code, § 103; Roby v. Roby, 10 Idaho, 139, 77 Pac. 213.

44 Cal. Civ. Code, § 104. See Hardenbergh v. Hardenbergh, 14 Cal. 654.

45 Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694; Kenniston v. Kenniston, 6 Cal. App. 657, 92 Pac. 1037.

46 Morrison v. Morrison, 20 Cal. 431. See, also, Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 820; Alkire v. Alkire, 33 W. Va. 517, 11 S. E. 11; Williams v. Williams, 130 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. 98, 14 L. R. A. 220.

47 Morrison v. Morrison, 20 Cal. 431.

stitute desertion, even though she be maintaining an action for separate maintenance.[48] The word "willful," as used in the statute concerning divorces, signifies "intentional," and does not imply malice.[49] If the desertion has continued two years (one year), the offer of the offending party to return and live and cohabit with the other will not defeat an action for divorce, unless the offer is accepted and acted upon.[50] And a wife's desertion of her husband, under the California statute, is cured, if she, before the expiration of the statutory period required to make the desertion a cause of divorce, and when in the vicinity of her husband's home, offers to go back and resume the performance of her marital duties, and he refuses to receive her. Under such circumstances, an actual physical return is not necessary. From the date of his refusal, the husband is deemed to have deserted the wife.[51] But where, on the liability of a husband to support his wife, they separate voluntarily, and she returns to her relatives, the separation is not a willful desertion on his part, though he should cease to correspond with her.[52] He need not urge her to come back.[53] To constitute a ground for divorce under the California statute, willful desertion must continue one year.[54] If the court can gather the requisite facts from the complaint, as if it charge willful desertion by the defendant without any reasonable cause, fixing clearly the time thereof, and alleging its continuance for a period of one year, and up to the commencement of the action, it will be sufficient.[55]

§ 3604. Complaint in desertion.—A separation without consent may become a separation by consent; and the same is a question of fact to be pleaded and considered by the jury when a jury is had.[56] A complaint in an action of divorce alleging that on March 8, 1898, the defendant voluntarily separated himself from the plaintiff, without any fault of plaintiff, with intent to desert her, and has continued to desert her, sufficiently

48 Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297.

49 Benkert v. Benkert, 32 Cal. 467.

50 Id.

51 Andrews v. Runyon, 65 Cal. 629, 4 Pac. 669.

52 Ingersoll v. Ingersoll, 49 Pa. St. 249, 88 Am. Dec. 500. See, also, Cal. Civ. Code, §§ 99-101.

53 Patterson v. Patterson, 45 Wash. 296, 88 Pac. 196.

54 Cal. Civ. Code, § 107.

55 Calvert v. Calvert, 15 Colo. 390, 24 Pac. 1043.

56 McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808.

states a cause of action under section 95 of the California Civil Code, providing that willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.[57] A desertion is not shown if the wife has not left the domicile established by the husband or has not refused to come to a new domicile established by him.[58]

§ 3605. Divorce on ground of felony.—A felony is a crime which is punishable with death or by imprisonment in the state prison.[59] The action for divorce, for this cause, in California, must be brought within two years after a pardon, or the termination of the period of sentence.[60] In an action for a divorce on this ground against one Nathaniel U., a record of the conviction of Nathan U. is admissible in evidence, upon proof of identity.[61]

§ 3606. Extreme cruelty, what is.—Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage.[62] The question is no longer an open one whether mental suffering, as the result of willful ill-treatment, not accompanied with violence to the person, is or may be such as to justify a divorce on the ground of extreme cruelty. "Grievous—afflictive; painful; hard to be borne."—Webster. Any unjustifiable conduct upon the part of either of the spouses, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the health, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty.[63] The only question is as to the extent or degree of mental suffering which must be borne without relief, or that will justify relief; whether, to be a ground for divorce, the mental suffering must have affected the body by injuring the health, or be such, at the least, as to seriously endanger the health. It would be difficult to collate from the authorities, or aside from the authorities to enunciate, any well-defined rule that would be applicable in all cases. It is evident that the body is an un-

57 Sheridan v. Sheridan, 134 Cal. 88, 66 Pac. 73.

58 State v. Luper (Or.), 95 Pac. 811.

59 Cal. Pen. Code, § 17.

60 Cal. Civ. Code, § 124.

61 Utsler v. Utsler, Wright, 627.

62 Cal. Civ. Code, § 94.

63 Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

reliable indicator of mental suffering. A peculiarly sensitive mind may exist in a body so vigorous as to prevent any material inroad upon the health from mental suffering, no matter how great; whilst in other cases, where the mind is less sensitive, the body may be so weak as to yield to comparatively trifling mental suffering.[64] If divorces are granted to prevent or relieve suffering, and not simply to preserve life, it is difficult to assign a satisfactory reason why the bodily suffering should be relieved, and not the mental.[65] Indeed, in the large majority of cases of personal violence, the wounded pride, the consciousness of lost affection, and the indignity endured cause keener suffering than the wounded flesh or broken limb. The difficulty, however, lies in the proof. Cruel and inhuman treatment sufficient to justify a divorce may consist of abusive language and improper conduct as well as personal violence.[66] Where the mental suffering has produced no visible effect upon the bodily health or appearance, the tangible standard by which its extent may be measured, whether with accuracy or not, is wanting, and we are left to the recital of suffering by the aggrieved party, and inference as to the probable effect of the aggressor's treatment. From the very nature of the case, the testimony of third persons to the mental sufferings of a complainant can rarely, if ever, present to the court a just conception of it. In a California case,[67] the district judge, in passing on a motion for new trial, said: "While upon paper it may not appear that plaintiff had any great reason to complain on the score of mental anguish, yet the appearance of the parties in court, in connection with the evidence offered, entirely satisfied my mind that she was a keen sufferer by reason of the premeditated, persistent, and willful system of persecution and annoyance adopted by the defendant towards her; . . . that his language to and treatment of her not only caused her mental, but also physical, suffering, and that to remand her to his control and companionship would be virtually consigning her to a premature death or to insanity." In the same case the supreme court say: "The voluminous record sent up is full of the details of the most disgusting and outrageous conduct of the

64 Geisseman v. Geisseman, 34 Colo. 481, 83 Pac. 635.

65 Harding v. Harding, 36 Colo. 106, 85 Pac. 423; Colo. Sess. Laws 1893, p. 236, c. 80, § 1.

66 Benfield v. Benfield, 44 Or. 94, 74 Pac. 495.

67 Matthai v. Matthai, 49 Cal. 93.

defendant towards the plaintiff; and if the evidence tending to show these is to be believed, it would be a reproach to the law should relief be denied to the plaintiff." The effect of this conduct upon the plaintiff was not discussed by the supreme court.

In an earlier California case,[68] Cope, C. J., said: "It appears that the defendant was in the habit of using towards the plaintiff the vilest and most abusive language, falsely charging her with adulterous intercourse; that she is a weak, nervous woman, modest in her deportment, and amiable in her disposition; that the conduct of the defendant caused her much mental suffering, producing fits of illness, and threatening permanent injury to her health, rendering a separation from him necessary." In the same case, it was further said: "Cruelty, as defined by Bishop, is such conduct in one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as naturally interferes with the discharge of marital duties. This definition falls strictly within the doctrine of the cases, and in *Morris* v. *Morris*,[69] we adopted it as expressing substantially the meaning of our statute. It seems to be settled that, in order to justify a divorce, the harm to be avoided must be bodily harm, and not merely mental, and some of the authorities go so far as to hold that mental suffering, though affecting the health and endangering the physical safety, is not sufficient. The better opinion, however, is opposed to this view, and we think that any conduct sufficiently aggravated to produce ill-health or bodily pain, though operating primarily upon the mind only, should be regarded as legal cruelty."[70]

The definition given by section 94 of the California Civil Code, has since been adopted. Where, in an action for divorce on the ground of cruel and inhuman treatment, the evidence disclosed that plaintiff was very jealous of her husband without cause, and that he was irritable, and that they frequently quarreled and assaulted each other, in which encounters they were quite

68 Powelson v. Powelson, 22 Cal. 358.

69 14 Cal. 76, 73 Am. Dec. 615.

70 See, also, Fleming v. Fleming, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. 566; Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487; Mason v. Mason, 131 Pa. St. 161, 18 Atl. 1021; Beyer v. Beyer, 50 Wis. 254, 36 Am. Rep. 848, 6 N. W. 807; Kelly v. Kelly, 18 Nev. 49, 51 Am. Rep. 732, 1 Pac. 194, in which false accusations of marital infidelity on the part of the husband, made by the wife, were held extreme cruelty.

evenly matched, a decree dismissing the decree was proper.[71] The conduct of a wife in failing to take an interest in the husband's affairs, and in refusing to enter into the social life which he desires, or the fact that she is moody, whimsical, exacting, and irascible, and not considerate of the husband, does not authorize the granting of a divorce to the husband on the ground of cruelty.[72]

§ 3607. Cruelty pleaded.—Evidence of acts of cruelty is inadmissible in support of a bill for divorce, unless the acts constituting the cruelty complained of are specially alleged in the bill.[73] Cruelty not being defined by the code, some specific acts constituting the cruelty must be pleaded,[74] and that such acts caused grievous bodily injury or danger to plaintiff's life.[75] In Illinois, it was held that although abusive language is not, by itself, cause for divorce, yet where blows are proved, abusive language may be taken into view as determining their character as constituting cruelty such as warrants a divorce.[76] A gross abuse of marital rights by the husband, resulting in injury or suffering to the wife, may constitute extreme cruelty within the meaning of the statute of New Jersey, allowing divorces *a mensa et thoro* upon that ground.[77] Where a husband by force compels his wife to submit to sexual intercourse while she is pregnant and suffering from morning sickness, the effect of which is to make her very sick at times, and which, taken with his other conduct, gradually undermines her health, she is entitled to a divorce.[78] Where there is no reasonable apprehension of a continuance of cruelty, the divorce will be denied.[79] As to cruelty by violence, the kind of violence is not material. In this respect there is no difference between a blow, a push, or any other force.[80] For a husband to confine his wife; or to starve her; or, having the means to procure them, to deprive her of the necessaries of life; or to with-

71 Jones v. Jones, 44 Or. 586, 77 Pac. 134.

72 Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812.

73 Id.

74 Geisseman v. Geisseman, 34 Colo. 481, 83 Pac. 635.

75 Ryan v. Ryan, 33 Mont. 406, 84 Pac. 494.

76 Farnham v. Farnham, 73 Ill. 497; Day v. Day, 56 N. H. 316.

77 English v. English, 27 N. J. Eq. 579; Mayhew v. Mayhew, 61 Conn. 233, 29 Am. Rep. 195, 23 Atl. 966.

78 McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119.

79 English v. English, 27 N. J. Eq. 579.

80 Dysart v. Dysart, 1 Rob. 106, 125; Saunders v. Saunders, 1 Rob. 549, 560.

hold medical assistance in sickness while he is able to provide it; the ill-treatment of his wife's child, if for the purpose of annoying her; desertion; refusing marital connection, have all been held to be cruelty.[81] A bill for divorce which, in stating a case for divorce on the ground of adultery, avers the contracting by defendant of a venereal disease, will authorize a decree on the ground of extreme cruelty, where the proof clearly substantiates the fact so averred.[82] In Iowa, the cruel treatment must be such as to endanger life, and the complaint must state the specific acts of inhuman treatment.[83] Where a husband, in presence of his wife, in spite of her entreaties, unmercifully beats her child, it is cruel and inhuman treatment.[84] But demeanor calculated to provoke annoyance, discontent, and disgust is not sufficient.[85] And divorces are granted in such cases to relieve from apprehended danger of bodily harm,[86] and not from some one sudden attack or angry encounter.[87] But not when such cruelty is caused by the misconduct of the wife.[88] The acts or character of treatment which will amount to extreme cruelty sufficient to constitute a ground of divorce must in a great measure depend on the character of the respective parties and the peculiar circumstances of each case.[89] Under the California statute, adultery or habitual intemperance does not, in a legal sense, constitute extreme cruelty.[90] Nor does the fact that the husband deserted the wife for three months, during which time he remained in Europe to perfect himself in painting.[91] The specific acts which constitute the cruel treatment must be stated.[92]

81 See 1 Bishop on Marriage and Divorce, 5th ed., § 735 et seq., and cases cited. As to the amount of cruelty, or the extent of danger, see Barrere v. Barrere, 4 Johns. Ch. 187; Mason v. Mason, 1 Edw. Ch. 278; Richards v. Richards, 1 Grant (Pa.), 389; Mahone v. Mahone, 19 Cal. 626, 628, 81 Am. Dec. 91; Graecen v. Graecen, 1 Green Ch. 459; McMahan v. McMahan, 9 Or. 525; Albert v. Albert, 5 Mont. 577, 51 Am. Rep. 86, 6 Pac. 23; Carpenter v. Carpenter, 30 Kan. 712, 46 Am. Rep. 108, 2 Pac. 122.

82 Canfield v. Canfield, 34 Mich. 519; Collett v. Collett, 1 Curt. Ecc. 678; Long v. Long, 2 Hawks, 189.

83 Freerking v. Freerking, 19 Iowa, 34.

84 Bihin v. Bihin, 17 Abb. Pr. 19.

85 Conklin v. Conklin, 17 Abb. Pr. 20, note.

86 Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615.

87 Galigher v. Galigher, 49 Or. 155, 89 Pac. 146; Mills v. Mills, 47 Or. 246, 83 Pac. 390.

88 Johnson v. Johnson, 14 Cal. 459.

89 Reed v. Reed, 4 Nev. 395.

90 Haskell v. Haskell, 54 Cal. 262. See, also, Shutt v. Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519.

91 Smith v. Smith, 62 Cal. 466.

92 Anonymous, 11 Abb. Pr. 231;

§ 3608. **Common property.**—Where the decree of divorce, for extreme cruelty, in an action in which there was no averment in the pleadings as to the common property, awarded it all to the plaintiff, it was held that, in so far as it purported to make disposition of or direction concerning such property, it should be reversed, and the cause remanded for amendment of the pleadings and for further proceedings.[93] There is no doubt that the court, in granting a divorce, has authority to direct the defendant to pay the plaintiff alimony, and the allowance may be based upon his earnings, or his ability to earn money.[94]

§ 3609. **Condonation.**—An offer by a wife to return to her husband and live with him, made pursuant to an order of court for her support, in lieu of an allowance, is not a condonation of his previous cruel treatment.[95] While, generally speaking, condonation in divorce is a defense not available unless pleaded, when, though not pleaded, the issue has been contested in the evidence without objection, and it clearly appears that the offense alleged in the complaint has been condoned, the divorce will be denied.[96]

§ 3610. **Provocation of violence.**—A divorce will not be granted on the ground of extreme cruelty when it appears that the complaining party has willfully provoked the violence or misconduct complained of, unless such violence greatly exceeds the provocation.[97] Where the conduct of the plaintiff was not free from fault, but it was not of such a character as to excuse defendant's acts of personal violence, the court is authorized to grant a divorce.[98]

§ 3611. **Single act of violence.**—A mere act of violence, where there is no apprehension of its repetition, and which is the result of rashness rather than malignity, does not furnish a ground of divorce on the ground of extreme cruelty, because this relief

sub nom. Walton v. Walton, 32 Barb. 203. See Smith v. Smith, 62 Cal. 466.

93 Howe v. Howe, 4 Nev. 469. See Cal. Civ. Code, § 146.

94 Bishop on Marriage and Divorce, § 604.

95 Retz v. Retz, 19 Abb. Pr. 90.

96 Bordeaux v. Bordeaux, 30 Mont. 36, 75 Pac. 524; affirmed, 32 Mont. 159, 80 Pac. 6.

97 Reed v. Reed, 4 Nev. 395.

98 Eidenmuller v. Eidenmuller, 37 Cal. 364. See, also, Albert v. Albert, 5 Mont. 577, 51 Am. Rep. 86, 6 Pac. 23; Hawkins v. Hawkins, 65 Md. 104, 3 Atl. 749.

is not granted to punish the party guilty of misconduct, but relieve the other party from future suffering or violence.[99]

§ 3612. **Defenses—Affirmative.**—In Colorado, in all actions for divorce, defendant may file a cross-complaint, in which may be set forth any legal ground for divorce against plaintiff. If on trial thereof both parties should be found guilty of offenses which should entitle the opposite party to a divorce, no divorce shall be granted to either party. Defendant may set up by cross-complaint, and may prove, any act, such as cruelty, entitling him or her to a divorce, in order to defeat plaintiff's action, without asking for a divorce.[100]

§ 3613. **Willful neglect—Definition of.**—Willful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation.[101] Willful neglect must continue for one year before it becomes a ground for divorce.[102] The only limitation to this action is "an unreasonable lapse of time before the commencement of the action."[103] If the failure to provide is attributable clearly to one of these causes, it is sufficient to allege that one, and omit the other. If all are inserted, it must be in the conjunctive. The support of his wife is a continuing obligation on the part of the husband, and his failure to meet it is a continuing cause for a divorce, unless there has been an unreasonable lapse of time before the action is commenced; and he is not released from this obligation by a judgment in his favor in an action for a divorce upon this ground.[104]

§ 3614. **Charge of failure to support.**—It must affirmatively appear in the complaint that the husband was the owner of property sufficient to provide for the necessaries of life, and neglected so to do, where the application is made on the ground of the willful neglect of the husband, for the statutory period, to provide the common necessaries of life, having the ability to

99 Reed v. Reed, 4 Nev. 395; Hoshall v. Hoshall, 51 Md. 72, 34 Am. Rep. 298.

100 Cupples v. Cupples, 33 Colo. 449, 80 Pac. 1039.

101 Cal. Civ. Code, § 105.

102 Cal. Civ. Code, § 107.

103 Cal. Civ. Code, § 124.

104 Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

provide the same. The residence of the husband with the wife within the three years (now one year) is no answer to the application where it appears that they were not living together at the commencement of the suit. If common necessaries are provided by the earnings of either, there is no such willful neglect as is contemplated by the statute. The earnings of both husband and wife go into a common fund, and become common property, the disposition of which belongs to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree.[105] A decree of divorce for failure to make reasonable provision for the support of the family cannot be sustained where the evidence showing that defendant, with plaintiff's efforts, they being dependent on their own labor for their support, made ample provision until within less than a year before the commencement of the action.[106]

§ 3615. **Allegations of.**—A complaint which merely charges the defendant with "willful neglect" does not state a cause of action, because, by the statute, there are two sets of facts which are included within the expression "willful neglect,"—1. A neglect on the part of the husband to provide the wife with the common necessaries of life, he having the ability to do so; and 2. His failure to do so when he is unable, provided such inability has been caused by his idleness, profligacy, or dissipation.[107] A complaint averring willful neglect, in that, by reason of profligacy and dissipation, the defendant has failed to provide, etc., will not support a finding that the defendant failed to provide, having the ability to do so.[108]

§ 3616. **Habitual intemperance defined.**—Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.[109] He need not have more drunken than sober hours.[110]

105 Washburn v. Washburn, 9 Cal. 476.

106 Branch v. Branch, 30 Colo. 499, 71 Pac. 632.

107 Devoe v. Devoe, 51 Cal. 544.

108 Id. See Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935.

109 Cal. Civ. Code, § 106.

110 Page v. Page, 43 Wash. 293, 117 Am. St. Rep. 1054, 86 Pac. 582, 6 L. R. A. (N. S.) 914.

Before the adoption of this section it was said: If there be a habit of drinking to excess, to such a degree as to disqualify the party from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance.[111] Only the ultimate facts need be alleged where the ground is one defined by the code.[112] If cruelty is the ground, some specific acts of cruelty must be alleged,[113] and that such acts produced grievous bodily injury.[114] One who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquors are sold is an habitual drunkard within the meaning of the Michigan divorce law.[115] By the Kentucky Revised Statutes, a decree of divorce in favor of a wife may be had for the following cause: "Confirmed habit of drunkenness on the part of the husband of not less than one year's duration, accompanied with a wasting of his estate, and without any suitable provision for his wife and children." The words "wasting of his estate," where the husband has no property, apply to and embrace his health, time, and labor, all of which, for the purpose of supporting himself and family, are essentially his estate.[116] A single act of drunkenness and indecency of the wife is not such an indignity as will render the condition of the husband intolerable, within the meaning of the statute of Missouri.[117] Habitual drunkenness, a series of annoyances, and extraordinary conduct do not constitute legal cruelty, but, in addition to these, the willful communication of a venereal disease to the wife is cruelty.[118] An allegation that the defendant is "habitually intemperate," is sufficiently definite, if accompanied by an averment that the intemperance has continued for the statutory period.[119] An allegation that the defendant had been habitually intemperate to such a degree as to reason-

111 Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91. And see Wheeler v. Wheeler, 53 Iowa, 511, 5 N. W. 689, 36 Am. Rep. 240.

112 Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664.

113 Geisseman v. Geisseman, 34 Colo. 481, 83 Pac. 635.

114 Ryan v. Ryan, 33 Mont. 406, 84 Pac. 494.

115 Magahay v. Magahay, 35 Mich. 210. See, also, to same effect, McBee v. McBee, 22 Or. 329, 29 Am. St. Rep. 613, 29 Pac. 887; Brown v. Brown, 38 Ark. 328.

116 McKay v. McKay, 18 B. Mon. 8.

117 Kempf v. Kempf, 34 Mo. 211.

118 Brown v. Brown, L. R., 1 P. & D. 46; Boardman v. Boardman, L. R., 1 P. & D. 237.

119 Burns v. Burns, 13 Fla. 369.

ably inflict a course of great mental anguish upon the plaintiff is sufficient, under the California statute.[120]

§ 3617. **Causes by the court deemed sufficient.**—The mere fact that parties cannot live together is not ground for divorce.[121] A divorce may be granted on application of either party for any cause not specified, which is deemed by the court to be sufficient, and the court is satisfied that the parties can no longer live together. The court has jurisdiction to grant a divorce on proof that the husband had been guilty of sodomy.[122]

§ 3618. **Annulment of marriage—Under the California Code.**—A marriage may be annulled for any of the following causes, existing at the time of the marriage: 1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife; 2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force; 3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabit with the other as husband or wife; 4. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife; 5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife; 6. That either party was, at the time of the marriage, physically incapable of entering into the marriage state, and such incapacity continues and appears to be incurable.[123] A marriage contract creates a civil *status*, and is subject to dissolution only through the sovereign power of the state.[124] A complaint for annulment is not bad because it states the parties are, and have been, husband and wife. The marriage may be annulled if consent of

120 Forney v. Forney, 80 Cal. 528, 22 Pac. 294. See Reading v. Reading, 96 Cal. 4, 30 Pac. 803.

121 Wheeler v. Wheeler, 38 Wash. 491, 80 Pac. 762.

122 Poler v. Poler, 32 Wash. 400, 73 Pac. 372.

123 Cal. Civ. Code, § 82.

124 Hilton v. Roylance, 25 Utah, 129, 95 Am. St. Rep. 821, 69 Pac. 660, 58 L. R. A. 723.

either party was obtained by force, unless such party afterwards freely cohabits with the other as husband and wife.[125]

§ 3619. Action, by whom brought, and when.—1. For causes mentioned in subdivision 1: By the party to the marriage, who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such nonaged male or female, at any time before such married minor has arrived at the age of consent; 2. For causes mentioned in subdivision 2: By either party during the life of the other, or by such former husband or wife; 3. For causes mentioned in subdivision 3: By the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party; 4. For causes mentioned in subdivision 4: By the party injured within four years after the discovery of the facts constituting the fraud; 5. For causes mentioned in subdivision 5: By the injured party within four years after the marriage; 6. For causes mentioned in subdivision 6: By the injured party within four years after the marriage.[126]

§ 3620. Children of annulled marriage.—Where a marriage is annulled on the ground that a former husband or wife was living, or on the ground of insanity, children begotten before the judgment are legitimate, and succeed to the estate of both parents.[127]

§ 3621. Antenuptial unchastity.—While neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein,[128] yet antenuptial unchastity is not, as a rule, ground for annulling a marriage; and that even where the woman represents herself as chaste, and secures the marriage by such false representations.[129] In an extreme case, as where a man married a common prostitute without knowledge

125 Linebaugh v. Linebaugh, 137 Cal. 26, 69 Pac. 616.

126 Cal. Civ. Code, § 83. See People v. Beevers, 99 Cal. 286, 33 Pac. 844.

127 Cal. Civ. Code, § 84.

128 Cal. Civ. Code, § 62.

129 Barnes v. Barnes, 110 Cal. 418, 42 Pac. 904.

of her character, there seems to be doubt.[130] Cases where there was actual pregnancy, by a stranger, at the time of the marriage, authorize an annulment. In a California case,[131] the court said: "It cannot be pretended that the condition of the defendant was not a most material circumstance to the consent required for the validity of the contract. Its concealment operated as a fraud upon the plaintiff of the gravest character. His contract was with her and for her; it referred to no other person, much less included a child of bastard blood. A child imposes burdens and possesses rights. It would necessarily become a charge upon the defendant, and through her upon the plaintiff. It would become a presumptive heir of his estate. . . . A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract."[132] It is not necessary to prove express representations on her part that she was chaste.[133]

§ 3622. **Alimony.**—In an action by a man to obtain a decree declaring void a marriage, for the reason that the defendant at the time of such marriage had a living husband, the fact being admitted, the court will not grant the defendant alimony and a counsel fee, because she is admittedly not the wife of plaintiff.[134] Under the Oklahoma statute,[135] providing that on divorce the court shall grant such alimony to the wife as may appear just, where the court grants the husband a divorce for adultery, it may award the wife a reasonable amount of permanent alimony.[136] In determining the question of alimony the amount of property owned by the husband, his ability and opportunity to earn money, the health of the parties, their station in life, and the amount and kind of the wife's property should be taken into consideration by the trial court.[137] Where a court has no jurisdiction to open a divorce decree, its subsequent order for alimony and suit money is void.[138]

130 See 1 Bishop on Marriage and Divorce, § 179 et seq.

131 Baker v. Baker, 13 Cal. 87.

132 See, also, Leavitt v. Leavitt, 13 Mich. 452, 458; Dawson v. Dawson, 18 Mich. 335.

133 Donovan v. Donovan, 9 Allen, 140.

134 Appleton v. Warner, 51 Barb. 270.

135 Stats. 1893, § 4550.

136 Pauly v. Pauly, 14 Okla. 1, 76 Pac. 148.

137 Read v. Read, 28 Utah, 297, 78 Pac. 675; Brandt v. Brandt, 40 Or. 477, 67 Pac. 508; In re Cave, 26 Wash. 213, 90 Am. St. Rep. 736, 66 Pac. 425; Hart v. Hart, 31 Colo. 333, 73 Pac. 35.

138 Metler v. Metler, 32 Wash. 494, 73 Pac. 535.

§ 3623. **Frauds which invalidate.**—Those frauds which invalidate a marriage are usually such as negative any consent to be married at all, and are commonly duress, surprise, or stratagem in procuring the marriage, and the fraud must be nearly, if not actually, coincident with the marriage.[139] So of a marriage procured by abduction, terror, or fraud;[140] or by fraud and force.[141] Where the husband had, before marriage to the present wife, represented to her that his former wife was dead, when in fact she was living, he having been divorced from her, these representations, even if fraudulent, are not fraud in a material matter or thing within the legitimate purposes of marriage.[142]

§ 3624. **Minors—Age of consent.**—Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years and upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.[143] Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.[144] This section, as amended by act of March 26, 1895, reads thus: "Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases."

§ 3625. **Absence of former husband.**—Where, after a husband has been absent five years, and not heard from, and the wife, in good faith, supposing him dead, marries another, the marriage is voidable only, and cannot be adjudged void at the instance of a third party.[145] Under section 61 of the Civil Code of California, a marriage is not void because contracted when one of the spouses had a former husband or wife living, where such former husband or wife has been absent and not known to the other spouse to be living for the space of five years before the subsequent marriage, or is generally reputed and believed to

139 Leavitt v. Leavitt, 13 Mich. 452.

140 Ferlat v. Gojon, Hopk. 478.

141 Sloan v. Kane, 10 How. Pr. 66.

142 Clarke v. Clarke, 11 Abb. Pr. 228. As to annulment of marriage procured by fraud, see Tomppert v. Tomppert, 13 Bush, 326, 26 Am. Rep. 197.

143 Cal. Civ. Code, § 56.

144 Cal. Civ. Code, § 57.

145 Cropsey v. McKinney, 30 Barb. 47. See Griffins v. Banks, 24 How. Pr. 213.

be dead at the time of the contracting of the second marriage, but such subsequent marriage is valid until its nullity is adjudged by a competent tribunal.[146]

§ 3626. **Return to reason.**—Where a person, insane at the time of her marriage, after return to reason refused to ratify or consummate it, and filed her bill to annul it, the court decreed the marriage null and void.[147]

§ 3627. **Impotence—Medical examination.**—To authorize a sentence of nullity on the ground of impotence, the existence of incapacity at the time of marriage, its continuance, and that it is incurable, must be shown.[148] The court has power to compel the defendant to submit to a medical examination, though the statute made no provision for it. Whether in such case the court has power to compel the defendant to answer interrogatories on oath, *quære*.[149] Though a marriage be void *ab initio*, as for insanity, lineal consanguinity, etc., there ought to be a judicial decision to that effect.[150] "Either party to an incestuous or void marriage may proceed by action in the superior court to have the same so declared."[151]

§ 3628. **Jurisdiction of the person.**—The question of residence is a jurisdictional one in a divorce suit,[152] and the court must inquire into the same.[153] Where, in an action for divorce, plaintiff alleged residence in the state for more than ten years then last past, which the defendant specifically denied, plaintiff's admission in the complaint that during a considerable part of that time she had lived in a yacht, and was sailing the high seas,

146 Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Hunter v. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. 756, 31 L. R. A. 411.

147 Wightman v. Wightman, 4 Johns. Ch. 343. See Castor v. Davis, 120 Ind. 231, 22 N. E. 110.

148 1 Chit. M. J. 375; Law of Husband and Wife, 16; Brown v. Brown, 1 Hag. Ecc. 523; 2 Lee Ecc. Cas. 580; 1 Beck M. J. 68; 4 Partida, tit. 8; Van Leeuw, 87; Davenbagh v. Davenbagh, 5 Paige, 554, 28 Am. Dec. 443; Bascomb v. Bascomb, 25 N. H. 267; Keith v. Keith, Wright, 518; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Payne v. Payne, 46 Minn. 467, 24 Am. St. Rep. 240, 49 N. W. 230. But see Burtis v. Burtis, Hopk. 557.

149 Le Barron v. Le Barron, 35 Vt. 365.

150 Wightman v. Wightman, 4 Johns. Ch. 343. See Rawdon v. Rawdon, 28 Ala. 565.

151 Cal. Civ. Code, § 80.

152 Branch v. Branch, 30 Colo. 499, 71 Pac. 632.

153 Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197.

going from port to port, was not inconsistent with her residence in the state.[154] In Colorado, under the statute[155] providing that no person shall be entitled to a divorce unless a *bona fide* resident and citizen of the state for one year prior to the commencement of the action, a *bona fide* resident of the state for one year, who was foreign born, but has duly declared his intention to become a citizen of the United States, may maintain an action for a divorce.[156] The fact that defendant has not been a resident long enough to institute divorce proceedings does not prevent the court granting her a decree of divorce upon cross-complaint, if the husband had the necessary residence when he brought the suit.[157] In an action by the wife for divorce, evidence that the plaintiff came to the state about two years before suit was commenced, and spent much of that time in the state until the action began; though she was absent from the state for some time, the absence was to enable her to seek employment; that her child remained in the state; and that it was her constant intention to make her home within the state, was sufficient to establish residence for one year prior to bringing the action.[158] Where it appeared that plaintiff resided in the state the full statutory period, and defendant, a non-resident, appeared and surrendered himself to the court's jurisdiction, it was held that the court had jurisdiction to decide the whole case on the merits, and, if necessary, grant a decree to her on her cross-complaint.[159]

Abandonment of the wife by the husband, and his moving to another state, does not affect or change her domicile for the purposes of a divorce action.[160]

§ 3629. **Pleading jurisdiction.**—All jurisdictional facts must be pleaded in the complaint, such as the statutory residence of plaintiff.[161]

§ 3630. **Summons.**—Where defendant in an action for divorce had left the county where he had formerly resided with

154 De Tolna v. De Tolna, 135 Cal. 575, 67 Pac. 1045.

155 Laws 1893, p. 239, § 6.

156 Cairns v. Cairns, 29 Colo. 260, 93 Am. St. Rep. 55, 68 Pac. 233.

157 Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

158 Summerville v. Summerville, 31 Wash. 411, 72 Pac. 84.

159 Fisk v. Fisk, 24 Wash. 333, 67 Pac. 1064.

160 State v. Morse, 31 Utah, 213, 87 Pac. 705.

161 Mont. Rev. Codes, § 3674; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197; Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278.

his wife and had taken up a temporary residence in a foreign country, the word "residence," as used in section 57 of the Oregon code, should be construed to include such temporary residence; and hence it was proper for the court to require, in the order for publication, that the summons and complaint be mailed to defendant, directed to such temporary residence.[162] Such mailing of copies to defendant is mandatory, and a condition precedent to granting divorce.[163] A defendant in an action for divorce, alimony, and custody of children, entering an appearance to contest the right to the custody of the children, enters a general appearance.[164] The affidavit for service by publication must show what diligence has been used to secure personal service, and that at the time of making affidavit the defendant is out of the jurisdiction.[165] In California, a co-respondent named in a charge of adultery must be served with notice, in person, or as the court may direct.[165a]

§ 3631. **Ne exeat.**—The departure of the husband without procuring discharge of a writ of *ne exeat*, and without leave of court, whether before or after judgment, is a breach of the bond.[166]

§ 3632. **Jurisdiction—Venue.**—Since, under section 7 of article 8 of the Utah constitution, vesting the district courts of the state with original jurisdiction, the district court of the county in which a plaintiff in an action for divorce resided had jurisdiction of the subject-matter of an action for divorce for adultery committed in another county, defendant's appearance and failure to object that an action should be tried in the county where the alleged adultery was committed constituted a waiver of any objection to the jurisdiction of the court in the county where the suit was brought.[167] A divorce may be filed in the county in which plaintiff has resided for one year, and like proceedings had thereon as in a civil action; and where a complaint is so filed, the overruling of a motion for change of venue is

162 McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

163 Rodgers v. Nichols, 15 Okla. 579, 83 Pac. 923.

164 Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539.

165 Cordray v. Cordray, 19 Okla. 36, 91 Pac. 781.

165a Cal. Code Civ. Proc., § 1019.

166 Marselis v. People, 18 Colo. App. 258, 71 Pac. 429.

167 Gibbs v. Gibbs, 26 Utah, 382, 73 Pac. 641.

not error.[168] The provisions relative to the change in the place of trial apply to actions for divorce, though the place in which actions may be brought is expressly limited.[169] Where plaintiff was regularly awarded a divorce after service by publication, the court, after judgment was entered, had no jurisdiction to set the same aside and allow defendant to defend the suit.[170]

§ 3633. **Jurisdiction.**—In an action for divorce brought by the wife, the judge of the court in which the action is pending has no jurisdiction to hear and determine in the district court of an adjoining county, of the same district, an application by the wife for an allowance *pendente lite* and for the custody of the children of the marriage.[171] It can only be made in the court where the action is pending. In actions for divorce *a vinculo*, the jurisdiction of the court over the subject-matter of the action, and over the parties, in respect to all matters involved in it, terminates with the entry of final judgment thereon, save for the enforcement or correction of the judgment.[172]

§ 3634. **Legitimacy.**—While a divorce is granted for the adultery of the wife, the legitimacy of the children begotten of her before the commission of the adultery is not affected; but the legitimacy of the other children of the wife may be determined by the court upon the evidence in the case.[173]

§ 3635. **Limitation of action.**—A divorce must be denied under the California Civil Code—1. When the cause is adultery, and the action is not commenced within two years after the act is committed, or after its discovery by the injured party; 2. When the cause is conviction of felony, and the action is not commenced within two years after pardon, or expiration of sentence; 3. In all other cases, where there is an unreasonable lapse of time before the commencement of the action.[174]

168 Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193.

169 People v. District Court, 30 Colo. 123, 69 Pac. 597.

170 Metler v. Metler, 32 Wash. 494, 73 Pac. 535.

171 Bennett v. Southard, 35 Cal. 688.

172 Kamp v. Kamp, 59 N. Y. 212. As to jurisdiction in cases of divorce, see Weber v. Weber, 16 Or. 163, 17 Pac. 866; Wheeler v. Wheeler, 18 Or. 261, 24 Pac. 900; Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049; Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 246, 16 Pac. 887.

173 Cal. Civ. Code, § 145.

174 Civ. Code, § 124; Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935. As to presumptions established by

§ 3636. **Maintenance.**—Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband of the wife and children of the marriage, or any of them.[175]

§ 3637. **Marriage, averment of.**—The averment of marriage, if not denied, need not be proven.[176] In suit for divorce on the ground of adultery, the marriage, where it is denied in the answer, must be proved. It will not be inferred from matrimonial cohabitation with the reputation of being married.[177]

§ 3638. **Marriage, when void.**—Though a marriage be *ipso facto* void, as where a party was insane, yet it is proper that it should be declared void by a judicial tribunal.[178]

§ 3639. **Name of adulterer.**—The name of the person with whom the defendant committed adultery should be given, if known, though, to avoid scandal, it has been held that the name need not be given if sufficient certainty can otherwise be had.[179] The time and place of the adulterous act should be alleged with sufficient particularity to enable defendant to prepare his defense. But the particular places or houses need not be alleged when the acts extended over a period of months in different towns.[180] The co-respondent named must be served, and permitted to appear and plead as a party.[181]

§ 3640. **New Trial.**—The rule that where there is a conflict in the evidence the judgment will not be disturbed is applied in divorce cases.[182] If defendant uses sufficient diligence to secure a doctor's certificate and a continuance of a trial on account of sickness and fails, she may have a new trial on the same grounds.[183]

lapse of time, and how they may be rebutted, see Cal. Civ. Code, §§ 124-126.

175 Cal. Civ. Code, § 136. See generally upon the subject of maintenance or support, how secured, and against whom, and what property enforced, Cal. Civ. Code, §§ 136-148.

176 Fox v. Fox, 25 Cal. 587.

177 Case v. Case, 17 Cal. 598.

178 1 Bl. Com. 439; 1 Collins on Lunacy, 554; Wightman v. Wightman, 4 Johns. Ch. 343; Perry v. Perry, 2 Paige, 501.

179 Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784; Farr v. Farr, 34 Miss. 597, 69 Am. Dec. 406.

180 Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 Pac. 784.

181 Cal. Code Civ. Proc., § 1019.

182 Matthai v. Matthai, 49 Cal. 90.

183 Smith v. Smith, 145 Cal. 615, 79 Pac. 275.

§ 3641. **Parties.**—The wife, in a suit for divorce, may make a party of any one claiming interest in the common property.[184] But the defense of such a person extends only to the question of alimony.[185] In New Hampshire, a bill for divorce cannot be prosecuted by a third person where the libelant dies before entry of the bill.[186]

§ 3642. **Averments generally.**—A complaint for divorce should contain allegations of every fact the existence of which is made necessary by the statute in order to the granting of the divorce.[187] The residence of the plaintiff must be averred.[188] The allegation that plaintiff was a *bona fide* resident of the state constitutes a sufficient allegation of residence to confer jurisdiction, and to render the complaint amendable to conform to the proof.[189] Connivance or collusion need not be negatived in the complaint, as they are matters of defense.[190] If there is any uncertainty in either count of the complaint as to the residence of the plaintiff, the objection should be taken by demurrer, on the ground of uncertainty.[191]

§ 3643. **Alimony pendente lite.**—The court has power to order the husband to pay money to his wife for her support during the litigation, and for counsel fees and other legal expenses.[192] Alimony cannot be allowed until summons has been served upon defendant.[193] And it may be enforced by imprisonment for contempt.[194] Alimony *pendente lite* may be allowed without statutory authority, the power to grant it being incident to the power to grant the divorce.[195] To entitle a wife to alimony *pendente lite*, and for means to prosecute her suit, her petition should establish a *prima facie* case, and be supported by verification and affidavits; but the merits of the original or main contro-

184 Kashaw v. Kashaw, 3 Cal. 312.

185 Bennett v. Bennett, 15 Okla. 286, 81 Pac. 632, 70 L. R. A. 864.

186 Kimball v. Kimball, 44 N. H. 122, 82 Am. Dec. 194.

187 White v. White, 45 N. H. 121.

188 Bennett v. Bennett, 28 Cal. 599; Cal. Civ. Code, § 128.

189 Johnson v. Johnson, 30 Colo. 402, 70 Pac. 692.

190 Young v. Young, 18 Minn. 90; Roe v. Roe, 14 Hun, 612; Burns v. Burns, 60 Ind. 259; Smith v. Smith, 4 Paige, 432, 27 Am. Dec. 75.

191 Reading v. Reading, 96 Cal. 4, 30 Pac. 803.

192 Ex parte Perkins, 18 Cal. 60. See Cal. Civ. Code, § 137.

193 Baker v. Baker, 136 Cal. 302, 68 Pac. 971.

194 Id. See Romaine v. Chauncey, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. 826, 14 L. R. A. 712.

195 Petrie v. People, 40 Ill. 334.

versy cannot be inquired into on such a petition.[196] It was allotted on the average annual earnings of a husband, a master mariner, though at the time of his answering the petition for alimony he was temporarily out of employment.[197] The court may award alimony where there is a *de facto* marriage, though it is question whether the marriage is *de jure*.[198] The court has power to require a husband to pay alimony to the wife pending her appeal from a judgment granting him a divorce,[199] or any deficiency may be taxed against the husband.[200] The fact that the appeal is without jurisdiction does not affect the validity of the order for alimony.[201] The court may allow alimony to the wife, even after judgment in favor of the husband, until an appeal is settled or the time for appeal has expired.[202] In a suit by a wife against her husband for divorce, he is chargeable with the real value of such professional services as the wife may procure.[203] What allowance a husband who sued his wife for a divorce was required to make to her for the expenses of her defense by the courts of Washington territory varied with the circumstances.[204] Where husband and wife have been living apart for many years, and the wife has supported herself, and is still able to do so, alimony *pendente lite* will not be allowed.[205] The allowance is within the discretion of the court.[206] Proof of the amount of labor, or the value of services, of counsel, is not necessary to sustain an allowance for counsel fees. The court may determine, from its own experience and from the facts and circumstances of the case as disclosed by the papers, what is a reasonable fee.[207] In Maryland, courts of chancery exercise jurisdiction to grant alimony to the wife, but only upon allegation of facts which would be a sufficient foundation in England for granting a divorce *a mensa*

196 Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657.

197 Thompson v. Thompson, L. R., 1 P. & D. 553.

198 Eickhoff v. Eickhoff, 29 Colo. 295, 93 Am. St. Rep. 64, 68 Pac. 237.

199 Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

200 Roby v. Roby, 10 Idaho, 139, 77 Pac. 213.

201 Mercer v. Mercer, 19 Colo. App. 51, 73 Pac. 662.

202 Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359.

203 Sprayberry v. Merk, 30 Ga. 81. 76 Am. Dec. 637; Armstrong v. Armstrong, 35 Ill. 109.

204 Thorndike v. Thorndike, 1 Wash. T. 175.

205 Burrows v. Burrows, L. R., 1 P. & D. 554; George v. George, L. R., 1 P. & D. 554.

206 Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Rose v. Rose, 109 Cal. 544, 42 Pac. 452; De Llamosas v. De Llamosas, 62 N. Y. 618.

207 Id.; Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Read v. Read, 28 Utah, 297, 78 Pac. 675.

et thoro.[208] And New York follows the procedure of the English courts.[209] An order to pay alimony may be enforced by an attachment for contempt.[210] An order allowing temporary alimony and counsel fees is such a final order or decree as may be appealed from, under the Colorado code.[211]

§ 3644. **Alimony without divorce.**—It has been decided that a wife, who without cause or provocation is driven from her husband's house, with her infant child, and is wholly without the means of support, may maintain an action against the husband for a reasonable allowance, for the maintenance of herself and child, without coupling with the application a prayer for a divorce.[212] "The doctrine extends through the entire field of our law, as administered alike in the common law, equity, and ecclesiastic tribunals, that in effect whenever the wife is adjudged entitled to live separate from her husband, by reason of breaches of matrimonial duty committed by him, a concurring adjudication must be pronounced that he support her while so living; the one adjudication being commensurate in extent with the other, and neither one existing without the other."[213] In several states, by legislative enactment, an allowance for the separate maintenance of the wife disconnected with proceedings for a decree of divorce, is authorized.[214] "We, therefore conceive that the chancellor, before the statute and since, in cases not embraced by it, which have strong moral claims, had and has jurisdiction to decree alimony, leaving the matrimonial claim untouched, and that those authorities which decide in favor of such jurisdiction ought to prevail."[215] It is better, as the court says in the above case, to abandon the subterfuge to which courts have sometimes resorted in such cases "as a pretext for

208 Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; Helms v. Franciscus, 2 Bland, 544, 20 Am. Dec. 402.

209 Van Epps v. Van Deusen, 4 Paige, 74, 25 Am. Dec. 516; Galland v. Galland, 38 Cal. 265.

210 Lyon v. Lyon, 21 Conn. 185; Wightman v. Wightman, 45 Ill. 167; Grimm v. Grimm, 1 E. D. Smith, 190.

211 Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657.

212 Galland v. Galland, 38 Cal. 265.

213 Id., and cases cited.

214 Id.; Cal. Civ. Code, § 137, as amended 1907.

215 See Cal. Civ. Code, § 136. The same proposition is maintained in Purcell v. Purcell, 4 Hen. & M. (Va.) 507; Almond v. Almond, 4 Randolph (Va.), 662, 15 Am. Dec. 781; Logan v. Logan, 2 B. Mon. 142; Prather v. Prather, 4 Desaus. (S. C.) 33; Rhame v. Rhame, 1 McCord (S. C.), 197, 16 Am. Dec. 597; Glover v. Glover, 16 Ala. 446.

jurisdiction," and administer the appropriate relief without the "pretext."[216]

An abandonment need not continue for one year, or for any fixed time, to entitle the wife to separate maintenance.[217] The complaint should show that plaintiff and defendant are living apart without fault of the plaintiff.[218] A temporary allowance of alimony may be made, though the husband sets up in a cross-complaint matters which, if true, will entitle him to an absolute divorce.[219] Action for permanent maintenance of a wife by the husband, without a divorce, under section 137 of the California Civil Code, can only be based upon the ground of desertion by the husband; and proof of willful desertion by him, or that, by reason of his cruelty or threats of bodily harm, she was forced to leave the family dwelling-place, is essential to support the action.[220]

§ 3645. **Permanent support.**—In case of willful desertion by the husband or failure to provide, or if the wife has a cause of action for divorce under section 92 of the California Civil Code, she may, without applying for a divorce, maintain an action for permanent support of herself and children, and during pendency of such action may have temporary alimony, costs, and attorney fees.[221]

§ 3646. **Division of property.**—If divorce is granted on grounds of adultery or extreme cruelty of one of the parties, all the community property may be awarded to the other party, including the homestead;[222] but plaintiff cannot because of such guilt claim as a matter of right more than half of the community property. The discretion of the trial court governs,[223] and it may award the half directly to the minor children.[224] It is proper to make disposition of the homestead in the inter-

216 Galland v. Galland, 38 Cal. 265.

217 Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987.

218 Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812.

219 Cupples v. Cupples, 31 Colo. 443, 72 Pac. 1056.

220 Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906. See Poole v. Wilbur, 95 Cal. 339, 30 Pac. 548.

221 Cal. Civ. Code, § 137, as amended 1907.

222 Cal. Civ. Code, § 146; Towne v. Towne, 6 Cal. App. 697, 92 Pac. 1050; Markowski v. Markowski, 44 Wash. 594, 87 Pac. 914; Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935.

223 Nelson v. Nelson, 7 Cal. App. 76, 93 Pac. 399.

224 Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935.

locutory decree,[225] and, as a general rule, it cannot be made in an independent action.[226] The separate as well as the community property is subject to disposition by the court;[227] and if division is impracticable, all should be awarded to the husband, subject to a lien for money judgment in favor of the wife.[228]

In Oregon, the successful party is entitled to an undivided third in fee of the whole of the real estate owned by the other,[229] and, in addition thereto, such money judgment as may be proper for support;[230] but land merely occupied under the federal homestead laws is not subject to such disposition.[231]

If no adjudication is made as to property, community property becomes common property, and the parties tenants in common.[232] It may be a just and equitable disposition to award all the property to one of the parties, regardless of the grounds.[233]

§ 3647. Common property, disposition of.—In the absence of an allegation in a complaint for divorce that there is common property, the presumption would be that there was none. It is proper to declare, for the information of the court, in what the common property consists, its nature and value.[234] The statute which prescribes what shall be common property as between husband and wife, and how it shall be divided in case of a divorce, is a mere regulation of a right of property, and does not provide a new right of action. A complaint for relief under the statute need not, therefore, comply with the rules governing the forms of pleadings in statutory actions. The failure of a complaint in an action for a division of common property to state with sufficient particularity the fact showing the character of the property is a defect of form, which must be objected to by demurrer.[235] In an action for divorce for extreme cruelty, where nothing is said in the pleading about the disposition of the common prop-

225 John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53.

226 Ambrose v. Moore, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103.

227 Wash. Bal. Codes, § 2723 (Pierce's Codes, § 4637); Budlong v. Budlong, 43 Wash. 423, 86 Pac. 648.

228 Richardson v. Richardson, 44 Wash. 431, 87 Pac. 511.

229 Or. B. & C. Codes, § 511.

230 Or. B. & C. Codes, § 513.

231 Huffman v. Huffman, 47 Or. 610, 114 Am. St. Rep. 943, 86 Pac. 593.

232 Ambrose v. Ambrose, 46 Wash. 463, 90 Pac. 588; Hayes v. Horton, 46 Or. 597, 81 Pac. 386; Graves v. Graves, 48 Wash. 664, 94 Pac. 481.

233 Mitchell v. Mitchell, 39 Wash. 431, 81 Pac. 913.

234 Kashaw v. Kashaw, 3 Cal. 312.

235 Gimmy v. Doane, 22 Cal. 635.

erty, it is error to award it all to one of the parties.[236] A settlement out of court in division of community property, if void as against public policy, or if obtained by fraud, will be set aside.[237] Where a divorce is granted on the ground of extreme cruelty or adultery, the guilty party is entitled to receive only so much of the community property as the court may deem just under the facts of the case; and the discretion of the court in dividing the property is subject to revision on appeal.[238] The inference to be derived from sections 146 and 147 of the California Civil Code is that, if a divorce is granted on the ground of adultery or extreme cruelty, the injured party is entitled to more than half of the common property.[239] But where the injured party is to blame in part for the unlawful act of the guilty one, he is not entitled to the larger portion of the community property.[240] If the decree does not make any disposition of the common property, and no such question is presented by the pleadings, it will not conclude the parties, or either of them, in respect of their claims to such property. Any other court than the one rendering the decree of divorce, if otherwise competent, has jurisdiction to determine the disposition of the community property under the statute.[241] In Kansas, even where divorce is refused, the court may make an order for the control and equitable division of the property of the parties.[242] Where the decree directs that there shall be a division in definite proportions of the community property, the parties become, from the time the judgment is rendered, tenants in common *eo nomine,* in the land theretofore held by them in community.[243] In Oregon, the wife is entitled to hold one third of the husband's real estate as a tenant in common.[244] The settlement of property rights is incident to every action of divorce when there is any property involved; and such settlement may be sought in the cross-complaint as well as in the original complaint.[245]

236 Howe v. Howe, 4 Nev. 469. See Cal. Civ. Code, § 146.

237 Richardson v. Richardson, 36 Wash. 272, 78 Pac. 920.

238 Eslinger v. Eslinger, 47 Cal. 62. See Cal. Civ. Code, § 148.

239 See Strozynski v. Strozynski, 97 Cal. 189, 31 Pac. 1130; Brown v. Brown, 60 Cal. 579; Cummings v. Cummings, 75 Cal. 434, 17 Pac. 442; Gorman v. Gorman, 134 Cal. 378, 66 Pac. 313.

240 Richardson v. Richardson, 36 Wash. 272, 78 Pac. 920.

241 De Godey v. De Godey, 39 Cal. 157.

242 Bowers v. Bowers, 70 Kan. 164, 78 Pac. 430.

243 McLeran v. Benton, 31 Cal. 29.

244 Benfield v. Benfield, 44 Or. 94, 74 Pac. 495.

245 Mott v. Mott, 82 Cal. 413, 22 Pac. 1140.

§ 3648. **Interlocutory decree.**—In California, the court must file its decision and conclusions of law, and thereupon enter final judgment, if no divorce is granted; but if the court finds that a divorce ought to be granted, an interlocutory judgment declaring one to be entitled to a divorce must be entered. An appeal may be taken from such decree within six months thereafter, and the action cannot be dismissed without consent of both parties.[246]

§ 3649. **Interlocutory decree and final judgment.**—A final judgment entered prior to the expiration of a year from the date of the interlocutory judgment, or without any interlocutory judgment, is absolutely void, regardless of any considerations of waiver, consent, or acquiescence of the parties.[247] The right to divorce is statutory, and subject to regulation by the legislature, which may impose restrictions or delays in regard to the time for beginning the action, or the method and order of procedure after the same is begun; and hence the California legislature of 1903,[248] adding to the Civil Code sections 131 and 132, prohibiting the granting of absolute divorces until the expiration of a year from the entry of an interlocutory decree, is constitutional.[249] Where a decree of divorce embraced both an interlocutory and a final judgment, and they were simultaneously entered, but the part purporting to grant an immediate divorce was void, because at that time the year from the interlocutory judgment had not expired, the validity of the interlocutory judgment was not affected thereby.[250] Where an interlocutory decree of divorce is ordered entered *nunc pro tunc*, the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment.[251] The interlocutory decree must be entered in the judgment-book one year before a final decree can be granted.[252]

§ 3650. **Modification of judgment.**—The court has power to modify a former decree relative to alimony payable in the future,

246 Cal. Civ. Code, § 131, as amended 1909.

247 Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

248 Stats. 1903, p. 75.

249 Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

250 Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

251 Id.

252 Smith v. Superior Court, 147 Cal. 336, 82 Pac. 79.

as the changed circumstances may warrant.[253] Subsequent changes may be made by the court in respect to the distribution of property in decrees for divorce, authorizing the court to make such change in the alimony awarded a wife in a decree for divorce as will be just to both parties, in view of their changed condition.[254] Where plaintiff in a suit for divorce, in which service was had by publication only, elected to take a final decree of absolute divorce containing no provision for alimony or counsel fees, the court, after the expiration of the term, had no power to modify the decree, on obtaining jurisdiction of defendant's person.[255] Where a wife was allowed permanent alimony, and subsequently remarried, an order releasing defendant from payment of alimony which had accrued subsequent to such marriage, and from further payment of alimony money, was proper.[256] A divorced husband cannot escape the obligation to pay alimony imposed on him by the decree by a remarriage which increases his expenses so as to exhaust his income.[257]

§ 3651. Vacating judgment.—Actual notice, in time to make defense, may prevent vacation of the decree, even though plaintiff fraudulently sent notice to the wrong address.[258] The court may vacate the void part of a decree, and leave the interlocutory part in force.[259] If defendant is prevented, by false representations of her husband, from learning her rights, or that it is an action for divorce, she may have the decree vacated.[260] If void for fraud, the decree may be set aside after the death of the one securing the divorce.[261] The court may discharge an order for alimony on the grounds of inability to pay the same.[262] Where a valid interlocutory decree of divorce had been entered, and the time had passed for its vacation on appeal, by motion for new trial or otherwise, an order of the trial court purporting to set aside such interlocutory decree was without jurisdiction, and therefore

253 Stevens v. Stevens, 31 Colo. 188, 72 Pac. 1061.

254 Read v. Read, 28 Utah, 297, 78 Pac. 675.

255 McFarlane v. McFarlane, 43 Or. 477, 73 Pac. 203, 75 Pac. 139.

256 Brandt v. Brandt, 40 Or. 477, 67 Pac. 508.

257 State v. Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974.

258 McDonald v. McDonald, 34 Wash. 293, 75 Pac. 865.

259 Grannis v. Superior Court, 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891.

260 State v. Superior Court, 36 Wash. 81, 78 Pac. 198.

261 Rodgers v. Nichols, 15 Okla. 579, 83 Pac. 923.

262 Smith v. Smith, 142 Cal. 636, 76 Pac. 489.

void.[263] Where a husband represented to his wife that his father would deed him certain land if he would divorce the wife, and, to enable him to secure the land, she made no defense to a suit for divorce, it being understood that the husband would remarry her, she could not have a vacation of the divorce decree, especially where the husband had married again, and his wife was *enceinte*.[264] Where a wife against whom a divorce was obtained knew the facts alleged as grounds for vacating the decree thirteen years before proceeding for relief, during which time she remained silent, she cannot vacate the decree on the ground of fraud in procuring it.[265]

§ 3652. **Collateral attack.**—Fraud in procuring a judgment cannot be shown by the parties thereto in a collateral attack;[266] nor can the insufficiency of the complaint be shown.[267]

§ 3653. **Enforcing a foreign judgment.**—Action may be maintained upon a decree for alimony rendered in another state, if the amount payable is fixed and presently due; but installments payable in future are not such until the court of original jurisdiction fixes the specific amount due.[268] An interlocutory decree may be modified by the court rendering it, and is therefore not enforceable by a court not having jurisdiction of the original suit, as such enforcement might result in conflict of authority.[269] If both parties to a divorce action appear in a foreign state, and subject themselves to the jurisdiction of that state's court, they cannot afterwards impeach the decree on grounds of non-jurisdiction of the parties.[270]

§ 3654. **Divorce granted in another state, when invalid.**—A divorce granted in Indiana, where neither of the parties, in fact, resides at the time, and where there has been no personal service or process within that state upon the defendant, nor any author-

263 Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897.

264 Karren v. Karren, 25 Utah, 87, 95 Am. St. Rep. 815, 69 Pac. 465, 60 L. R. A. 294.

265 Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757.

266 Id.

267 McFarlane v. Cornelius, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

268 Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

269 Van Horn v. Van Horn, 48 Wash. 388, 125 Am. St. Rep. 940, 93 Pac. 670.

270 Bledsoe v. Seaman, 77 Kan. 679, 95 Pac. 576.

ized appearance for her, is invalid in New York, although the Indiana record recites the residence of the plaintiff in good faith within that state for one year, and shows an appearance for the defendant by one purporting to be an attorney at law in such state.[271]

§ 3655. **Evidence—Proof.**—Adultery may be established by circumstantial evidence. Proof of opportunity and equivocal circumstances affords no evidence of adultery in the absence of circumstances tending to show depravity and a guilty purpose.[272] The testimony must convince the judicial mind affirmatively that actual adultery was committed; since nothing short of the carnal act can lay a foundation for divorce.[273] But a fundamental principle never to be lost sight of in these cases is that the act need not be proved in time and place.[274] The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.[275] The confessions or admissions of the defendant can be given in evidence.[276] No divorce, however, can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee, but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers.[277] The proof of adultery must be clear, positive, and satisfactory.[278] Confession is not of itself sufficient.[279]

271 Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Dec. 299.

272 Matchin v. Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Best on Evidence, § 441, and cases there cited; Emmerson v. Emmerson, 62 Hun, 620, 16 N. Y. St. 793; Allen v. Allen, 101 N. Y. 658, 5 N. E. 341; Evans v. Evans, 41 Cal. 103; Blake v. Blake, 70 Ill. 618.

273 Hammerton v. Hammerton, 2 Hag. Ecc. 13, 16, 19.

274 Dailey v. Dailey, Wright, 514; Hammerton v. Hammerton, 2 Hag. Ecc. 13, 16, 19.

275 See Mulock v. Mulock, 1 Edw. Ch. 14; Day v. Day, 3 Green Ch. 444; Ferguson v. Ferguson, 3 Sandf. 307; Anonymous, 17 Abb. Pr. 48; Inskeep v. Inskeep, 5 Iowa, 204. Consult, also, 2 Bishop on Marriage and Divorce, 5th ed., § 612, et seq.

276 Evans v. Evans, 41 Cal. 103. See Steele v. Steele, 104 N. C. 631, 10 S. E. 707; Burke v. Burke, 44 Kan. 307, 21 Am. St. Rep. 283, 24 Pac. 466.

277 Cal. Civ. Code, § 130.

278 Herberger v. Herberger, 16 Or. 327, 14 Pac. 70.

279 Cal. Code Civ. Proc., § 2079. As to evidence of reputation, when and for what purposes admissible, see Marble v. Marble, 36 Mich. 387; Clement v. Kimball, 98 Mass. 535.

§ 3656. **Evidence — Presumptions.** — Although in a suit for divorce it appeared that prior to plaintiff's marriage to defendant she had been married to a third person, and that her former husband was living, it was not necessary for her to show that the former marriage had been dissolved, that fact being presumed from the solemnization of the second one.[280]

§ 3657. **Evidence—Corroboration.**—Divorce cannot be granted on uncorroborated testimony.[281] In an action for divorce for the wife's fault, her confession as well as plaintiff's testimony must be corroborated.[282] Admissions of the wife as to incontinency may be given in evidence by the husband, but should be cautiously received and carefully weighed.[283]

§ 3658. **Sufficient evidence.**—Evidence that plaintiff, on his return to his home early in the morning, found his wife in bed with a man who was boarding in their family was sufficient to entitle him to a divorce on the ground of adultery.[284] In an action for divorce, plaintiff testified that defendant often, in the presence of others, accused her of being intimate with other men; that he had a venereal disease, and accused her of giving it to him; that he many times threatened to take the minor child away from the plaintiff, and on one occasion took the child away for about two weeks, and would not tell plaintiff where it was; that he called her a prostitute; that he left her often without means of support; that she had to support herself; and that the conduct of defendant caused her mental suffering and bodily injury. It was held that such testimony sustained a finding of extreme cruelty.[285] In an action for divorce there was uncontradicted evidence that the wife, although fairly robust before the marriage, left her husband broken in health; that she rapidly recovered when she got from under his influence; that she was soon to become a mother for the first time; and that although she was penniless and dependent, he declared that it "was absolutely impossible" for them to live together again. Such

280 McKibben v. McKibben, 139 Cal. 448, 73 Pac. 143.

281 McMullin v. McMullin, 140 Cal. 112, 73 Pac. 808; Berry v. Berry, 145 Cal. 784, 79 Pac. 531.

282 Hayes v. Hayes, 144 Cal. 625, 78 Pac. 19.

283 May v. May, 71 Kan. 317, 80 Pac. 567.

284 Hall v. Hall, 43 Or. 619, 75 Pac. 141.

285 Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304.

evidence sufficiently corroborated the wife's testimony as to cruel treatment in compelling her to submit to sexual intercourse while pregnant and suffering from morning sickness, although denied by the husband, to warrant a reversal of the judgment of the trial court dismissing her action.[286] Refusal of the trial court to grant a divorce sought on the ground of extreme cruelty will not be disturbed when the only evidence of cruelty was a letter written by the husband to the wife, in which he charged that she had communicated a venereal disease to him, when neither party appeared to have the disease, and that she was sick for three or four days after receiving the letter.[287] In an action by a wife for divorce, it was held that the evidence sustained the court's finding of desertion, based on the husband's persistent failure to have reasonable matrimonial intercourse.[288] In a suit for divorce it appeared that the parties were married in Illinois and moved to Colorado. With the husband's consent, the wife returned to Illinois, remaining several years. A correspondence continued for some years, until the husband's ill-feeling was engendered by a letter from the wife concerning her support, she declining to return to Colorado unless he came to Illinois for her. After the receipt of the letter he desired her to remain in Illinois, and then determined no longer to live with her. She afterwards came to Colorado and offered to live with him. He refused her offer. It was held that neither party could secure divorce on the ground of desertion.[289]

§ 3659. **Verdict of jury.**—The statute of divorce which authorizes a decree to be "rendered upon full and satisfactory evidence," requires the evidence to be satisfactory to the judge as well as the jury; and where the verdict was in favor of the plaintiff, but the judgment in favor of the defendant, it will be presumed, in the absence of any statement of facts, that the judge correctly disregarded the verdict. The verdict of a jury in a chancery case is only advisory to the chancellor or to the trial court.[290]

286 McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119.

287 Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016.

288 Vosburg v. Vosburg, 136 Cal. 195, 68 Pac. 694.

289 Ault v. Ault, 29 Colo. 149, 68 Pac. 231.

290 Still v. Saunders, 8 Cal. 281. See, also, Goode v. Smith, 13 Cal. 84; Duff v. Fisher, 15 Cal. 376; Wingate v. Ferris, 50 Cal. 105.

§ 3660. **Custody of children.**—The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.[291]

§ 3661. **Effect of judgment of nullity.**—A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.[292] The second marriage is valid until its nullity is adjudged by a court of competent jurisdiction.[293]

§ 3662. **Place.**—It is well settled that a marriage which is valid under the law of the place where celebrated is valid everywhere. It would follow that a marriage in another state, which, if solemnized in California, would be voidable, could not be annulled in the latter state, unless it was voidable in the state where it was solemnized for a reason recognized by the California code. In a Massachusetts case,[294] it was held that a marriage which is good by the laws of the country where it is entered into is valid in any other country; and although it should appear that the parties went into another state to contract such marriage, with a view to evade the laws of their own country, the marriage will nevertheless be valid in the country where the parties live; but this principle will not extend to legalize incestuous marriages so contracted.[295] An action to annul a marriage goes to the inception of the relation, the marriage itself; while an action for divorce, strictly speaking, is for causes subsequent to the marriage, and in relation to which a different, though not uniform, rule prevails.

§ 3663. **Rights of divorced parties.**—The prohibition of remarriage in the state of California has no extraterritorial force, and the marriage of a woman within five months after obtaining a decree of divorce in California from her former husband, in the

291 Cal. Civ. Code, § 85.

292 Cal. Civ. Code, § 86.

293 Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Estate of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000.

294 Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131.

295 See, also, Putnam v. Putnam, 8 Pick. 433; West Cambridge v. Lexington, 1 Pick. 506, 11 Am. Dec. 231; Pearson v. Pearson, 51 Cal. 120; True

state of Nevada, to a citizen of that state, according to the law of that state, is a valid marriage.[296]

§ 3664. Appeal.—In a divorce suit brought by the husband, an appeal taken by the wife from a decree against her, within the statutory period, but after the death of the complainant, where the husband at his death left considerable estate, is held to be authorized by the Michigan statute. Lack of jurisdiction may be raised for the first time on appeal.[297] The representatives and heirs of the deceased complainant must be brought in as parties, before the hearing on appeal.[298] The administrator will not be compelled to pay alimony on such appeal. Where the chancellor refuses a divorce because proof is not made of the plaintiff's residence, but grants relief as to other matters embraced in the bill, the appellate court will, at the instance of the plaintiff, reverse the decree as to the divorce, and dismiss the bill on that point without prejudice.[299] In an appeal from an order denying a new trial in divorce, the supreme court has no power to modify the provision of the decree providing for the support of a minor child until its majority.[300] Where the evidence adduced to prove desertion in an action for divorce was conflicting, the determination of the trial court thereon is not reviewable on appeal.[301] A finding in an action for divorce as to the *bona fides* of plaintiff's residence, based on conflicting evidence, cannot be disturbed on appeal.[302] Plaintiff in a divorce suit, having married pending the appeal from the decree granting the divorce, is not entitled to be heard on appeal, or to have the case remanded for a new trial, the decree being reversed.[303] To justify this court in reversing the judgment of the court below refusing a divorce, under the clause giving "discretionary powers," etc., a very clear case must be shown of an improper exercise of that power.[304] A decree for divorce *a vinculo* is final, and an appeal lies therefrom, notwith-

v. Ranney, 21 N. H. 52, 53 Am. Dec. 164.

296 In re Wood's Estate, 137 Cal. 129, 69 Pac. 900.

297 Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278.

298 Shafer v. Shafer, 30 Mich. 163.

299 Edwards v. Edwards, 30 Ala. 394.

300 Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304.

301 Harding v. Harding, 140 Cal. 690, 74 Pac. 284, 198 U. S. 317, 49 L. Ed. 1066, 25 Sup. Ct. 679.

302 Id.; O'Sullivan v. O'Sullivan, 35 Wash. 481, 77 Pac. 806; Long v. Long, 38 Wash. 218, 80 Pac. 432.

303 Branch v. Branch, 30 Colo. 499, 71 Pac. 632.

304 Ruby v. Ruby, 29 Ind. 174.

standing a reference to the commissioner for the determination of alimony pending the suit.[305]

§ 3665. **Appeal, effect of.**—An attempted appeal by defendant from a decree of divorce rendered for want of an answer did not prevent the decree from terminating the marriage relation on the date it was entered.[306] Under the constitution of Idaho,[307] after the record on appeal is filed, the supreme court can order the payment of the attorney's fees or suit money in divorce, when necessary to the complete exercise of its appellate jurisdiction;[308] and under the provisions of the statutes of that state,[309] the district courts retain jurisdiction in divorce, after appeal from the judgments of such courts, to make orders directing the payment of costs and expenses necessary in the preparation of the appeal, and for attorney's fees in prosecuting the same.[310] In Montana, the supreme court has no power under the constitution, nor any inherent power, to allow temporary alimony or suit money after an appeal in a divorce case, the suit being still pending in the district court; as an appeal in equity does not operate to bring the entire case before the court, but only authorizes a trial of a question of law, and an affirmance, modification, or reversal of the judgment, or a remand for further proceeding as authorized by section 21 of the Code of Civil Procedure.[311] An action for divorce is triable *de novo* on appeal,[312] and suit money may then be allowed.[313]

§ 3666. **Defense of desertion.**—A wife, having reason to believe that her husband had been guilty of adultery, separated from him and instituted a suit for divorce, in which she failed. The husband never thereafter sought to resume cohabitation, nor did the wife, and it was not resumed. It was held that these facts did not constitute desertion by the husband.[314]

305 Shaw v. Shaw, 9 Mich. 164.

306 State v. Leasia, 45 Or. 410, 78 Pac. 328.

307 Art. 5, § 9.

308 Roby v. Roby, 9 Idaho, 371, 74 Pac. 957.

309 Rev. Stats. 1887, §§ 2472, 4927.

310 Roby v. Roby, 9 Idaho, 371, 74 Pac. 957.

311 Bordeaux v. Bordeaux, 26 Mont. 533, 69 Pac. 103.

312 Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

313 Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; Duxstad v. Duxstad, 16 Wyo. 396, 94 Pac. 463.

314 Fitzgerald v. Fitzgerald, L. R., 1 P. & D. 694.

§ 3667. **Inhabitancy.**—An answer setting up plaintiff's adultery merely as a defense need not allege the inhabitancy of the parties, or either of them, at the time of the offense, as is necessary in a complaint.[315] But that the offense was committed without the defendant's procurement, connivance, privity, or consent is essential in such an answer.[316]

§ 3668. **Defense of insanity.**—In an action for a decree of the nullity of the marriage, the defendant cannot have leave to allege, by way of amendment, that plaintiff was insane at the commencement of the action; for this is not an issuable fact.[317]

§ 3669. **Limitation.**—In an action for a divorce, the physical incapacity of the plaintiff to enter into the marriage relation is not, after two years from the date of the marriage, a defense.[318] This objection can only be taken by answer, and is applicable to actions for divorce.[319] So where a complaint averred acts of cruelty committed more than ten years before, and the defense was not interposed in the answer, evidence of such cruelty was admissible.[320]

§ 3670. **Marriage must be denied.**—If the complaint in an action to obtain a divorce avers the marriage of the plaintiff and defendant, and the answer does not deny the averment, it is an admission of the fact for the purpose of the trial, and the marriage need not be proved.[321]

§ 3671. **Recrimination.**—Adultery committed by the plaintiff is a perfect defense to an action for an absolute divorce, and is also a ground for affirmative relief in the same action.[322] The doctrine of recrimination, or *compensatio criminum*, applicable in suits for divorce, and the several offenses which by the statute constitute grounds of divorce, are pleadable in bar to such suits,

315 Leseuer v. Leseuer, 31 Barb. 330.

316 Morrell v. Morrell, 3 Barb. 236; Anonymous, 17 Abb. Pr. 48.

317 Appleton v. Warner, 51 Barb. 270.

318 Griffin v. Griffin, 23 How. Pr. 183.

319 Bihin v. Bihin, 17 Abb. Pr. 19.

320 Id.

321 Fox v. Fox, 25 Cal. 587. As to insufficient averment of coverture, see Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467.

322 Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938; Anonymous, 17 Abb. Pr. 48.

the one to the other, within the principle of the doctrine.[323] To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant.[324] In a husband's suit for divorce for the wife's adultery, his adultery cannot be set up under the code of New York as a counterclaim, and, if proved, will not entitle her to a divorce.[325]

§ 3672. **Residence.**—In an application by the wife for a divorce, on the ground of the willful neglect of her husband, and his failure to provide her with the necessaries of life for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit.[326]

§ 3673. **Condonation.**—Condonation must be specially pleaded.[327] This defense may be joined with a denial of the adultery charged, and also with a defense charging the plaintiff with adultery as a bar.[328] Plaintiff should not cohabit with defendant after knowing of defendant's adulterous intercourse, or the act will be condoned.[329] The breach of a conditional condonation revives the original offense and authorizes divorce therefor.[330]

§ 3674. **Cross-complaint.**—It is the practice in California for the trial courts to entertain cross-complaints in actions for divorce or annulment of marriage.[331] There may be a cross-complaint in an action for a divorce, upon which affirmative relief may be granted to the defendant upon a cause for divorce from

323 Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Leseuer v. Leseuer, 31 Barb. 330.

324 Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Cal. Civ. Code, §§ 122, 123.

325 R. F. H. v. S. H., 40 Barb. 9. See, however, Anonymous, 17 Abb. Pr. 48; Campbell v. Campbell, 12 Hun, 636; Bleck v. Bleck, 27 Hun, 296.

326 Washburn v. Washburn, 9 Cal. 475.

327 Smith v. Smith, 4 Paige, 432; Morrell v. Morrell, 3 Barb. 236.

328 Smith v. Smith, 4 Paige, 432, 27 Am. Dec. 75; Wood v. Wood, 2 Paige, 108; Hopper v. Hopper, 11 Paige, 46.

329 Andros v. Andros, 1 Cal. App. 309, 82 Pac. 90.

330 Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935.

331 Wadsworth v. Wadsworth, 81 Cal. 182, 15 Am. St. Rep. 38, 22 Pac. 648.

the plaintiff.[332] And when such cross-complaint is filed and is complete and distinct in all its parts, entitling the defendant to affirmative relief, the action cannot be dismissed by the plaintiff without the consent of the defendant.[333] In a divorce suit in Oregon, the defendant may take advantage of the defense of condonation without pleading.[334] And defendant may, in an answer in the way of a cross-bill or counterclaim, demand and obtain the affirmative relief of a divorce, when shown to be entitled thereto.[335] In Georgia, the defendant may have affirmative relief upon his answer alone.[336]

§ 3675. **Condonation and connivance.**—Condonation is a conditional forgiveness, and a repetition revives the condoned injury;[337] or living with the guilty party, and sleeping in the same bed with the spouse, after learning of her adulterous intercourse.[338] And former injuries will be revived by misconduct of a slighter nature than such as to constitute an original ground for a divorce.[339] Condonation of acts of actual violence, blows, etc., may be forfeited or set aside by subsequent words of abuse, so that a wife may sue for a divorce on the ground of the blows, although she could not obtain one for the verbal abuse.[340] Connivance destroys all claim to remedy by way of divorce.[341]

§ 3676. **Consent.**—The court will not proceed on the ground of the consent of the parties to a dissolution of the marriage contract.[342]

332 Blakely v. Blakely, 89 Cal. 324, 26 Pac. 1072.

333 Mott v. Mott, 82 Cal. 413, 22 Pac. 1140.

334 Hill v. Hill, 24 Or. 416, 33 Pac. 809. See, also, North v. North, 5 Mass. 320.

335 Dodd v. Dodd, 14 Or. 338, 13 Pac. 509. See, also, Waltermire v. Waltermire, 110 N. Y. 183, 17 N. E. 739; Wilson v. Wilson, 40 Iowa, 233. By express statute in Indiana and Missouri, Glasscock v. Glasscock, 94 Ind. 163; Ficke v. Ficke, 62 Mo. 337.

336 Owen v. Owen, 54 Ga. 526. So in Nebraska: Shafer v. Shafer, 10 Neb. 468, 6 N. W. 768.

337 Burr v. Burr, 10 Paige, 29. See Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590.

338 Day v. Day, 71 Kan. 385, 80 Pac. 974; Bordeaux v. Bordeaux, 30 Mont. 36, 75 Pac. 524.

339 Burr v. Burr, 10 Paige, 20. See, also, Whispell v. Whispell, 4 Barb. 217; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299.

340 Farnham v. Farnham, 73 Ill. 497. See, on this subject, Cal. Civ. Code, §§ 111, 123.

341 Myers v. Myers, 41 Barb. 114; Cal. Civ. Code, §§ 111, 112; Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424.

342 Williamson v. Williamson, 1 Johns. Ch. 488. See Cal. Civ. Code,

§ 3677. Custody of child.—A wife suing for a divorce on the ground of extreme cruelty is entitled to the custody of their female child of tender years.[343] There is no error in requiring the husband to maintain a minor child committed to the mother's custody after a decree of divorce obtained on account of his misconduct.[344] Plaintiff securing a divorce on the fault of defendant, cannot force defendant to take the custody of the children.[345] The court must, on motion of either party, reconsider its order in reference to the custody of the children,[346] and upon proper showing, change its custody;[347] but such changes can be granted only in the action in which the divorce was decreed.[348] Even in a default judgment, where service was by publication, the court may modify its order, and require defendant to support the minors.[349] A stay-bond pending appeal will not prevent a change of custody of the minor, on an order made by the court.[350] Where in a divorce suit the court has jurisdiction of the parties and the subject-matter, the departure of the children of the parties from the territorial jurisdiction prior to the decree does not deprive the court of jurisdiction to fix the custody of the children.[351] Under the Nevada statute,[352] providing that the relief granted plaintiff, if there be no answer, shall not exceed that demanded in the complaint, a complaint praying for divorce, and that defendant be awarded the custody of the children, and for such other and further relief as may seem just and equitable, does not authorize the award of custody of the children to plaintiff, and payments to her by defendant for support of plaintiff and children.[353] Where a final divorce decree contained no provision therefor, the superior court had no

§ 130; Hamilton v. Hamilton, 89 Ill. 349.

343 Price v. Price, 55 N. Y. 656; Wand v. Wand, 14 Cal. 512. See, also, Cal. Civ. Code, § 138.

344 Armstrong v. Armstrong, 35 Ill. 100. See, also, Cal. Civ. Code, § 139; Ex parte Gordan, 95 Cal. 374, 30 Pac. 561.

345 Stover v. Stover, 24 Utah, 92, 66 Pac. 766.

346 Pearce v. Pearce, 30 Mont. 269, 76 Pac. 289.

347 Crater v. Crater, 135 Cal. 633, 67 Pac. 1049; Miles v. Miles, 65 Kan. 676, 70 Pac. 631. See, contra, Stevens v. Stevens, 31 Colo. 188, 72 Pac. 1061.

348 Karren v. Karren, 25 Utah, 87, 95 Am. St. Rep. 815, 69 Pac. 465, 60 L. R. A. 294.

349 McFarlane v. McFarlane, 43 Or. 477, 73 Pac. 203, 75 Pac. 139.

350 De Lemos v. Siddall, 143 Cal. 313, 76 Pac. 1115.

351 State v. Rhoades, 29 Wash. 61, 69 Pac. 389.

352 Cutting's Comp. Laws, § 3245.

353 Mitchell v. Mitchell, 28 Nev. 110, 79 Pac. 50.

jurisdiction to make a subsequent order compelling either party to pay the other for maintenance of a child.[354]

§ 3678. **Default.**—A divorce will not be granted upon the default of the defendant without proof of the facts charged.[355] Under section 135 of the New York code, fixing a time wherein a defendant, "except in an action for divorce," may be allowed to come in and defend, where service of summons was by publication, it was held that the courts were not deprived of the power to open a default in a divorce case, where the summons was so served.[356] Section 473 of the California Code of Civil Procedure makes no exception as to the power to open a default where the summons was not personally served. A divorced wife may sue her former husband for a share of the expenses incurred by her in support of their minor children, whose custody was awarded her in the divorce decree, and for their future support so long as she maintains their custody and control; but attorney fees in such action cannot be allowed.[357]

§ 3679. **Defenses to payment of alimony.**—The court still has power to grant alimony, although the husband is and promises to continue to pay all bills contracted by the wife,[358] or though defendant had a home in which he was willing for plaintiff to live pending suit for divorce on grounds of cruelty.[359] The power of the court to compel the husband to pay the wife's counsel fees for services of her attorney in an action for divorce, where she is without means to pay them, is not exhausted by the granting of a final judgment.[360] While the district court may allow a wife against whom a judgment for divorce has been rendered the money necessary to enable her to prepare her statement or bill of exceptions on motion for a new trial, a necessity for such allowance must be shown.[361] The supreme court will not make an order requiring defendant, who has appealed from a decree of divorce for plaintiff, to pay to her suit money for the appeal, it

354 Shattuck v. Shattuck, 135 Cal. 192, 67 Pac. 45.

355 Cal. Civ. Code, § 130.

356 Brown v. Brown, 58 N. Y. 609.

357 Ditmar v. Ditmar, 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353.

358 Anderson v. Anderson, 137 Cal. 225, 69 Pac. 1061.

359 Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877.

360 Grannis v. Superior Court, 143 Cal. 630, 77 Pac. 647.

361 Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359.

appearing that efforts to enforce orders for suit money for the trial were effectual, she not alleging or showing his ability to pay, and his affidavits being that he has two children to support, has no available means, and is unable, because of injuries, to work.[362] An order awarding counsel fees "to the plaintiff, or to the counsel," in a suit for divorce, while inaccurate in directing payment to be made to plaintiff's counsel, is not sufficiently irregular to justify a reversal.[363]

FORMS—DIVORCE.

§ 3680. Complaint for divorce on ground of adultery.

Form No. 980.

[TITLE.]

The plaintiff complains, and alleges:

I. That plaintiff and defendant intermarried at . . ., in the county of . . ., state of . . ., on or about the . . . day of . . ., 19. . , and ever since have been, and now are, husband and wife.

II. That the plaintiff is, and has been, a *bona fide* resident of the state of California for more than one year, and of the said county of . . . for more than three months immediately preceding the commencement of this action.

III. And plaintiff, on her information and belief, alleges that the defendant did, on the . . . day of . . ., 19. . , commit adultery with one . . ., at . . . [name the place, and describe the house].

IV. Plaintiff further alleges, on her information and belief, that defendant, on divers days and times between said last-mentioned day and the commencement of this action, has committed adultery with the said . . ., and is now living and cohabiting with the said . . ., at the place and in the house above mentioned.

V. Plaintiff further alleges that each and all of said acts of adultery were committed without the consent, connivance, procurement, or previous knowledge of plaintiff, and that she has not lived or cohabited with defendant since she became cognizant of the commission by the defendant of the several acts of adultery complained of.

362 Bachelor v. Bachelor, 30 Wash. 203, 70 Pac. 491.

363 Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877.

VI. Plaintiff further alleges that the defendant is the owner and possessed of the following-described real and personal property: [particularly describe it, and state its value], all of which has been acquired by him since their said marriage.

VII. Plaintiff alleges that the rents, issues, and profits of said real property are of the monthly value of about . . . dollars, in United States gold coin.

VIII. Plaintiff further alleges that there are now living of the issue of their said marriage . . . children. [State their sex, names, and ages.]

IX. Plaintiff further alleges that she is in indigent circumstances, and wholly dependent upon her own labor for her support, [or, that she is in ill health, or too aged to earn her livelihood, and is dependent on the charity of her friends for support].

Wherefore, plaintiff demands judgment:

1. That the bonds of matrimony between herself and the defendant be dissolved, and that the custody of the said minor children be awarded to the plaintiff.

2. That such portion of the common property be allowed and set apart to plaintiff as shall be equitable and just, and that the defendant be enjoined and restrained from disposing of or in any manner incumbering the property herein described.

3. That the defendant may be required to pay a reasonable sum into court to defray the expenses of this action, and for counsel fees and that he pay to plaintiff such further sum for alimony as to this court may seem just, for her support during the pendency of this action. Plaintiff prays for general relief.

§ 3631. Allegation of adulterous intercourse.

Form No. 981.

That the defendant has committed adultery with one A. B., and ever since the . . . day of . . . , 19. . , has been living in adulterous intercourse with him [her], at the house known as . . . , on . . . street, in . . .

§ 3632. Allegation where name is unknown.

Form No. 982.

That on the . . . day of . . . , 19. . , at the house known as . . . , on . . . street, in the city of . . . , the defendant committed adul-

tery with a man [or a woman] whose name is unknown to the plaintiff.

§ 3683. Complaint on ground of desertion.

Form No. 983.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That on or about the year . . . [more than a year last past], the said defendant, disregarding the solemnity of his marriage vow, willfully and without cause deserted and abandoned the plaintiff, and ever since has, and still continues to, so willfully and without cause desert and abandon said plaintiff, and to live separate and apart from her, without any sufficient cause or any reason, and against her will, and without her consent.

[DEMAND OF JUDGMENT.]

§ 3684. Complaint on ground of conviction for felony.

Form No. 984.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That on the . . . day of . . ., 19 . ., in the superior court in the county of . . ., state of California, the defendant was [duly] convicted of felony, to-wit, for the crime of . . ., and [duly] sentenced by the said court to confinement in the state prison of said state for the term of . . . years, and in pursuance of the said sentence the defendant is now confined in said state prison [or, if the sentence has expired, or a pardon was granted, omit the words "is now confined in said state prison," and add, "was confined in said state prison," that the period of his sentence therefor terminated on the . . . day of . . . , 19 . . , at which date he was discharged therefrom (or was pardoned)].

[DEMAND OF JUDGMENT.]

§ 3685. Alleging conduct making it unsafe to live together.

Form No. 985.

That ever since the . . . day of . . ., 19. . , and for . . . years prior to commencement of this action, the said defendant has

been guilty of conduct toward the plaintiff which renders it unsafe and improper for plaintiff to live with said defendant, in this, that the said defendant has [state specifically the conduct complained of].

§ 3686. Complaint on ground of extreme cruelty.

Form No. 986.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That since said marriage, the defendant has treated her in a cruel and inhuman manner, and in particular as follows: On the . . . day of . . ., 19.., at . . ., the defendant [here state the particular acts of cruelty, specifying date and place for each, and the nature of the act].

[DEMAND OF JUDGMENT.]

§ 3687. Complaint for alimony without divorce.

Form No. 987.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That from the . . . day of . . ., 19.., they continued to live and cohabit together as man and wife, in this state, till . . ., 19.., during which time they had born unto them one child, a son (now under plaintiff's care), and by their united exertions acquired property of the value of twenty thousand dollars, which property consists of money, stocks, notes, and other personal securities, now entirely in the hands and under control of the defendant; that in the month of . . ., 19.., defendant, without cause or provocation, drove plaintiff from his house, and ever since has refused, and still does refuse, to live or cohabit with plaintiff, or allow her to return to his house or to speak to him; that since the separation as aforesaid the defendant has supplied her with seventy-five dollars per month for the maintenance of herself and child, but threatens to reduce or wholly deprive her of this allowance at his pleasure; that she has no separate property.

Wherefore, plaintiff prays permanent alimony in the sum of . . dollars per month, to be paid and secured to her for the separate maintenance of herself and child, and that the custody of said child be awarded to her.

§ 3688. Complaint on ground of willful neglect, having ability to provide.

Form No. 988.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That the defendant for more than one year last past has willfully neglected to provide for plaintiff the common necessaries of life, having the ability so to do, and has compelled plaintiff to live upon the charity of friends, notwithstanding he is abundantly able to support her, and is worth, as this plaintiff is informed and believes, about the sum of . . . dollars, and is in the constant receipt of wages sufficient for their joint support from his daily labor, to-wit, about . . . dollars per month.

[DEMAND OF JUDGMENT.]

§ 3689. Complaint on ground of willful neglect—Failure by reason of idleness, etc.

Form No. 989.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That the defendant for more than one year last past has failed to provide for the plaintiff the common necessaries of life because of his idleness, profligacy, and dissipation.

[DEMAND OF JUDGMENT.]

§ 3690. Complaint on ground of habitual drunkenness.

Form No. 990.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 980.]

II. [Allege residence as in form No. 980.]

III. That the defendant, disregarding his duties as a husband towards the plaintiff, has been guilty of habitual intemperance for more than one year last past.

[DEMAND OF JUDGMENT.]

§ 3691. Complaint on ground of fraud.

Form No. 991.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [Allege marriage ceremony and residence as in form No. 994.]

III. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented that she was chaste and virtuous, and was physically competent to marry the plaintiff, and concealed from the plaintiff her real physical condition.

IV. That the defendant was not then and there chaste and virtuous, and was not at the time physically competent to marry the plaintiff, but was at the time of the said marriage in a state of pregnancy by some other man than the plaintiff.

V. That the plaintiff was induced to consent to the said marriage by the said representations, which he believed at the time of his said marriage to be true, and that if the said representations had not been made to him, and said concealment had not been practiced, he would never have consented to the said marriage.

VI. That immediately upon his discovery of the falsehood of said representations, to-wit, on the . . . day of . . . , 19. . , the plaintiff ceased to cohabit with the defendant, and has never since cohabited with her.

Wherefore, the plaintiff prays that said marriage may be annulled, and that he be forever released and discharged from any and all obligations and duties arising from said marriage, and for other proper relief.

§ 3692. Complaint on ground of nonage.

Form No. 992.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [As in form No. 994.]

III. That at the time of her said marriage she was residing with her parents, A. B. and D. B., at . . . ; that at the time of

her said marriage she was under the age of fifteen years, to-wit, of the age of fourteen years and one month, and that she arrived at the age of fifteen years on the . . . day of . . ., 19.. And she avers that her said marriage was contracted and consummated without the consent [and against the will] of her said parents, and that she has not since she obtained the age of fifteen years cohabited with the said defendant.

[DEMAND OF JUDGMENT, ANNULLING, ETC.]

§ 3693. The same—By parent.

Form No. 993.

[TITLE.]

The plaintiff complains, and alleges:

I. That A. B. is the daughter of this plaintiff; that she is a minor under the age of fifteen years, to-wit, of the age of . . ., and has always, until the time of her marriage hereinafter stated, resided with, and been under the care, custody, and control, of this plaintiff.

II. That on the . . . day of . . ., 19.., at . . ., she, the said A. B., intermarried with the defendant, D. B.

III. That the parents of the said A. B. did not, nor did either of them, consent to her said marriage to the defendant.

[DEMAND OF JUDGMENT.]

§ 3694. Complaint on ground of former husband or wife living.

Form No. 994.

[TITLE.]

The plaintiff complains, and alleges:

I. That she is now, and for more than . . . last past has been, a *bona fide* resident of the state of California, and now resides at . . ., in said state.

II. That on the . . . day of . . ., 19.., she was married to the defendant at . . ., in said state.

III. That at the time of said marriage the said defendant had a former wife living, and that the defendant's marriage with said former wife was then, to-wit, at the time of plaintiff's said marriage to the defendant, in force, and undissolved by decree of divorce or otherwise.

[DEMAND OF JUDGMENT.]

§ 3695. Complaint on ground of lunacy.

Form No. 995.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 994.]

II. [Allege residence as in form No. 994.]

III. That at the time of such marriage he [she] was a lunatic, and incapable of contracting a marriage, and has been ever since [or state the duration].

IV. That the defendant is now perfectly recovered of his [her] lunacy aforesaid, and restored to his [her] right mind, memory, and understanding, and has been for about . . . months last past, and that since his [her] restoration to a sound state of mind as aforesaid, the plaintiff has not cohabited with the said defendant.

[DEMAND OF JUDGMENT.]

§ 3696. Complaint on ground of physical incapacity.

Form No. 996.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege marriage as in form No. 994.]

II. [Allege residence as in form No. 994.]

III. That immediately after said marriage took place, the plaintiff discovered that the said defendant, A. B., at the time of her [his] marriage with the plaintiff, as aforesaid, was physically incapable of entering into the marriage state; that the [etc., stating the cause of such incapacity].

IV. That the physical incapacity of the said A. B., arising from her [his] diseased condition, as aforesaid, was well known to the defendant at the time of her [his] intermarriage with the plaintiff, as aforesaid, but was wholly unknown to the plaintiff.

V. That the plaintiff has been informed and believes that the said physical incapacity of the said A. B. still exists, and is incurable, and so charges the fact to be.

Wherefore, the plaintiff demands judgment, that the marriage between him [her] and the said defendant may be dissolved and annulled, according to the statute in such case made and provided.

§ 3697. Complaint to declare marriage void.

Form No. 997.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege residence as in form No. 994.]

II. That on the . . . day of . . ., 19.., at San Francisco, in this state, a marriage between the plaintiff and defendant was duly solemnized by A. B., who was then and there a justice of the peace, duly authorized by the laws of this state to solemnize marriages, and the certificate of such solemnization has been duly recorded as required by law.

III. That plaintiff is a white person, and the said defendant is a mulatto [or allege any cause which, under the statute, makes the marriage void].

Wherefore, the plaintiff prays that said marriage may be, by the decree of this court, declared to be void for the reason aforesaid, and for other proper relief.

§ 3698. General denial.

Form No. 998.

[TITLE.]

The defendant answers to the complaint:

And admits the marriage alleged in the complaint, but denies each and every other allegation of said complaint.

§ 3699. Denial of adultery, and cross-complaint.

Form No. 999.

[TITLE.]

The defendant answers to the complaint:

First. For a defense:

That he never committed adultery with the person named in said complaint, or with any other person, at any time or place, or at all.

Second. For a second defense, and cross-complaint, the defendant alleges:

[Allege acts of adultery as in form No. 980.]

Wherefore, the defendant demands judgment, etc. [as in that form].

§ 3700. Condonation.

Form No. 1000.

[TITLE.]

The defendant answers to the complaint:

I. That after the time mentioned in the complaint, and before this action, the plaintiff, being informed as to the matters therein alleged, freely condoned said alleged adultery, and forgave the defendant thereof [and freely cohabited with him].

II. That ever since such condonation the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

§ 3701. Complaint on foreign judgment for alimony.

Form No. 1001.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the circuit court in and for the county of Cook, in the state of Illinois, was a court of general jurisdiction over matters in equity and law, duly created and organized by the laws of that state.

II. That on the . . . day of . . ., 19.., the plaintiff commenced an action for divorce in said court against the defendant; that said defendant was duly served with process therein, and on the . . . day of . . ., 19.., appeared in said action and submitted himself personally to the jurisdiction of the court.

III. That thereafter such proceedings were had therein in said court that on the . . . day of . . ., 19.., a decree was duly made, entered, enrolled, and docketed in said court dissolving the bonds of matrimony between this plaintiff and said defendant, and thereafter, on the . . . day of . . ., 19.., by the consideration and judgment of said court, the said decree was duly amended by adding thereto and making a part thereof a provision and clause that said defendant pay to this plaintiff alimony to the amount of . . . dollars, with . . . dollars in addition thereto, as solicitor's fees, and that such money should be so paid within . . . days thereafter, and should stand when paid as a satisfaction in full for all claims for alimony and solicitor's fees on the part of this complainant. And the said plaintiff avers that no part of such sums of money has been paid.

IV. Complaining further, the said plaintiff avers: That under and by virtue of the provisions of the Revised Statutes

of the state of Illinois of 1874, chapter 22, entitled "Chancery," and chapter 40, entitled "Divorce," such decree, as amended, so entered as aforesaid, has the force and effect of a judgment at law for the payment of money. That such is the construction thereof, and the force and effect to be given to the same has been adjudicated and determined by the supreme court of said state, and such is the law of said state.

V. That by reason thereof this plaintiff is advised and believes that, under and by virtue of section 1 of article IV of the constitution of the United States, she hath a good right to maintain her cause of action aforesaid in the courts of the state of . . ., to have and recover of the said defendant the said sums of money so awarded to her as aforesaid, and that the said courts will give the same force and effect to said decree so above stated as is given thereto in the state of Illinois.

[DEMAND OF JUDGMENT.]

§ 3702. Affidavit by wife as plaintiff in divorce action, for suit money, temporary alimony, etc.

Form No. 1002.

[TITLE.]

[VENUE.]

A. B., being duly sworn, says that she is the plaintiff in this action, and that the same is brought to secure a divorce from the defendant upon the grounds stated in her complaint, of which a copy is annexed hereto.

That she is without means of support for herself or her children hereinafter named [except, etc.], and is also without means to pay the necessary expenses for counsel fees and disbursements in the prosecution of said action. [If she be sick or feeble in health state facts.]

That the children of said marriage consist of [give names and ages]; that she desires the custody of said children pending this action; and that the defendant is not a proper person to have charge of said children for the reason that [state facts].

That said defendant threatens that he will do violence to the affiant; that he will never permit her to have the care or custody of their children; that he will take them away from her by force, and carry them away; and affiant verily fears that, unless restrained by the order of this court, he will carry such threats into execution.

[If it is desired to enjoin defendant from disposing of his property, set forth facts showing that he proposes to do so, e. g.:] That the defendant is about to sell and dispose of his personal property, and convert the same into money, and remove with the same without this state; that he threatens and gives out that he will do so, and is attempting to make such sales; that he has declared such to be his purpose to the plaintiff, and, as she is informed and believes, to others; and she believes and fears that, unless restrained by the order of this court, the defendant will remove his property out of this state, and depart therefrom, so as to render ineffectual any judgment for alimony which she may obtain.

That the defendant is a strong and able-bodied man, and earns about the sum of . . . dollars per week in his business as a . . ., and that he has real and personal property amounting to the sum of . . . dollars in value [or, otherwise, set forth his financial condition].

Wherefore, affiant prays that said defendant may be required to pay affiant a suitable sum for her support and that of her said children pending this action, as well as a suitable sum for suit money to enable her to carry on the same, that the custody of said children be awarded to her, and that defendant be restrained from interfering with her personal property, or with her custody of said children, and also from disposing of, incumbering, or removing said property, and for such further order as may be just.

[JURAT.] A. B.

§ 3703. Affidavit of wife, as defendant in divorce action, for suit money, etc.

Form No. 1003.

[TITLE.]

[VENUE.]

C. B., being first duly sworn, on oath, says:

That she is the defendant in this action.

That she has fully and fairly stated the case in this action to G. H., Esq., her attorney and counsel, who resides in the city of . . . in said county, and that she is advised by her said counsel, upon such statement thus made, that she has a valid and substantial defense to said action, upon the merits, and to the whole thereof.

That she is about to make answer to the complaint denying all the charges therein alleged as ground for divorce, and intends and desires to defend said action and to set up a counterclaim for divorce on the ground of cruel and inhuman treatment, to-wit: [Here set forth the facts showing a cause of action on her own part for divorce.]

That the affiant is without means to support herself or to defend this action [except, etc.].

That the plaintiff is of ample means, abilities, and faculties; that he has [here specify his property, ability to earn money, probable income, etc.].

That she makes this affidavit for the purpose of moving for an order for suit money in, and a suitable allowance for her support pending, this action.

[If other relief, such as injunction against the plaintiff, is desired, state the facts justifying such relief.]

[JURAT.] C. B.

§ 3704. Order to show cause.

Form No. 1004.

[TITLE.]

On reading and filing the verified complaint of the plaintiff, and the affidavits of said plaintiff and of N. O. and O. P., and on motion of E. F., attorney for the plaintiff:

It is ordered, that the above-named defendant show cause, before me, at my chambers, in the courthouse in the city of . . ., in said county, on the . . . day of . . ., 19.., at . . . o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the defendant should not be required to pay the plaintiff a suitable sum weekly for her support and maintenance and the support and maintenance of her children during the pendency of this action, and why [proceed in the same manner with the other matters included in the motion].

And let a copy of said complaint and said affidavits be served with this order on the defendant, at least . . . hours before the time fixed herein for showing cause.

And until the hearing of said order and further order thereon the defendant, his attorneys, agents, and servants, are hereby ordered to desist and refrain from selling, disposing of, concealing, or removing out of this state any of the property of the plaintiff.

[Add order restraining defendant from interfering with the liberty of the plaintiff, if desired, pending the hearing of the motion.]

[DATE.] J. K., Judge.

§ 3705. Order for suit money, temporary alimony, etc.

Form No. 1005.

[TITLE.]

The plaintiff's motion for suit money, temporary alimony, etc., [state what motion includes] coming on to be heard this day before me on the verified complaint, the affidavits of A. B., N. O., and O. P., in support of said motion, and the affidavits of Q. R. and R. S., in opposition thereto; after hearing E. F., Esq., attorney for the plaintiff, and G. H., Esq., attorney for the defendant:

It is ordered, that the defendant pay to E. F., the plaintiff's attorney, the sum of . . . dollars on or before the . . . day of . . . , 19. . , as suit money, to enable the plaintiff to carry on this action, and that he pay to the plaintiff personally [or, deposit in the . . . bank for the use of and to the credit of the plaintiff] the sum of . . . dollars per week [or, month] to be paid or deposited each week [or, month] on Saturday [or, if monthly, on the last Saturday of each month], for the support and maintenance of the plaintiff, pending this action.

That the plaintiff be allowed the custody and charge of the infant children of the parties [name them] until the further order of the court, and that the defendant pay to plaintiff the sum of . . . dollars per month for their suitable support and maintenance, to be paid [state time and place].

That the defendant do absolutely desist and refrain from imposing any restraint upon the personal liberty of the plaintiff, and from taking from her custody or charge any or either of said children.

[If ground is shown for an order restraining the defendant from disposing of his property:] That the defendant refrain from disposing of, concealing, removing out of the state, or incumbering any of his property, real or personal, until the further order of this court.

[DATE.] J. K., Judge.

§ 3706. Judgment of divorce with final division of property instead of alimony.

Form No. 1006.

[TITLE.]

[Recitals of trial and findings according to the fact.]

It is adjudged:

I. That the bonds of matrimony heretofore existing between the plaintiff, A. B., and the defendant, C. D., be and the same are hereby wholly dissolved, and the parties freed from the obligation thereof.

II. That the plaintiff's name be changed to [maiden name], by which name she was known and called prior to entering into the marriage hereby dissolved.

III. That a final division and distribution of the estate, real and personal, of the said defendant [and so much of the estate of the plaintiff as has been derived from the defendant] be and is hereby made between the parties as follows: The following-described real estate of the defendant [describe same] is awarded to the plaintiff, and the title in fee thereof is hereby divested from the defendant and transferred to the plaintiff absolutely; and the following-described personal property of the defendant is awarded to the plaintiff, to-wit: [describe same]; and the title thereto is hereby transferred from the defendant to the plaintiff absolutely; and the title to the remaining property of the defendant, real and personal, is hereby vested absolutely in said defendant, free from all claim of the plaintiff thereon of any nature.

IV. That the custody of the infant children of the parties [name them] be and is hereby awarded to the plaintiff [with leave to the defendant to see and visit them, as follows: specify particularly when and under what conditions defendant may visit them].

V. That the defendant pay to the plaintiff, as a suitable allowance for the support, maintenance, and education of said children, the following sums: [Specify amounts to be paid and when.]

VI. That the plaintiff have and recover her costs herein, taxed at . . . dollars, in addition to sums heretofore ordered to be paid.

[DATE.]

By the Court: O. P., Clerk.

§ 3707. Judgment of absolute divorce in wife's favor.

Form No. 1007.

[TITLE.]

[Recitals of trial and findings.]

It is adjudged:

I. That the bonds of matrimony heretofore existing between the plaintiff, A. B., and the defendant, C. D., be and the same are hereby wholly dissolved, and the parties freed from the obligations thereof.

II. That the plaintiff's name be changed to [maiden name], by which name she was known and called prior to entering into the marriage hereby dissolved.

III. That the said defendant, C. D., pay to the plaintiff, A. B., the sum of . . . dollars a year, as a suitable allowance for her support; and that the same be paid in manner following: [specify times and place of payment], during the natural life of the plaintiff, and that said payments be charged as a lien upon the following described real estate of the defendant, to-wit: [Describe it.] [Or, if the payment of the alimony is to be secured by bond, here specify the bond to be given and by whom approved.]

IV. That the custody of the infant children of the parties [name them] be and is hereby awarded to the plaintiff, with leave to defendant to see and visit them, as follows: [Specify particularly when and under what conditions defendant may visit them.]

V. That the defendant pay to the plaintiff as a suitable allowance for the support, maintenance, and education of said children the following sums: [Specify amounts to be paid and when.]

VI. That the plaintiff have and recover her costs herein, taxed at . . . dollars, in addition to sums heretofore ordered to be paid.

By the Court: O. P., Clerk.

§ 3708. Judgment of divorce from bed and board.

Form No. 1008.

[TITLE.]

[Recital as in preceding form.]

It is therefore adjudged, that the plaintiff and the defendant be and they are hereby separated and divorced from bed and board forever [or, for the term of . . . years from this date].

[Add provisions for alimony, custody of children, etc.]

§ 3709. Interlocutory decree.

Form No. 1009.*

[TITLE OF COURT AND CAUSE.]

The above-entitled action came on regularly to be heard and tried before the court, sitting without a jury, on the . . . day of . . ., 19.., the plaintiff appearing in person and by her attorney . . ., and the defendant not appearing, either in person or by attorney;

Upon said hearing, it appearing to the satisfaction of the court that the defendant herein . . ., was, on the . . . day of . . ., 19.., at . . ., in the county of . . ., state of California, duly served in person with summons herein, attached to a copy of the complaint on file in this cause, [and if a co-respondent in adultery is named in the pleadings: that . . ., the person named in the complaint herein as the person with whom defendant is alleged to have committed adultery, having been served with notice of this action and a copy of the pleading, wherein he is named as the person with whom defendant has committed adultery, on the . . . day of . . ., 19.., by . . . [state manner of service], in accordance with law [or, the order of this court]; and the defendant having failed to appear and answer said complaint of the plaintiff, and the time for answering having expired and no answer or demurrer having been filed, and the default of said defendant, . . ., having been duly entered according to law, [and said . . ., named as the party with whom defendant committed adultery, not having appeared and not having pleaded or asked to be heard in this action], and the court having heard the testimony introduced in behalf of said plaintiff and in support of her complaint, and the cause having been submitted; the court having duly considered the law and the evidence, and it appearing satisfactorily to the court that each and all of the material allegations and averments in plaintiff's complaint are true:

Now, therefore, it is ordered, adjudged, and decreed, that the plaintiff above named is entitled to a divorce upon the grounds stated in her complaint, and that the bonds of matrimony heretofore existing between the plaintiff and the defendant should be dissolved, and that the plaintiff is entitled to the relief asked for in her complaint; and it is determined that an interlocutory

*California Practice; see §§ 3648, 3649, ante.

judgment should be entered in said action, and such interlocutory judgment is hereby entered accordingly;

It is further ordered, adjudged, and decreed, that at the expiration of one year from the entry of this interlocutory judgment said plaintiff shall be entitled to, and there shall be entered by the court, on motion of either party, or upon its own motion, a final judgment granting the said divorce and dissolving the bonds of matrimony between the said plaintiff and the said defendant, and restoring them to the *status* of single, unmarried persons.

It is further ordered, adjudged, and decreed, that said plaintiff shall be allowed to resume the name of . . ., which was the name of said plaintiff prior to her marriage with said defendant.

Dated, . . ., 19..

. . ., Judge of said Superior Court.

§ 3710. Final decree.

Form No. 1010.*

[TITLE OF COURT AND CAUSE.]

This cause came on regularly to be heard on the . . . day of . . ., 19.., at which time, after due proceedings had, it was proven to the satisfaction of the court, and the court found, that due and legal notice of said action had been given defendant in accordance with law and the orders of the court; that defendant had failed to appear either in person or by attorney, and had failed to file any pleading in said cause, and that the default of defendant had been duly entered herein, and that plaintiff was entitled to an interlocutory decree of divorce; and the court thereupon made and entered herein its interlocutory judgment, by which, among other things, it was ordered, adjudged, and decreed that the plaintiff herein was entitled to a decree of divorce from said defendant, and to have the bonds of matrimony theretofore existing between the plaintiff and defendant dissolved.

And more than one year having expired since the date of the entry of said interlocutory judgment, and no appeal having been taken from such judgment or at all, and said judgment being now, and at all times since the entry thereof, in full force and effect:

*California Practice; see §§ 3648, 3649, ante.

Now, therefore, on motion of plaintiff [or, defendant; or, of the court], it is ordered, adjudged, and decreed, that plaintiff shall have and is hereby granted a divorce from said defendant, and that the bonds of matrimony between said plaintiff and said defendant are hereby dissolved, and the said parties, and each of them, are hereby restored to the *status* of a single, unmarried person.

Dated . . ., 19..

. . ., Judge of said Superior Court.

§ 3711. Final decree—Another form.

Form No. 1011.

[Title of Court and Cause.]

This cause came on regularly to be heard on the . . . day of . . ., 19.., upon the complaint of the plaintiff herein, taken as confessed by the defendant for failing to answer the said complaint, and . . ., attorney at law, appearing for plaintiff, and no appearance having been made by the defendant, and no one appearing for him, the court did proceed to hear the evidence submitted on the part of the plaintiff in support of the allegations of the complaint; and it appearing at that time that the defendant, . . ., had been duly and legally served with summons, and had made no appearance in said case, this court did thereupon make and enter its findings of fact, and it further did make and cause to be entered its interlocutory decree, wherein it is found that the plaintiff herein, . . ., was entitled to have the marriage between the said plaintiff and . . ., said defendant, dissolved, in accordance with sections 131 and 132 of the Civil Code of the state of California; and this court did further, thereupon, adjudge and decree that, at the time of the expiration of one year from the date of entry of said decree, the parties herein should, by final decree, be absolutely released from the bonds of matrimony theretofore existing between them.

Whereas, more than one year has expired since the entering of said interlocutory decree, and no further proceedings having been had or taken in said cause, and it appearing at this time to this court that the said final judgment should be entered in accordance with the interlocutory decree so entered:

Now, therefore, it is hereby ordered, adjudged, and decreed, that the marriage between the plaintiff, . . ., and the defendant,

. . ., be and the same is hereby dissolved, and that the said plaintiff and defendant, and each of them, be and they are absolutely released from all obligations thereof, in conformity to said interlocutory decree, which interlocutory decree is hereby ratified and approved.

Done this . . . day of . . ., 19..

. . ., Judge of said Superior Court.

CHAPTER CIII.

PARTNERS.

§ 3712. Actions between partners.—As a general rule, no action at law can be maintained between partners, pending the relation as such,[1] although a stipulation by one, for the benefit of the others, may be enforced by them or their trustees, as against a limited partner.[2] They cannot sue one another for any of the business or undertakings of the firm.[3] They can only ask for a dissolution and an accounting. One partner cannot sustain an action against his copartner for the delivery of personal property belonging to the copartnership.[4] If a partner disposes of the entire partnership stock, in violation of the statute,[5] the purchaser may be sued in conversion without joining the partner.[6] But one partner may sue his copartner on a note;[7] or one partner may sue another at law for damages caused by a premature dissolution on breach of copartnership articles,[8] and after division of a specific fund he may sue for his allotted portion.[9] So one partnership firm may sue another, having a mutual partner, for an ascertained balance,[10] and such mutual partner may elect whether to be plaintiff or defendant in the action.

§ 3713. Authority of partner.—In California, a partner cannot make an assignment of the partnership property to a creditor, or in trust for creditors, nor dispose of the good-will of the

1 Koningsburg v. Launitz, 1 E. D. Smith, 215; Sweet v. Morrison, 102 N. Y. 235, 8 N. E. 396; Hoff v. Rogers, 67 Miss. 208, 19 Am. St. Rep 301, 7 South. 358; Gleason v. White 34 Cal. 258, 263; Chase v. Steel, 9 Cal 64.

2 Robinson v. McIntosh, 3 E. D. Smith, 221; see Cal. Civ. Code, § 2491.

3 Riddell v. Ramsey, 31 Mont. 386, 78 Pac. 597; Buckley v. Carlisle, 2 Cal. 420; Stone v. Fouse, 3 Cal. 292; Barnstead v. Empire Min. Co., 5 Cal. 300; Koningsburg v. Launitz, 1 E. D. Smith, 215. But see Robinson v. McIntosh, 3 E. D. Smith, 221.

4 Buckley v. Carlisle, 2 Cal. 420.

5 Mont. Rev. Code, § 5483.

6 Doll v. Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625.

7 Van Ness v. Forrest, 8 Cranch, 30, 3 L. Ed. 478. See Bull v. Coe, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808; Bank of British North America v. Delafield, 126 N. Y. 410, 27 N. E. 797.

8 Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756.

9 Crosby v. Nichols, 3 Bosw. 450; Ross v. Cornell, 45 Cal. 133.

10 Cole v. Reynolds, 18 N. Y. 74.

business, nor dispose of the whole of the partnership property at once, unless it consists entirely of merchandise, nor do any act which would make it impossible to carry on the ordinary business of the partnership, nor confess a judgment, nor submit a partnership claim to arbitration, unless his copartners have wholly abandoned the business to him, or are incapable of acting.[11] Such a sale conveys to the purchaser only the interest of the partner.[12] Nor can one member of a partnership bind his copartner by a promissory note for a partnership demand, made after the dissolution of the partnership;[13] but one doing business under a firm name can assign a note made payable to him in such name.[14]

§ 3714. **Arbitration.** — It is a general rule that a partner has no authority, as such, to submit partnership matters to arbitration so as to make the award binding on the firm.[15] A partner may submit his own interest in the firm to reference, but he cannot thereby bind the other partners.[16]

§ 3715. **Individual interest.**—The interest of a copartnership cannot be given in evidence on an averment of individual interest; nor can an averment of copartnership interest be supported by a special individual contract.[17]

§ 3716. **Joint assumpsit.**—Where suit is brought on a partnership transaction, the complaint stating a contract with the partner sued, evidence may be given of a joint *assumpsit*.[18]

§ 3717. **Judgment against partners—Service on one.**—A partnership consisting of several persons must sue or be sued by their names at length, and not in the name of the firm.[19] Such

11 Civ. Code, § 2430. See Carrie v. Cloverdale etc. Commercial Co., 90 Cal. 84, 27 Pac. 58; Quinn v. Quinn, 81 Cal. 14, 22 Pac. 264.

12 Phillips v. Thorp, 12 Okla. 617, 73 Pac. 268.

13 Curry v. White, 51 Cal. 530. See, also, Stokes v. Stevens, 40 Cal. 391.

14 Gardner v. Wiley, 46 Or. 96, 79 Pac. 341.

15 Cal. Civ. Code, § 2430, subd. 6; St. Martin v. Thrasher, 40 Vt. 460.

16 Karthaus v. Ferrer, 1 Pet. 222, 7 L. Ed. 121; Jones v. Baily, 5 Cal. 341. See, also, Lyle v. Rodgers, 5 Wheat. 394, 5 L. Ed. 117.

17 Graves v. Boston Marine Ins. Co., 2 Cranch, 419, 2 L. Ed. 324.

18 Barry v. Foyles, 1 Pet. 311, 7 L. Ed. 157; Cal. Civ. Code, § 2442; Williams v. Southern Pac. R. Co., 110 Cal. 457, 42 Pac. 974.

19 Bentley v. Smith, 3 Caines, 170.

is the common-law rule; but "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability," is the form of a provision found in the California Code of Civil Procedure.[20] This section does not authorize an action to be brought in a copartnership or firm name.[21] Similar provisions exist in the codes or statutes of many of the states. The supreme court of the United States has refused to give a judgment thus obtained against a partner not served with process any extraterritorial force, on the ground that the judgment was obtained without due process of law.[22] In several states, the validity of such a judgment has been either tacitly assented to or expressly upheld by the courts.[23] In California, the earlier cases upheld the constitutionality of such a judgment,[24] but this position has been since receded from, and such judgments, at least as against the partner not served, are considered void.[25] Service on a member of a partnership may be made by leaving a copy of the summons and complaint at his usual place of residence, with a member of his family over fifteen years of age.[26] In a California case,[26a] the court, per Rhodes, J., said: "The statute provides that the 'joint property' of all the defendants may be taken in execution for the satisfaction of the judgment; but none of the cases in this court defines such joint property. . . . In *Mason* v. *Denison,* 15 Wend. 64, it is said that the term applies to

20 Cal. Code Civ. Proc., § 388, as amended 1907.

21 Doll v. Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625.

22 Mason v. Eldred, 6 Wall. 239, 18 L. Ed. 783; Public Works v. Columbia College, 17 Wall. 527, 21 L. Ed. 687; D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271.

23 Johnson v. Lough, 22 Minn. 203; Lahey v. Kingon, 13 Abb. Pr. 192; Harker v. Brink, 24 N. J. L. 333; Martin v. Rising, 2 Pac. Coast L. J. 56; Guimond v. Nast, 44 Tex. 114; Kidd v. Brown, 2 How. Pr. 20; Whitmore v. Shiverick, 3 Nev. 288.

24 Welsh v. Kirkpatrick, 30 Cal. 203, 89 Am. Dec. 85.

25 Tay v. Hawley, 39 Cal. 95.

26 Barnes v. Colo. Sprs. & C. C. D. Ry., 42 Colo. 461, 94 Pac. 570.

26a Tay v. Hawley, 39 Cal. 95.

the property which one defendant might apply to the satisfaction of the debt, without consulting his co-contractor. Accepting the restriction indicated in that case, or even limiting the meaning of 'joint property' to partnership property of the persons alleged to be joint debtors, we are utterly unable to see how a judgment that is to be enforced against the interest in such property of a person who has not been served with process, and has not appeared, can be maintained. It is a cardinal principle of jurisprudence that a judgment shall not bind or conclude a man, either in respect to his person or property, unless he has had his day in court. No person shall be deprived of life, liberty or property without due process of law, says the constitution; but this principle is older than written constitutions, and, without invoking the constitutional declaration, every person may, as a matter of common right, insist that he be heard in his own defense before judgment passes which binds, charges, or injuriously affects his person or estate. It is no answer to say that the judgment affects only the joint property of the defendants,—property that either of the debtors might apply to the satisfaction of the common debt,—for that assumes that the defendants are joint debtors, and that may be to the defendant who is not served the vital point of the controversy. He may be ready to admit every allegation of the complaint, except that he is a party to the contract; or he may even admit the contract, and yet be ready, if an opportunity were presented, to make a successful defense on the ground of fraud, failure of consideration, payment, accord and satisfaction, etc. The defendant who is served may be ignorant of the defenses upon which his co-defendants would rely, or he may, either negligently or purposely, omit to present them. And whatever his answer may be, he only answers for himself; and there is nothing in the law regulating the acquisition or disposition of joint property which confers upon one joint owner the right to defend actions for his fellows. Unless it can be shown that such property is under the ban of the law, a judgment which subjects to execution the interest of a person who has had no opportunity to be heard in the action cannot be upheld without violating principles which lie at the base of all judicial proceedings." In the latter part of this opinion the judge stated that "the provisions of the code, which provide for summoning a defendant who had not originally been served to

show cause why he should not be bound by the judgment, furnish the exclusive mode by which he can be bound by the judgment, and such provisions necessarily imply that he is not already bound."

In an action against copartners on a partnership obligation, where the names of all the individuals composing the firm are set forth both in the caption and the body of the complaint and summons, with the addition that they are doing business under a firm name, judgment cannot be rendered under section 388 of the California Code of Civil Procedure against those defendants who have not been served with process and have not appeared; but a judgment entered in such action against those who have been served will not be vitiated as to them because the other defendants are included therein.[27]

§ 3718. **Estoppel from denying partnership.**—One may estop himself from denying his liability as a partner where such relation does not exist in fact, by holding himself out as such, or by negligently permitting one to do so with whom he is engaged in business.[28] Where a member of a firm of contractors used language to a member of another firm, which led, and was intended to lead, it to believe that they were to share as partners in the contract, and the partnership did so believe, and acted thereon, the contractors are bound by the agreement, whether they intended finally to be bound by it or not.[29] A defendant having knowledge of a newspaper article asserting that he is a member of a partnership, published after an interview with him, who fails to publish a denial, must be regarded as holding himself out as a partner, rendering the article admissible on the issue of his membership in the firm.[30]

§ 3719. **Liability of partners.**—The whole of the partners are liable on a warranty by one of the members, on sale of firm property.[31] An act done by a partner within the scope of his authority is binding on the firm;[32] but persons dealing with a

27 Davidson v. Knox, 67 Cal. 143, 7 Pac. 413.

28 Rider v. Hammell, 63 Kan. 733, 66 Pac. 1026.

29 North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 Pac. 890.

30 Stevens v. Walton, 17 Colo. App. 440, 68 Pac. 834.

31 Sweet v. Bradley, 24 Barb. 549; Cal. Civ. Code, § 2443.

32 Peterson v. Armstrong, 14 Okla. 532, 78 Pac. 324; Salt Lake Brewing

partner are bound to take notice of his authority and the apparent scope of the partnership business.[33] One partner is liable to third parties for injuries occasioned by negligence of another.[34] All are liable for the fraud of one,[35] but not for a malicious prosecution instituted by a copartner, unless they advise or participate therein.[36] However, it matters not whether a partner is acting fairly with his copartners, so long as his dealings with the third party are within the scope of the firm business; all of the partners are equally liable.[37] Ratification is equivalent to antecedent authority.[38]

§ 3720. **Partnership, what constitutes.**—Actual intention is necessary to constitute a partnership *inter se.* There must be a joint undertaking to share in the profit and loss. Each party must, by the agreement, in some way participate in the losses as well as the profits.[39] An agreement to divide the gross earnings does not constitute the parties to it partners.[40] A partnership may exist as to third persons, when there is no partnership as between the persons thus liable.[41]

§ 3721. **Partnership property.**—The plaintiff must recover on the allegations in his complaint, if at all; and if the complaint fails to aver that the property was partnership property, the judgment of the court should not find that fact.[42]

Co. v. Hawke, 24 Utah, 199, 66 Pac. 1058.

33 Id.; Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 Pac. 885.

34 Cotter v. Bettner, 1 Bosw. 490. See Tucker v. Cole, 54 Wis. 538, 11 N. W. 703; Hess v. Lowrey, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156, 7 L. R. A. 90; Gibson v. Henley, 131 Cal. 6, 63 Pac. 61.

35 Getty v. Devlin, 54 N. Y. 403.

36 Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886, 71 Pac. 551.

37 Salt Lake City Brewing Co. v. Hawke, 24 Utah, 199, 66 Pac. 1058.

38 Cassidy v. Saline Co. Bank, 14 Okla. 532, 78 Pac. 324; Peterson v. Armstrong, 14 Okla. 532, 78 Pac. 524; Guthiel v. Gilmer, 27 Utah, 496, 76 Pac. 628; Clark v. Ball, 34 Colo. 223, 114 Am. St. Rep. 154, 82 Pac. 529, 2 L. R. A. (N. S.) 100.

39 2 Kent Com. 23-28; Hazard v. Hazard, 1 Story, 373, Fed. Cas. No. 6279; Denny v. Cabot, 6 Metc. (Mass.) 82; Muzzy v. Whitney, 10 Johns. 228; Champion v. Bostwick, 18 Wend. 181, 31 Am. Dec. 376; Smith v. Moynihan, 44 Cal. 53; Wheeler v. Farmer, 38 Cal. 203. See Sindelare v. Walker, 137 Ill. 43, 31 Am. St. Rep. 353, 27 N. E. 59; Jones v. Call, 93 N. C. 170.

40 Pattison v. Blanchard, 5 N. Y. 186; Story on Partnership, § 34, and cases cited in note 3; Wheeler v. Farmer, 38 Cal. 203.

41 Cal. Civ. Code, § 2444. See Ontario Bank v. Hennessey, 48 N. Y. 545; Manhattan Brass etc. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; McStea v. Matthews, 50 N. Y. 166.

42 Sterling v. Hanson, 1 Cal. 480. As to allegation as to partnership in

§ 3722. Special partner.—In California, the general partners may sue and be sued alone, in the same manner as if there were no special partners.[43]

A plaintiff, who bases his right to an accounting upon an allegation of a partnership between himself and the defendant is not entitled to such relief upon the mere proof of a tenancy in common.[44] An action for the dissolution of a partnership can only be brought at the instance of a partner.[45]

§ 3723. Allegation of partnership.—The same allegation will do where the plaintiffs are partners, substituting the word "plaintiffs" for "defendants." Where the partnership is a material fact, it should be alleged.[46] A distinct averment of partnership between the plaintiffs is only necessary when the right of action depends upon the partnership.[47] When a joint ownership or joint contract will enable them to recover, it is no objection to their complaint that their partnership is not pleaded.[48] Correct pleading requires that parties intending to sue as partners should allege the fact of their copartnership in the body of the pleading.[49] And a showing in the caption of the complaint that the plaintiffs are partners is not indispensable, if in the body of the complaint it be specially averred that the plaintiffs are in fact partners, and it appears from the facts alleged that the obligation sued on was created in favor of the partnership.[50] So an allegation of partnership is only necessary when the cause of action depends on its existence; and where an action on an implied contract for goods furnished by a firm is brought in the name of the partners,

lands, see Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745.

43 Civ. Code, § 2492.

44 Noonan v. Nunan, 76 Cal. 44, 18 Pac. 98. As to insufficient complaint in an action for an accounting and settlement of a partnership, see Cuyamaca Granite Co. v. Pacific Paving Co., 95 Cal. 252, 30 Pac. 525. As to action for an accounting and dissolution of a partnership, consult Wulff v. Superior Court, 110 Cal. 215, 52 Am. St. Rep. 78, 42 Pac. 638; Rowe v. Simmons, 113 Cal. 688, 45 Pac. 983. As to action to dissolve partnership between corporations, see Loftus v. Fischer, 114 Cal. 131, 45 Pac. 1058.

45 Behlow v. Fischer, 102 Cal. 208, 36 Pac. 509.

46 Martin v. District Court, 13 Nev. 85.

47 Loper v. Welch, 3 Duer. 644. See Oechs v. Cook, 3 Duer, 161.

48 For a sufficient though informal averment of partnership, see Anable v. Conklin, 25 N. Y. 470; Anable v. Steam Engine Co., 16 Abb. Pr. 286.

49 Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817. As to sufficient averment of partnership, see Pfister v. Wade, 69 Cal. 133, 10 Pac. 369.

50 Wise v. Williams, 72 Cal. 544, 14 Pac. 204.

and it is alleged that they jointly furnished the goods, it is not necessary to allege the partnership.[51] A complaint in an action against a firm, which alleges a distinct and independent indebtedness against each member thereof, does not state a cause of action.[52] But where the complaint in an action on a promissory note, after alleging that the defendants at all the times therein mentioned were partners, averred that "the said defendants, copartners as aforesaid," executed the notes in question, this was held a sufficient averment that the notes were executed by the defendants as copartners.[53] An objection to a complaint against copartners, that the names of the defendants and the allegation of partnership do not appear in the body of the complaint, is not well taken where the same matters are fully stated in the caption.[54]

§ 3724. **Dormant partner.**—At common law a dormant partner need not be, and ought not to be, joined in a suit by the firm.[55] So if a dormant partner be unknown in the contract of a lease, it was held that he need not be joined as defendant.[56] They have the right, but are not bound, to sue all under such circumstances.[57] The liability of the dormant partner rests upon the intention of all the alleged partners to form a partnership.[58] A secret partnership does not vest a dormant partner with any rights to partnership assets, as against the creditors of such partnership.[59] The burden of proof is on the party alleging the partnership.[60] Where the name of a dormant partner was fraudulently concealed, an injunction to restrain a levy on partnership property was set aside.[61]

51 Clark v. Wick, 25 Or. 446, 36 Pac. 165. See Lee v. Orr, 70 Cal. 398, 11 Pac. 745; Wood v. Fithian, 24 N. J. L. 33.

52 Faust v. Smith, 3 Colo. App. 505, 34 Pac. 261.

53 Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708.

54 Pierson v. Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015.

55 Leveck v. Shaftoe, 2 Esp. 468, 7 T. R. 361; Lloyd v. Archbowl, 2 Taunt. 324, 1 Chit. Pl. 9; Clarkson v. Carter, 3 Cow. 84; Clark v. Miller, 4 Wend. 628; N. Y. Dry Dock Co. v. Treadwell, 19 Wend. 525. But that the rule would appear to be otherwise under the code of New York, see Secor v. Keller, 4 Duer, 416. Compare Belshaw v. Colie, 1 E. D. Smith, 213.

56 Hurlbut v. Post, 1 Bosw. 28; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425.

57 Brown v. Birdsall, 29 Barb. 549.

58 North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 Pac. 890.

59 Willard v. Bullen, 41 Or. 25, 67 Pac. 924, 68 Pac. 422; Willey v. Crocker etc. Bank, 141 Cal. 508, 75 Pac. 106.

60 Strickler v. Gitchel, 14 Okla. 523, 78 Pac. 94.

61 Van Valen v. Russell, 13 Barb. 590.

§ 3725. **Fictitious name—Right to sue.**—Every partnership, except a commercial or banking partnership established and transacting business in a place without the United States, transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated a certificate, stating the names in full of all the members of such partnership and their places of residence, and publish the same once a week for four successive weeks in a newspaper, published in the county.[62] "Abrams Bros." is not such a designation as shows the names of the interested partners.[63] The certificate must be signed by the partners and acknowledged under oath. Persons doing business as partners contrary to the provisions of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name in any court of the state, until they have first filed the certificate and made the publication required.[64] The statute being penal in nature, will not be construed to embrace any penalty not provided therein, and therefore does not affect the prosecution of an action to recover possession of real property.[65]

No disability is imposed by the foregoing provisions to make contracts or to have transactions.[66] An assignee of the partnership, even though a member thereof, may maintain an action.[67] Upon plaintiff's failure, and upon objection taken in time, nonsuit should be granted.[68] An averment as to compliance with the statute is necessary, and the complaint is demurrable for failure to set out such compliance.[69] Upon change of membership, a new certificate and a new publication must be had.[70]

§ 3726. **Duties of surviving partner.**—The surviving partner is to wind up the affairs of the partnership, and pay its debts out of the assets, if sufficient, and divide the residue, if any,

62 Cal. Civ. Code, §§ 2466, 2467.

63 North v. Moore, 135 Cal. 621, 67 Pac. 1037.

64 Cal. Civ. Code, § 2468; Colo. Acts 1897, p. 248, ch. 65.

65 Wallbrecht v. Blush, 43 Colo. 329, 95 Pac. 927.

66 Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451.

67 Gray v. Wells, 118 Cal. 11, 50 Pac. 23; Cheney v. Newberry, 67 Cal. 125, 126, 7 Pac. 444, 445; Quan Wye v. Chin Lin Hee, 123 Cal. 185, 55 Pac. 783.

68 Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444.

69 Id.

70 Cal. Civ. Code, § 2469.

among those entitled to it.[71] And a claim of the surviving partner against the estate of the deceased partner is contingent, and does not become absolute till the partnership affairs are settled.

§ 3727. **Partnership debt.**—An action at law does not lie against the personal representative of the deceased partner. It must be brought against the survivor.[72] So when one of two joint covenantors dies.[73]

§ 3728. **Promise, how stated.**—In an action for a debt which accrued to the partnership before the death of one of its members, that fact, the death of the member, and survivorship must be alleged, unless there has been an accounting with the survivor.[74]

§ 3729. **Right of possession.**—A surviving partner has the exclusive right of possession, and the absolute power of disposition of the assets of the partnership,[75] and he may sue alone regarding subject-matter affecting firm property.[76]

§ 3730. **Services.**—He is not entitled to pay for his services in merely winding up the affairs of the concern.[77] But if he expends his time and labor in the care and management of the partnership property, by which its value is enhanced, he should receive compensation for the same.

§ 3731. **Survivor, liabilities of.**—The survivor of a partnership may be charged on a debt of the firm, contracted before the death of the other, and without averring the partnership, death, etc.[78] And the personal representative of a deceased partner cannot be joined with him, unless the survivor be insolvent.[79] Where, after the death of one partner, on account stated

71 Gleason v. White, 34 Cal. 258.

72 Grant v. Shurter, 1 Wend. 148; Cal. Code Civ. Proc., § 1585.

73 Gere v. Clarke, 6 Hill, 350.

74 Holmes v. De Camp, 1 Johns. 36, 3 Am. Dec. 293; Tom v. Goodrich, 2 Johns. 213; Cal. Code Civ. Proc., § 1585.

75 Allen v. Hill, 16 Cal. 113. See Cal. Code Civ. Proc., § 1585.

76 Miller v. Kern, 137 Cal. 516, 70 Pac. 549.

77 Griggs v. Clark, 23 Cal. 427.

78 Goelet v. McKinstry, 1 Johns. Cas. 405. Compare Holmes v. De Camp, 1 Johns. 34, 3 Am. Dec. 293.

79 Voorhis' Exrs. v. Child, 17 N. R. 354; Morehouse v. Ballou, 16 Barb. 289; Higgins v. Freeman, 2 Duer, 650.

between defendant and the copartnership, admitting balance due for goods sold in the lifetime of deceased, the survivor may recover it on *insimul computassent,* without averring the death of the other partner.[80]

A surviving partner has power, under section 2461 of the California Civil Code, to prosecute a claim for unliquidated damages in favor of the partnership, and, under section 1585 of the Code of Civil Procedure, has power to settle the business of the partnership, which includes everything that may be necessary to wind up its affairs.[81] He is entitled to sue in his representative capacity for the amount due the partnership, and in his own name for the amount due to himself individually. The respective demands may be united in the same action, but should be separately stated.[82] The surviving partner is a proper but not indispensable party to an action to foreclose a mortgage made by a deceased partner of his individual property to secure the firm indebtedness.[83] The heirs of a deceased person are not the proper parties to maintain an action for an accounting and settlement of a partnership between the decedent and a surviving partner or his representatives, and they have no legal capacity to do so. The surviving partner must account with the executor or administrator of the deceased partner.[84] Such order may be made by the court whenever it appears to be necessary; and in case of neglect to do so, it may, after notice, compel obedience by contempt proceedings based upon the order to account.[85]

80 Holmes v. De Camp, 1 Johns. 34, 3 Am. Dec. 293.

81 Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112.

82 Quillen v. Arnold, 12 Nev. 234.

83 London etc. Bank v. Smith, 101 Cal. 415, 35 Pac. 1027.

84 Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086.

85 Cal. Code Civ. Proc., § 1585; Ariz. Civ. Code, par. 1829; Idaho Rev. Codes, § 5554; Mont. Rev. Codes, § 7607; Nev. Comp. Laws, § 2954; Or. B. & C. Codes, §§ 1130-1132; Utah Rev. Stats., § 2918; Wash. Bal. Codes, §§ 6190-6192.

FORMS—ACTIONS BY AND AGAINST PARTNERS.

§ 3732. Complaint against partners—Averring partnership.

Form No. 1012.

[STATE AND COUNTY.] [COURT.]

John Doe, Plaintiff,
v.
A. B. and C. D., Defendants.

The plaintiff complains of the defendants, and alleges:

I. That at the time hereafter mentioned, the defendants were copartners, and doing business as merchants or traders [or otherwise] at the city of . . ., under the firm name of A. B. & Co.

II. [State cause of action.]

[DEMAND OF JUDGMENT.]

§ 3733. Complaint by surviving partner.

Form No. 1013.

[STATE AND COUNTY.] [COURT.]

John Doe, Plaintiff,
v.
Richard Roe, Defendant.

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the plaintiff and one C. D. were partners, doing business as merchants or traders [or otherwise] at the city of . . . , under the firm name of "John Doe & Co."

II. [Statement of cause of action.]

III. That on the . . . day of . . ., 19.., at . . ., said C. D. died, leaving the plaintiff the sole survivor of the said firm.

[DEMAND OF JUDGMENT.]

§ 3734. Affidavit for discharge of attachment on partnership property attached in action against one partner alone.

Form No. 1014.

[TITLE OF COURT AND CAUSE.]

[VENUE.]

E. F., being first duly sworn, says: That the above-entitled action has been duly commenced, and is now pending, in this

court, and that on the . . . day of . . ., 19.., a writ of attachment was duly issued out of this court in the said action, under and by virtue of which writ the sheriff of the said county of . . . did on the . . . day of . . ., 19.., seize and levy upon the following described personal property: [here insert description of property attached]; that at the time said property was so seized the same was, and still is, partnership property, belonging to the firm of [insert name of firm], which firm was then, and still is, composed of this affiant and the defendant C. D.; that the property so levied upon is worth the sum of . . . dollars, and that the interest of the defendant C. D. in said property is worth not exceeding the sum of . . . dollars.

Wherefore, this affiant makes this affidavit for the purpose of applying to the court for an order discharging the said attachment upon the said partnership property, [upon the giving of an undertaking].

[JURAT.] E. F.

§ 3735. Undertaking for discharge of attachment on partnership property.

Form No. 1015.

[TITLE OF COURT AND CAUSE.]

A writ of attachment having been issued in the above-entitled action to the sheriff of the county of . . ., and one E. F., of . . ., in said county, having made affidavit that the property heretofore seized by the sheriff in this action, described as follows: [here insert description of the property attached], was at the time of such seizure, and still is, partnership property, belonging to the defendant C. D. and said E. F., as copartners; and having made application for an order discharging the said attachment as to said personal property upon giving the undertaking required by the statute in such case, and the said court after the hearing of testimony and having fixed the amount of said undertaking at the sum of . . . dollars:

We, E. F., as principal, and G. H. and J. K., as sureties, all of . . ., in said county of . . ., state of . . ., do hereby, pursuant to the statute in such case made and provided, undertake in the sum of . . . dollars that if judgment shall be rendered in this action in favor of the plaintiff we will pay to the said sheriff on demand the amount of the judgment rendered against said defendant C. D., above named, but not exceeding the amount

of the interest of said defendant in the said partnership property, which amount is to be determined by reference or otherwise, as the court may direct.

Dated . . ., 19..

E. F.
G. H.
J. K.

§ 3736. By surviving partner, on note payable to order of his late firm.

Form No. 1016.

I. That at the time of the making of the note hereinafter mentioned, the plaintiff and one C. D. were partners, doing business under the firm name of A. B. & Co.

II. That on the . . . day of . . ., 19.., the defendant made and delivered to said firm his promissory note in writing, dated on that day, and thereby promised to pay to them, under this said firm name [or their order] . . . dollars, . . . months after said date [or, on the . . . day of . . ., 19..].

III. That no part thereof has been paid [except the sum of, etc.].

[Or, set forth copy of note, and allege non-payment.]

IV. That on the . . . day of . . ., 19.., at . . ., said C. D. died, leaving the plaintiff the sole surviving partner of said firm.

§ 3737. Assignment of partnership assets to receiver.

Form No. 1017.

This indenture, made the . . . day of . . ., 19.., between A. B. and C. D., heretofore partners in trade, doing business in the city of . . ., under the style of A. B. & Co., of the first part; and R. C., of [etc.], receiver of the estate and effects hereinafter referred to, appointed by the . . . court of . . ., of the second part;

Whereas, in and by an order of the said court, before, [etc.], in a certain action, wherein the said A. B. was plaintiff, and R. C. was appointed receiver of the estate and property of said partnership, with powers as in the order of appointment contained:

And whereas, the said party of the second part has given and filed the requisite security, pursuant to the rules and practice of the said court, and to the provisions of the said order:

Now this indenture witnesseth, that the said parties of the first part, in obedience to the said order, and in consideration of

the premises aforesaid, and of one dollar to each of them in hand paid by the said party of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, have, and each of them has, conveyed, assigned, transferred, and delivered over, and by these presents do, and each of them does, convey, assign, transfer and deliver over, unto the said party of the second part, under the direction of the said referee, testified by his approval indorsed hereon, all and every the stock in trade, good-will, estate, real and personal, chattels-real, moneys, outstanding debts, things in action, equitable interests, property, and effects whatsoever and wheresoever, of or belonging or due to the said firm, or to the said parties of the first part as partners therein, or in which the said firm, or they or either of them as such partners, had any estate, right, title or interest at the time of filing the complaint in said action, to-wit, on the . . . day of . . . last; and also all deeds, writings, leases, muniments of title, books of account, papers, vouchers, and other evidence whatsoever relating or appertaining thereto;

To have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the order, direction, and control of the said . . . court. And for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the stock, estate, book-debts, property, choses in action, and effects hereby conveyed, assigned and transferred, they, the said A. B. and C. D., have made and appointed, and by these presents do make and appoint, the said R. C., party of the second part, his successors and assigns, the attorney and attorneys of them, the said parties of the first part, in their names, or in his own name, to commence, continue, discontinue, and again bring, perfect, and carry out actions and suits against any persons or corporations, for or on account of all or any part of the said estate, stock, property, book-debts, choses in action, or effects.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

A. B. [Seal.]
C. D. [Seal.]

Signed and delivered in the presence of:
[Acknowledgment.]

CHAPTER CIV.

FOR DISSOLUTION OF PARTNERSHIP.

§ 3738. Accounting.—When a partner is entitled to a dissolution, the taking of an account is necessary, and follows as a matter of course.[1] Claim for partnership accounting and a claim against a third party fraudulently holding part of partnership's property may be united.[2] Generally, the account must be taken from the beginning to the end of the partnership. But if there has been a partial settlement between the partners themselves, that fact may be proven in the action, and if proven, the settlement will be considered valid as between the partners themselves, unless it is assailed on the ground of mistake, error, or fraud. If there be no valid objection to the settlement, it is conclusive upon the partners, as far as it goes, and leaves open only the unsettled portions of the account.[3] An individual obligation is not a proper matter of set-off to a partnership claim; nor can a partnership debt be a set-off to a claim by one of the members of the firm.[4] Interest should be allowed upon a partner's overdraft from the time he drew it down to the time of settlement, but not thereafter, if there is money due him.[5] In an action for an accounting between a partner and the assignee of his copartner's interest in the firm assets, the partner whose individual interest has been sold is an indispensable party, although he is out of the state, and his whereabouts unknown.[6]

§ 3739. Adverse proceedings by creditors.—Where one partner has filed his bill for a dissolution of partnership and the appointment of a receiver, until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and thereby gaining a preference.[7] Accepting notes given by a partner in the firm name,

1 Cottle v. Leitch, 35 Cal. 434.
2 Wade v. Rusher, 4 Bosw. 537.
3 Stretch v. Talmadge, 65 Cal. 510, 4 Pac. 513.
4 Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263.
5 Forsyth v. Butler, 152 Cal. 396, 93 Pac. 90.
6 Wright v. Ward, 65 Cal. 525, 4 Pac. 534.
7 Adams v. Hackett, 7 Cal. 187; Adams v. Woods, 8 Cal. 152, 68 Am.

merely to close up the account, and not as payment, does not discharge the other partner, although the notes be given after dissolution.[8]

§ 3740. Allegation of partnership and indebtedness.—Partnership must be proven like any other fact, and cannot be established by mere surmise or innuendo.[9] In a proceeding for the settlement of partnership accounts, a petition which does not show the existence of the partnership, and did not contain any statement of the account by the plaintiff, nor ask for a statement by the defendant, was held defective.[10] An indebtedness, however, must be averred, and, if denied, proved.[11] But the complaint need not set out the defendant's acts and conduct in detail.[12] It need not show that the defendant ever had any portion of the firm's property in his possession, if it avers that the plaintiff has paid out money for the firm, and that the defendant has refused to settle with him therefor.[13] But a mere desire of one of the partners is not sufficient to authorize the court to decree a dissolution of the same, but cause must be shown.[14]

§ 3741. Books of partnership.—The books of a liquidating partnership are in the quasi-possession of the law, and must be placed in the hands of the receiver if one is appointed.[15] By agreement, in California, one or more partners may be given full powers of liquidation.[15a]

§ 3742. Corporations.—In New York, a complaint which asks for a receiver of the property of a corporation which is sued, without asking for its dissolution, and for an injunction against its trustees without making them parties, or even stating who they are, is defective and demurrable.[16] In California, the involuntary dissolution of corporations is provided for by the Code of Civil Procedure,[17] and the voluntary dissolution by the same

Dec. 313, 9 Cal. 24; Naglee v. Lyman, 14 Cal. 450.

8 Moon Bros. v. Devenish, 42 Wash. 415, 85 Pac. 17.

9 Hudson v. Simon, 6 Cal. 453.

10 Pope v. Salsman, 35 Mo. 362.

11 Hunt v. Gorden, 52 Miss. 194.

12 Holladay v. Elliott, 3 Or. 340; Carlin v. Donegan, 15 Kan. 495.

13 Carlin v. Donegan, 15 Kan. 495; Sears v. Starbird, 78 Cal. 225, 20 Pac 547.

14 Bradley v. Harkness, 26 Cal. 69. But see Cal. Civ. Code, § 2450.

15 Succession of Andrew, 16 La. Ann. 197.

15a Hawn v. Seventy-six Land and Water Co., 74 Cal. 418.

16 Reid v. The Evergreens, 21 How. Pr. 319.

17 §§ 802-810.

code.[18] A college corporation may, at common law, dissolve itself by a surrender of its franchise and the transfer of its corporate property by proper proceedings.[19] In an action brought by a private citizen for the dissolution of a corporation, the relator, in order to maintain the action, must have some interest beyond that common to every citizen.[20]

§ 3743. **Correcting errors.**—A court of equity may correct errors in the settlement of partnership affairs, where they arise from misrepresentations innocently made by one or more of the firm.[21]

§ 3744. **Decree.**—If in an action to wind up a partnership between plaintiff and defendant in corporation stock, standing in the name of defendant, it appears that the plaintiff has agreed that the defendant may retain certain shares until the demand against the estate is settled, the court should not direct a conveyance of those shares without proof that the demand has been settled.[22] The decree should not order the private sale of firm property.[23] Where the complaint alleges that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due for such dividends before final distribution of the assets.[24] The judgment should not be in the alternative, requiring the defendant to either transfer to the plaintiff his part thereof, to pay him a certain sum of money, but should direct a division in kind, or a sale and division of the proceeds.[25] Where a bill is filed to settle the affairs of a partnership, the partnership transactions of each and all the partners should be taken into account, and the decree should include all these so as to leave nothing open for future litigation.[26] No personal decree should be rendered against individual partners until the assets have been converted into money.[27] A com-

18 §§ 1227-1234. See Civ. Code, 400, 401.

19 People v. President etc. College of California, 38 Cal. 166. As to rules of pleading in actions brought to procure the dissolution of corporations, see The People v. The Ravenswood etc. Turnpike etc. Co., 20 Barb. 518.

20 People v. Grand River Bridge Co., 13 Colo. 11, 16 Am. St. Rep. 182, 21 Pac. 898; State v. Stein, 13 Neb. 530, 14 N. W. 481.

21 Stephens v. Orman, 10 Fla. 9.

22 Harper v. Lamping, 33 Cal. 641.

23 Jones v. Thompson, 12 Cal. 191.

24 O'Connor v. Stark, 2 Cal. 153.

25 Harper v. Lamping, 33 Cal. 641.

26 Griggs v. Clark, 23 Cal. 427; Raymond v. Came, 45 N. H. 201.

27 Stower v. Kamphefner, 6 Cal. App. 80, 91 Pac. 424.

plete winding-up of the firm's affairs must have been found.[28] In an action to reopen a settlement and sale made between partners, and for an accounting of the partnership affairs, on the ground of fraud practiced by the defendant, the court cannot, without setting aside such sale and making an accounting, render judgment for the plaintiff for a specific amount on the ground that the defendant was guilty of a breach of warranty or of deceit.[29] A prayer for general relief, in a bill by one party against another, is sufficient to authorize a sale of the partnership property.[30]

§ 3745. Dissolution of partnership.—A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance, subject, however, to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution.[31] In California, a general partnership is dissolved as to all partners—1. By lapse of the time prescribed by agreement for its duration; 2. By the expressed will of any partner, if there is no such agreement; 3. By the death of a partner; 4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property; 5. By war, or the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or, 6. By a judgment of dissolution.[32] Where there are several members of a partnership, and one of them, even by consent, retires from the firm, this dissolution necessarily severs the copartnership relations of each of its members.[33] The two or more members who remain in the firm cannot maintain a joint action at law against the member who retired.[34] The bankruptcy of one partner *ipso facto* dissolves the partnership, and the assignee is tenant in common with the solvent partner in the

28 Albery v. Geis, 1 Cal. App. 381, 82 Pac. 262.

29 Black v. Merrill, 65 Cal. 90, 3 Pac. 113.

30 Lyman v. Lyman, 2 Paine, 11, Fed. Cas. No. 8628.

31 Cal. Civ. Code, § 2451.

32 Civ. Code, § 2450. As to insanity of partner effecting a dissolution of the partnership, see Raymond v. Vaughn, 128 Ill. 256, 15 Am. St. Rep. 112, 21 N. E. 566, 4 L. R. A. 440.

33 Ross v. Cornell, 45 Cal. 133.

34 Id.; Miller v. Drigham, 50 Cal. 615. For a case depending on special facts, see Eagle v. Bucher, 6 Ohio St. 295, 67 Am. Dec. 342.

joint stock.[35] But the voluntary absence of one partner from the state does not operate as a dissolution of the partnership.[36]

§ 3746. **Dissolution, when partner entitled to.** — A general partner is entitled to a judgment of dissolution—1. When he, or another partner, becomes legally incapable of contracting; 2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or, 3. When the business of the partnership can be carried on only at a permanent loss.[37] A renunciation of the partnership by one partner will entitle his copartners to dissolve the partnership.[38] Violent and lasting dissension between the members of a firm is ground upon which a court of equity will decree a dissolution. So, too, when the whole scheme is found to be visionary, or founded upon erroneous principles.[39]

§ 3747. **Distribution of assets.**—The filing of a bill by one partner against his copartners for dissolution and account, and praying for an injunction and receiver, does not prevent a creditor from proceeding by attachment and gaining a priority over other creditors, until a final decree of dissolution and order of distribution.[40]

§ 3748. **Exclusion of a member.**—Where a voluntary association for mutual relief excluded plaintiffs from the association, because of their refusal to take an oath not required by the constitution or by-laws, and foreign to the objects thereof, a suit for dissolution might be maintained.[41] But where the association, on being advised of its duties, rescinded the resolution, the court will be authorized to refuse the decree.[42]

§ 3749. **Joint account transactions—Allegations.**—Where the complaint alleged that the plaintiff composed one firm and the defendant another, and entered into "an arrangement to transact business in sugars on joint account," and alleged that plaintiffs had shipped to defendants sugar to an amount greater than they

35 Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17664, 15 Bank. Reg. 60.

36 Bernheim v. Porter (Cal.), 4 Pac. 446, 3 West Coast Rep. 434.

37 Cal. Civ. Code, § 2452.

38 Cal. Civ. Code, §§ 2417, 2418.

39 Lafond v. Deems, 52 How. Pr. 41.

40 Adams v. Woods, 9 Cal. 24.

41 Gorman v. Russell, 14 Cal. 531.

42 Id.; 18 Cal. 688.

had drawn bills against, that defendants had failed and assigned to defendant B., that the assignment was fraudulent and void, and prayed judgment for excess specified, for half of the profits and appointment of a receiver, and other proper relief, it was held, that, though inartificial, it was sufficient. The proper form in such case should allege that this was a partnership transaction; that credit of both parties was involved; that the joint names and credit of two firms, the one as drawers and the other as acceptors, were the means by which they procured the moneys that bought the sugars; that the same were bought on joint account by them as partners in the transaction; that a large amount of sugar and proceeds thereof were on hand; that the joint indebtedness for these sugars was outstanding, and should be paid out of the joint property arising out of the transaction; and that an accounting should be had between the parties, and that an injunction be granted and a receiver appointed.[43]

§ 3750. **Joint-stock association.**—A portion of the company cannot, contrary to the articles of association, dissolve the company at their will and pleasure; but if it is found impracticable to keep the company together, or to prosecute successfully the contemplated enterprise, the court may decree a dissolution and the distribution of its effects.[44] A joint-stock association, formed for a definite period, cannot be voluntarily dissolved, except by the unanimous consent of all the stockholders.[45] Where there is nothing in the constitution of a joint-stock company to regulate the remedies of shareholders, the general law of partnership must govern them.[46] A voluntary association is not dissolved by the withdrawal of two of its members, upon their objecting to a purchase of land, and refusing to pay assessments, or to co-operate in its business and to participate in its proceedings.[47]

§ 3751. **Jurisdiction—Agreement for arbitration.**—A stipulation in articles of partnership that all matters of controversy shall be submitted to arbitration does not take away the jurisdiction of equity to decree a dissolution.[48]

43 Davis v. Grove, 27 How. Pr. 70.
44 Von Schmidt v. Huntington, 1 Cal. 55.
45 Id.
46 Bullard v. Kinney, 10 Cal. 60.
47 Troy Factory v. Corning, 45 Barb. 231.
48 Meaher v. Cox, 37 Ala. 201.

§ 3752. **Receiver.**—A partner filing a bill for dissolution, and to enjoin the copartnership from continuing the business in the name and on the credit of the partnership, is, nevertheless, not entitled to have a receiver appointed, unless the copartner has been guilty of a breach of duty, or of the partnership contract.[49] The appointment of a receiver is only a means to attain the end contemplated by the plaintiff.[50] Wrongful exclusion of plaintiff, a partner, from his interest in land purchased for subdivision and sale is ground for the appointment of a receiver.[51] It should appear that the property is in danger of being lost, removed, or materially injured,[51a] and in such case the receiver may be appointed prior to the dissolution, as in case of sale of perishable goods.[51b]

§ 3753. **Surrender of franchise.**—The trustees of a corporation have the power to surrender the franchise, after its debts are paid, and if they should do so without having made any disposition of its property, there being no stockholders or creditors, the personal property of the corporation would vest in the state.[52] And so would such real estate as was acquired by the corporation for value, the vendor having no interest in the appropriation of the property to any specific object, and no reversion where the succession fails.[53]

§ 3754. **Tenants in common of mill.**—Where the relation of tenants in common in a mill was established between two persons, and it appeared that one had the entire management of the concern, occasionally paying some of the proceeds to his cotenant, but that no settlement had taken place, it was held, that though there was no partnership shown, it was a proper case for an accounting between the parties.[54]

§ 3755. **Water-ditch.**—A complaint in an action for an accounting, touching the affairs, rents, and proceeds of a water-ditch, and for a sale of the property and a division of the proceeds, which

49 Wilson v. Fitcher, 3 Stock. 71.

50 Adams v. Woods, 8 Cal. 306.

51 Whipple v. Lee, 46 Wash. 266, 89 Pac. 712.

51a Cal. Code Civ. Proc., § 564.

51b Wulff v. Superior Court, 110 Cal. 215, 42 Pac. 638.

52 2 Kent Com. 386; Angell & Ames on Corporations, § 195.

53 People v. President etc. College of California, 38 Cal. 166; Bacon v. Robertson, 18 How. 480, 15 L. Ed. 499.

54 Mitchell v. O'Neale, 4 Nev. 504.

first avers in general terms a copartnership between plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient to constitute a cause of action, either for a dissolution and settlement of the affairs of a partnership, or for a partition.[55] The complaint in a case alleging that plaintiff and defendants are members of a joint-stock company, known as the "Miners' Ditch Company"; that defendants exclude plaintiff from participation in the business or benefit from it; that they have received large sums of money from the same, and refuse to account or pay him anything, etc., entitles plaintiff to a relief by a decree affirming his interest and directing an account.[56]

§ 3756. **Winding up affairs.**—A partner is always entitled to have the partnership wound up by a sale of all the property, as the best mode of ascertaining its value.[57] Where a partnership is liable to be dissolved at the will of either party, the consequence of such dissolution is to throw the winding up of their partnership affairs into a court of equity, unless they agree on the mode of settlement.[58] A court of equity will dissolve a partnership when the respondent in a suit for dissolution does not intend to carry out one of the terms of the partnership agreement.[59] One party cannot, by withdrawing himself from the association before the period stipulated between the parties for its continuance, either dissolve the partnership or extricate himself from the responsibilities of a partner, either in respect to his associates or to third persons, but the partnership may be ended by notice, by the act of God, or by operation of law.[60] In the voluntary winding-up of a joint-stock company, claim made to the liquidator on bank-notes and drafts current at the time of the stoppage is a sufficient demand for payment, and interest runs from the date of such claim.[61]

§ 3757. **Dissolution by assignment.** — The assignment of all joint interest in a patent, by one joint owner, is a dissolution of

55 Bradley v. Harkness, 26 Cal. 69.

56 Smith v. Fagan, 17 Cal. 178.

57 Lyman v. Lyman, 2 Paine, 11, Fed. Cas. No. 8628.

58 Stevens v. Yeatman, 19 Md. 480; Cal. Civ. Code, § 2460.

59 Meaher v. Cox, 37 Ala. 201.

60 Pearpoint v. Graham, 4 Wash. C. C. 232, Fed. Cas. No. 10877. See Cal. Civ. Code, §§ 2417, 2418, and 2453.

61 In re East of England Banking Co., L. R., 4 Ch. 14.

the partnership for working it.[62] A partnership is dissolved by the *cessio bonorum* made by one of the members, and the solvent partner being bound *in solido,* has a right, but not an exclusive one, to liquidate its affairs.[63]

§ 3758. **Mining partnership.**—One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership.[64]

§ 3759. **Sale to stranger.**—Evidence that a partner sold to a stranger his interest in a stock of goods belonging to the firm, but not in the notes, accounts, and other assets of the firm, and that the purchaser formed a partnership with the seller's partners, is not sufficient proof of the dissolution of the original partnership.[65] Where one partner retires from business, assigning to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property.[66] Where one partner sells out his interest in the partnership, it works dissolution to the same.[67] The introduction of new members into a firm works dissolution of the pre-existing copartnership, except for the purpose of collecting the assets and paying the debts of the concern.[68] A sale by one partner of all the property used by the firm in carrying on its business operates as a dissolution.[69] But a mining partnership is not necessarily dissolved by the retirement of one of the partners and a sale of his interest to a third person, even without the consent of the remaining partner; nor is such partnership dissolved by the bankruptcy or death of one of the partners.[70]

§ 3760. **Actual notice.**—Where the partnership agreement provides for a dissolution upon notice, any notice is sufficient which clearly fulfills the intention of the agreement.[70a]

62 Parkhurst v. Kinsman, 1 Blatchf. 488, Fed. Cas. No. 10757.

63 Saloy v. Albrecht, 17 La. Ann. 75; Cal. Civ. Code, §§ 2458-2462.

64 Duryea v. Burt, 28 Cal. 569; Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96; Cal. Civ. Code, § 2516.

65 Cody v. Cody, 31 Ga. 619.

66 Dimon v. Hazard, 32 N. Y. 65.

67 Bradley v. Harkness, 26 Cal. 69; Cal. Civ. Code, § 2450.

68 Mudd v. Bast, 34 Mo. 465; Cal. Civ. Code, § 2462.

69 Patterson v. Hare, 38 N. Y. Supp. 565.

70 Thomas v. Hurst, 73 Fed. 372; Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Cal. Civ. Code, § 2516.

70a Johnson v. Totten, 3 Cal. 343.

§ 3761. **Mutual consent.**—When a partnership is dissolved by mutual consent, a court will assume control of its business, and appoint a receiver only when it appears necessary to protect the interest of the parties, and not as a matter of course.[71] In New York, the dissolution of a limited partnership by filing a notice with the county clerk, and by publication for four weeks,[72] does not become operative until the complete performance of both these acts.[73] Such notice is necessary to exonerate the members of a firm from liability on a promissory note made in its name after dissolution.[74] When notice of the change of a firm's name is relied on to exonerate a retiring partner, such change must show that he has retired from the business.[75]

§ 3762. **Offer to dissolve.**—An allegation by one partner, contained in a pleading, of his desire to dissolve is not equivalent to an acceptance of an offer to dissolve made by the other party a month previous.[76]

§ 3763. **When dissolution may be obtained.**—A partnership that has no limit in respect to time may be dissolved by either party at will.[77] Yet where parties have agreed to enter into such a partnership, the refusal of one of them to enter is a good cause of action to the other.[78] A provision in the articles of a copartnership describing a definite period for its continuance, is sufficient, without any prohibition of an earlier dissolution, to prevent either party from dissolving it at will.[79]

§ 3764. **Bankruptcy.**—A decree of bankruptcy against a member of a firm operates as a dissolution of the partnership, and the assignee becomes tenant in common with the solvent partner.[80] The joint property remains in the hands of the solvent

71 Cox v. Peters, 13 N. J. Eq. 39; Cal. Code Civ. Proc., § 564.

72 1 Rev. Stats., 767, § 24; Cal. Civ. Code, § 2509.

73 Fanshawe v. Lane, 16 Abb. Pr. 71.

74 City Bank of Brooklyn v. McChesney, 20 N. Y. 240; City Bank of Brooklyn v. Dearborn, 20 N. Y. 244.

75 American Linen Thread Co. v. Wortendyke, 24 N. Y. 550; Cal. Civ. Code, § 2454.

76 Bank of New York v. Vanderhorst, 32 N. Y. 553.

77 Chitty on Contracts, 208. See Fletcher v. Reed, 131 Mass. 312.

78 Skinner v. Tinker, 34 Barb. 333.

79 Smith v. Mulock, 1 Abb. Pr. (N. S.) 374. See Cal. Civ. Code, § 2417.

80 Wilkins v. Davis, 2 Low. 511, Fed. Cas. No. 17664, 15 Bank. Reg 60. See Eustis v. Bolles, 146 Mass. 413, 4 Am. St. Rep. 327, 16 N. E. 286.

partner clothed with a trust. He can enter into no new partnership engagement, but his whole authority is limited to settling and closing the partnership concerns.[81] And ordinarily the assignee has no right to interfere with the administration of the effects of the firm.[82]

§ 3765. **False entry in books.**—Where one partner has the management of the partnership affairs, and makes false entries in the books, and defrauds his copartner of a portion of the partnership receipts, and retains the same to his own use, the partner defrauded is entitled to a dissolution and an accounting. The taking of an account follows dissolution as a matter of course. If in such case there has been an accounting between the partners, and the partner defrauded does not discover the fraud until after the accounting, he may sue for an accounting and dissolution, and on the trial may surcharge and falsify the account, without demanding a reaccounting prior to the commencement of the action.[83]

§ 3765a. **Dissolution by death.**—The partnership is dissolved by death.[84] The death of a partner is not a revocation of the agency.[85] The survivor may close up the partnership business, but he is prohibited from administering upon the estate of his deceased copartner.[86] The survivor may continue the business, with the consent of the executor of the deceased partner and the approval of the court, and in such case may receive compensation from the estate.[87]

§ 3766. **Rights of survivor.**—When a partnership is dissolved by the death of one of its members, the surviving partner is to wind up the affairs of the partnership, pay its debts out of its assets, and divide the residue among those entitled to it.[88] He

81 3 Kent Com. 59; Story on Partnership, §§ 1, 328, 341, 407. See Miller v. Brigham, 50 Cal. 615; Marx v. Goodnough, 23 Or. 545, 32 Pac. 511.

82 Matter of Norcross, 1 N. Y. Leg. Obs. 100, Fed. Cas. No. 10293.

83 Cottle v. Leitch, 35 Cal. 434.

84 Scholefield v. Eichelberger, 7 Pet. 586, 8 L. Ed. 793; Burwell v. Cawood, 2 How. 560, 11 L. Ed. 378; Schmidt v. Archer, 113 Ind. 365, 14 N. E. 543; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275.

85 Bank of New York v. Vanderhorst, 32 N. Y. 553.

86 Cal. Code Civ. Proc., § 1365.

87 McElroy v. Whitney, 12 Idaho, 512, 88 Pac. 349; Griggs v. Clark, 23 Cal. 427.

88 Gleason v. White, 34 Cal. 258;

has the exclusive right of possession and absolute power of disposing of the assets.[89] He may transfer the title to a chose in action of the firm; and after such transfer the remedy must be prosecuted in the name of the real party in interest.[90] In Louisiana, on the death of a partner, his interest in the assets of the concern become vested in the heirs at law, and the surviving partners can only acquire that interest by transfer and assignment from the heirs, and thereby acquire the right to sue for a debt in their own name.[91] The right of a surviving partner to administer the partnership effects is an absolute right in California.[92]

§ 3767. Accounting between partners—Pleading.—It is the duty of a partner to account to his copartner for all funds arising from the sale of partnership property which come into his hands.[93] In an action for an accounting between partners the complaint need not specify the particular transactions as to which the accounting will be required.[94] Allegations of a partnership between the complainant and defendant, which has been dissolved, but whose accounts have never been settled, and of the possession of the books and papers thereof by the defendant, and his refusal to allow the complainant to inspect the same, are sufficient to sustain a bill in equity for an accounting, though the complainant has waived his right to a discovery.[95] When in a suit for an accounting of partnership affairs an employee is improperly sued as a partner, with the plaintiff and another defendant, and a nonsuit granted as to the employee, it is proper to proceed with the accounting between the plaintiff and the remaining defendant, between whom a partnership is shown to exist, and a nonsuit may be refused to such defendant. The issue tendered as to partnership between the three persons includes an issue as to partnership

Loeschigk v. Addison, 19 Abb. Pr. 169. See Goldsmith v. Eichold, 94 Ala. 116, 33 Am. St. Rep. 97, 10 South. 80; King v. Leighton, 100 N. Y. 386, 3 N. E. 594.

89 Cal. Code Civ. Proc., § 1585; Allen v. Hill, 16 Cal. 113.

90 Roys v. Vilas, 18 Wis. 169; Durant v. Pierson, 124 N. Y. 444, 21 Am. St. Rep. 686, 26 N. E. 1095, 12 L. R. A. 146; Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112.

91 Skipwirth v. Lea, 16 La. Ann. 247.

92 Cal. Code Civ. Proc., § 1585. Contra, see McKowen v. McGuire, 15 La. Ann. 637.

93 Langell v. Langell, 17 Or. 220, 20 Pac. 286.

94 Teschemacher v. Lenz, 82 Hun, 594, 31 N. Y. Supp. 543.

95 Congdon v. Aylsworth, 16 R. I. 281, 18 Atl. Rep. 247; Cal. Civ. Code, § 2438.

between the remaining two which may be tried without amendment.[96]

§ 3768. **Dissolution of Partnership—Pleading—Multifariousness.**—A bill in equity, for dissolution and winding up of the affairs of a partnership, which alleges that the defendant partner willfully neglects to comply with the partnership agreement, that the business is being conducted at a loss, and that the complainants were induced to enter into the agreement through the defendant's misrepresentations, is not multifarious.[97] Where the complaint alleges an equitable cause of action for the dissolution of a partnership and the appointment of a receiver, and the evidence presents only a cause of action for damages for a breach of a contract for services, the court cannot give judgment for damages, or allow the complaint to be amended, but must dismiss the action.[98]

§ 3769. **Defense—Construction of articles.**—In an action between partners for an accounting, the complaint alleged, and the articles of agreement which were set forth in the complaint stated, that the plaintiff contributed two thousand two hundred and fifty dollars to the capital of the firm, which sum, the complaint alleged, the defendant had converted to his own use. The answer denied that the two thousand two hundred and fifty dollars was contributed as capital, and averred that it was to be paid by the plaintiff for an equal interest in the business, that the money was paid on that basis, and that both parties have acted upon the understanding that such was the meaning of the articles. It was held sufficient to present the issue, whether the articles were by mistake so drawn as not to express the actual agreement of both parties.[99]

§ 3770. **Defense—Judgment, when a bar.**—Judgment for winding up the affairs of a corporation is no bar to a suit to enforce the individual responsibility of a shareholder.[100] Suit for an injunction to restrain a debtor from making an assignment in viola-

96 Chalmers v. Chalmers, 81 Cal. 81, 22 Pac. 395.

97 Rosenstein v. Barns, 41 Fed. 841. See Ketchum v. Lewis, 19 N. Y. Supp. 452.

98 Dalton v. Vanderveer, 31 Abb. N. C. 430.

99 Isles v. Tucker, 5 Duer, 393.

100 Diven v. Duncan, 41 Barb. 520; Moran v. McInerney, 129 Cal. 29, 61 Pac. 575.

tion of an agreement does not preclude an action upon the debt itself.[101]

§ 3771. **Costs.**—The allowance of fees of the receiver as costs in dissolution proceedings is in the discretion of the court, and a judgment in favor of plaintiff for costs imposes all such fees and expenses on defendant.[102]

FORMS IN DISSOLUTION OF PARTNERSHIP.

§ 3772. Complaint for dissolution—Common form.

Form No. 1018.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., he entered into partnership with defendant under an agreement [of which a copy is hereto annexed, marked "Exhibit A"].

II. That on the . . . day of . . ., 19. . , the defendant took exclusive possession of the partnership books and stock, and ever since has prevented the plaintiff from having access to the same, or from participating in any manner in the partnership business [or state any facts constituting a breach of the agreement].

Wherefore the plaintiff demands judgment:

1. That the said partnership be dissolved.

2. That a receiver of the property thereof be appointed with the usual powers.

3. That the defendant be restrained by injunction from interfering with the said property.

4. That the same be applied, first, to the payment of the partnership debts; and the remainder be divided between the parties, according to their respective rights.

§ 3773. Complaint on ground of assignment by partner.

Form No. 1019.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege partnership as in form No. 1018.]

II. That on the . . . day of . . ., 19. . , at . . ., the defendant A. B., without the knowledge or assent of the plaintiff, assigned

101 Paige v. Wilson, 8 Bosw. 294.

102 Costello v. Scott (Nev), 94 Pac. 222.

and transferred to the defendant C. D., all his interest in said partnership, and all his right, title, and interest to any and all property of said firm.

[DEMAND OF JUDGMENT.]

§ 3774. Complaint upon notice of expiration of term of co-partnership.

Form No. 1020.

[TITLE.]

I. [Allege partnership as in form No. 1018.]

II. That on the . . . day of . . ., 19. . , the defendant [or, the plaintiff], pursuant to the provision of said agreement, gave to the [defendant, or plaintiff] a written notice of his intention to dissolve said agreement, a copy of which notice, and also of said agreement, is hereto annexed.

[DEMAND OF JUDGMENT.]

§ 3775. Complaint on ground of bankruptcy of partner.

Form No. 1021.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege partnership as in form No. 1018.]

II. That on the . . . day of . . ., 19. . , at . . ., the defendant A. B. was declared a bankrupt by the United States district court for the district of California, in a certain proceeding therein, wherein C. D. was petitioner and the said A. B. was defendant, and afterwards the defendant E. F. was regularly chosen as assignee of said A. B. and gave bond and qualified as such, and by virtue of the assignment so made to said E. F. by said A. B., and of the proceeding in said cause, said E. F. is tenant in common with the plaintiff in the property and assets of said firm.

[Demand of judgment of dissolution, and an accounting, etc.]

§ 3776. Complaint on grounds of misappropriation of funds.

Form No. 1022.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege partnership as in form No. 1018.]

II. That since the commencement of said partnership, the defendant has, from time to time, applied to his own use, from receipts and profits of said business, large sums of money, greatly

exceeding the proportion thereof to which he was entitled, to-wit, the sum of . . . dollars.

III. That the defendant still continues to collect the copartnership debts and appropriate the money to his own use, greatly exceeding the proportion thereof to which he is entitled, to the detriment of the business of said firm, and the injury of the plaintiff.

Wherefore the plaintiff demands judgment:

1. That the said copartnership may be dissolved.

2. That a receiver of the property thereof be appointed, with the usual powers.

3. That an account be taken of all the said copartnership dealings and transactions, from the commencement thereof, and of the money received and paid by the plaintiff and defendant respectively in relation thereto.

4. That the defendant be restrained by injunction from interfering with the debts or moneys or property or effects of said partnership.

5. That the property of the firm, real and personal, be sold and the copartnership debts and liabilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interest.

6. And for such other and further relief as may be just, with the costs of this action.

§ 3777. Complaint in suit for dissolution and accounting.

Form No. 1023.

[Title.]

The plaintiff complains of the defendant, and alleges:

I. That on or about the . . . day of . . ., 19.., the plaintiff and defendant, at . . ., entered into and formed a copartnership for the purpose of [state nature of business], under the firm name and style of . . ., and that they thereafter entered upon and continued to transact such copartnership business under their firm name.

II. That since the commencement of said copartnership, the defendant has wrongfully, and without the assent of the plaintiff, applied some of the money or receipts and profits of their said business to his own use, and by reason thereof has become indebted to said copartnership, and impeded and injured the business thereof.

III. That the plaintiff has repeatedly requested the defendant to pay said copartnership the money so received by him and misappropriated as aforesaid, or to account to said firm therefor, but that the defendant has heretofore neglected and refused, and still does neglect and refuse, so to account, and has threatened to continue to collect the copartnership debts and appropriate the same to his own use.

Wherefore the plaintiff prays:

I. That said copartnership may be dissolved, and an accounting taken of all the dealings and transactions thereof.

II. That the property of the firm be sold, and the firm's debts and liabilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests, and for such other relief as may be just, together with the costs of this suit.

§ 3778. Complaint in suit for accounting after dissolution.

Form No. 1024.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege formation and purposes of partnership as in form No. 1023.]

II. That on or about the . . . day of . . ., 19. . , by the mutual consent of said partners, the said firm was dissolved.

III. That at such time the defendant promised and agreed with the plaintiff to account for and pay over to the plaintiff his proportionate share of all moneys which had been previously collected by the defendant, on account of said firm, and also to collect the debts due said firm, and to render from time to time to the plaintiff, on demand, full statements of the debts due to said firm, and the payments made on account thereof, and to pay over to the plaintiff his full share of the assets of said firm.

IV. That prior to and since the dissolution of said firm the defendant has collected large sums of money, amounting to the sum of . . . dollars, more or less, on account of the debts due to said firm, and has applied the same, and the whole thereof, to his own use, and has neglected and refused, and still does neglect and refuse, to account with and pay to the plaintiff his proportionate share of the assets of said firm, so collected as aforesaid, or any part thereof, although often requested by the plaintiff so to do.

[Demand for relief as in preceding form, omitting prayer for dissolution.]

§ 3779. Complaint in suit by administrator for dissolution of copartnership, on ground of death of partner.

Form No. 1025.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , one A. B. entered into partnership with the defendant, under an agreement of which the following is a copy: [Copy agreement.]

II. That the said copartnership business was entered upon pursuant to said agreement, and continued to be carried on under and pursuant to the same up to the time of the death of the said A. B.

III. That on the . . . day of . . . , 19.. , at . . . , the said A. B. died.

IV. That at the time of the death of the said A. B. there was on hand partnership assets to the amount or value of about . . . dollars, as follows: [Specify personal property and its value; real property, describing it and its value; and other property, as book-accounts, etc., and their value.]

V. Allege appointment of plaintiff as executor or as administrator, as in forms Nos. 897, 898.

VI. That ever since the death of the said A. B. the said defendant has continued in the possession of the said real and personal property, and to manage and carry on said business, and to dispose of said property, and to collect the debts and things in action, and to pay debts and liabilities of said firm out of the avails thereof; and that he has so collected large sums, the amount of which the plaintiff does not know and cannot ascertain.

VII. That the defendant has not paid over to the plaintiff, as administrator of the estate of said A. B., any money or other proceeds of said copartnership since the death of said A. B., nor has he assigned, transferred, or delivered over to said plaintiff, as administrator, any of the assets, securities, or property of said copartnership.

VIII. That the defendant is insolvent, and is unable to give any security for payment to the plaintiff, as representative of said A. B., for the value of the interest of said A. B. in said copartnership.

IX. That the plaintiff has requested of said defendant a statement and account of said copartnership transactions, which the defendant refused to give.

Wherefore, the plaintiff demands:

1. That an account may be taken of all the said copartnership dealings and transactions, from the time of the commencement thereof to the time of the dissolution by the death of said A. B., and of the moneys received and paid by the said partners respectively in regard thereto, and that the defendant account for all dealings with and transactions in regard to the property, assets, and effects of said firm since its dissolution by the death of said A. B., and the property sold or disposed of by him, either as surviving partner or otherwise, and of the moneys collected and received and paid out by him on account thereof.

2. That the defendant may be adjudged to pay the plaintiff, as administrator as aforesaid, the residue which shall appear to be due to the estate of said A. B., after payment of all the debts of the firm.

3. That a receiver be appointed, with the usual powers and duties, and under the usual directions; and that the defendant may be restrained by order of this court from disposing of or in any manner interfering with the property and effects of said firm, or from collecting or receiving the copartnership debts or other moneys coming to said firm.

4. For such other or further relief as may be just, with costs of this action.

§ 3780. Order of reference for accounting in partnership cause.

Form No. 1026.

[TITLE.]

This cause coming on to be tried, and it appearing that the taking of an account is necessary for the information of the court before judgment; thereupon, on hearing counsel for the respective parties:

It is ordered, that it be referred to R. F., Esq., as sole referee, to take and state an account of all dealings and transactions between the plaintiff and defendant, as partners, under the style of A. B. & Co.; and for the better taking and stating of which account the parties are to produce before the said referee, under oath, all books, deeds, papers, and writings in their custody, or under their

control, relating thereto, and are to be examined upon interrogatories, or otherwise, as the said referee shall direct, who, in taking the said account, is to make all just allowances to the parties as between themselves; and what, on the balance of the said account, shall appear to be due from either party to the other is to be paid as the said referee shall direct; and the referee is at liberty to state and report any special circumstances, as well as his reasons for allowing or disallowing any allowances which may be claimed.

And it is further ordered, that the question of costs, as well as all other questions, are reserved until the coming in of the report and hearing for further directions.

§ 3781. Referee's report on accounting in partnership cause.

Form No. 1027.

[TITLE.]

To the . . . Court of . . .

Pursuant to an order of this court, in this action, dated the . . . day of . . ., 19.., I, the undersigned referee, report:

I. That having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matter so referred. I further report, that on such hearing, the books, deeds, papers, and vouchers of the said partnership having been produced before me, the defendant rendered his [or, both parties rendered their respective] accounts, which are hereto annexed, and marked "Schedule A."

II. That I examined said defendant, and also X. Y., concerning the transactions aforesaid, and adjusted a mutual account between the plaintiff and defendant, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, and marked "Schedule B."

III. That said defendant owes to said partnership, at this date, the sum of . . . dollars, with interest from the . . . day of . . ., 19.., at the rate of . . . per cent per annum, amounting to . . . dollars, which sum I have allowed.

IV. That the balance shown by said "Schedule B," after defendant has made good to said partnership said sum, belongs to plaintiff and defendant in equal shares [or, in the following proportions, stating them].

[DATE.] O. P., Referee.

§ 3782 Answer—That the term has not expired.

Form No. 1028.

[TITLE.]

The defendant answers to the complaint:

That the partnership between him and the plaintiff, set forth in the complaint, was not upon the terms and according to the stipulations, agreements, or covenants alleged by plaintiff in his said complaint; but, on the contrary, that said partnership was formed, and entered into, and carried on, under and in pursuance of a written agreement and articles of copartnership between him and said plaintiff, a copy of which is hereto annexed, and forms a part of this answer, showing that the time for the continuance of said copartnership is not yet expired, which agreement has never been altered or varied in writing or by parol; and that the copartnership formed and carried on in pursuance thereof is the same set forth and alleged in said complaint.

§ 3783. Overdrawing done by plaintiff's assent.

Form No. 1029.

[TITLE.]

The defendant answers to the complaint:

That he denies each and every allegation set forth in the [third separate cause of action in] said complaint, relative to the alleged misconduct of defendant, and his alleged acts and doings in the management of the said partnership business, except the allegation of his drawing out from the funds of said copartnership more than his portion of the profits thereof, to-wit, the sum of . . . dollars, and investing the same in [etc.]; and as to such allegation, defendant alleges and states that it was done with the full knowledge of said plaintiff, and with his approbation and express assent.

§ 3784. Final judgment of dissolution of partnership, and closing up proceedings.

Form No. 1030.

[TITLE.]

This action having come on for final hearing upon the report of L. M., the referee, to take an account, appointed herein, and it appearing from said account, which is hereby in all respects confirmed, that the respective interests of the plaintiff, A. B., and the defendant, C. D., in the assets of said firm are as follows : [State interests.]

And it further appearing from the report of the receiver heretofore appointed herein that after payment of all debts and demands against said firm and the expenses and compensation of said receiver there remains in his hands the sum of . . . dollars for division between said partners; now, being fully advised in the premises:

Upon motion of G. H., attorney for the plaintiff,

It is adjudged, that said receiver pay out of the moneys in his hands the sum of . . . dollars, the costs of this action, as taxed; that he retain the sum of . . . dollars for his compensation and expenses, which sum is hereby allowed; and that he pay to the plaintiff A. B. . . . dollars and to the defendant C. D. . . . dollars, being their respective shares in the partnership assets as shown by said accounting.

It is further adjudged that the following real estate owned by said partnership [describe same], be and the same is hereby assigned to said partners as tenants in common, viz., to A. B. an undivided one half and to the defendant C. D. an undivided one half.

[Insert such other provisions as are necessary.]

It is further ordered that said receiver file with the clerk of this court a supplemental report showing his doings under the terms of this judgment.

. . , Judge of the . . . Court.

CHAPTER CV.

FOR ASSAULT AND BATTERY.

§ 3785. Abatement of action.—Action for assault and battery can only be brought in the name of the party immediately injured, and if he dies the remedy determines.[1] This is the rule at common law, but it is changed by the statutes of many of the states. And for injuries committed on the wife by battery, husband and wife must join; and if she die before judgment, the suit abates.[2] But if the wife dies after judgment, the judgment survives to the husband.[3]

§ 3786. Assault defined—Instances.—An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.[4] An assault is an offer to strike, beat, or commit an act of violence on the person of another, without actually doing it or touching his person;[5] striking at a person with the hand or with a stick, or by shaking the fist at him, or presenting a gun or other weapon within such a distance as that a hurt might be given, or drawing a sword and brandishing it in a menacing manner, provided the act is done with intent to do some corporal hurt.[6] When it is apparent that the acts, if not stopped or diverted, will lead to the corporal hurt of another, the execution of the purpose has begun, and there is sufficient attempt to satisfy the statutory definition of an assault.[7] The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened.[8] Cocking and

1 1 Chit. Pl. 60.

2 1 Chit. Pl. 73; Paine v. San Bernardino V. Tr. Co., 143 Cal. 654, 77 Pac. 659; Gomez v. Scanlan, 2 Cal. App. 579, 84 Pac. 50.

3 Stroop v. Swarts, 12 Serg. & R. 76.

4 Cal. Pen. Code, § 240. See, also, State v. Sears, 86 Mo. 169; Stivers v. Baker, 87 Ky. 508, 9 S. W. 491; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42.

5 Johnson v. Tompkins, 1 Baldw. 571, 600, Fed. Cas. No. 7416.

6 United States v. Ortega, 4 Wash. C. C. 534, Fed. Cas. No. 15971; United States v. Hand, 2 Wash. C. C. 435, Fed. Cas. No. 15297; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

7 State v. McFadden, 42 Wash. 1, 84 Pac. 401.

8 People v. McMakin, 8 Cal. 547.

raising a gun, and threatening to shoot a person, when the act indicates an intention to shoot;[9] or raising a club over the head of a woman within striking distance, and threatening to strike her if she opens her mouth, are assaults.[10] So, also, to double the fist and run it at another, saying, "If you do that again I will knock you down."[11] So the mere taking hold of the coat, or laying the hand gently on the person of another, if done in anger, or in a rude and insolent manner, or with a view to hostility, amounts not only to an assault, but to a battery.[12]

§ 3787. **Assault and slander.**—A plaintiff may aver in his complaint all that took place at the time, though a part constitute an assault, and part a slander, and recover damages which he has sustained for the compound injury.[13]

§ 3788. **Avoiding injury.**—To recover damages for an assault and battery, it is not necessary that the plaintiff should have fled to avoid the injury, if he used ordinary care to prevent injury, and it ensued from the wrongful act of the defendant.[14]

§ 3789. **Battery defined.**—A battery is any willful and unlawful use of force or violence upon the person of another.[15] A battery is the touching or commission of any actual violence on the person of another in a rude and angry manner.[16]

§ 3790. **Damages.**—In cases of aggravated assault, the jury are permitted to give exemplary or punitive damages.[17] An employer, though not present, and in no manner consenting to or

9 United States v. Kierman, 3 Cranch C. C. 435, Fed. Cas. No. 15529.

10 United States v. Richardson, 5 Cranch C. C. 348, Fed. Cas. No. 16155.

11 United States v. Myers, 1 Cranch C. C. 310, Fed. Cas. No. 15845.

12 United States v. Ortega, 4 Wash. C. C. 534, Fed. Cas. No. 15971. For further illustrations, see Clark v. Downing, 55 Vt. 259, 45 Am. Rep. 612; Cooper v. McKenna, 124 Mass. 284, 26 Am. Rep. 667; Dyk v. De Young, 35 Ill. App. 138; Goodrum v. State, 60 Ga. 509. That riding a bicycle against one on a sidewalk in a rude and reckless manner is an actionable assault, see Mercer v. Corbin, 117 Ind. 450, 10 Am. St. Rep. 76, 20 N. E. 132, 3 L. R. A. 221.

13 Brewer v. Temple, 15 How. Pr. 286.

14 Heady v. Wood, 6 Ind. 82.

15 Cal. Pen. Code, § 242.

16 Johnson v. Tompkins, 1 Baldw. 571, 600, Fed. Cas. No. 7416.

17 Drohn v. Brewer, 77 Ill. 280; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Wilson v. Middleton, 2 Cal. 54; Wade v. Thayer, 40 Cal. 578. See, also, Wheaton v. North Beach etc. R. R. Co., 36 Cal. 590; Shea v. Potrero etc. R. R. Co., 44 Cal. 414;

aiding the assault, is liable for the actual damage sustained in an assault upon the person, committed by his servants or employees, while in the performance of their duties as such.[18]

§ 3791. Malice.—The language of the defendant while committing the assault is admissible in evidence, for the purpose of characterizing the act as bearing on the question of malice.[19]

§ 3792. Assault by master of vessel.—A master or commander of a vessel is, in general, not liable to an action for assault and battery for chastisement inflicted upon a seaman or marine, where he acted under a sincere conviction that it was necessary to enforce discipline or compel obedience to orders, and not from passion or revenge.[20] So where a master, believing there is immediate danger of mutiny, makes use of a dangerous or deadly weapon to reduce a seaman actually in mutiny to obedience, he is not liable.[21] Seamen are generally entitled to recover damages for an assault and battery from the officer of a ship—1. Where a personal violence is inflicted wantonly, and without provocation or cause; 2. Where there was provocation or cause, but the punishment was cruel or excessive; 3. Usually where the punishment is inflicted with a dangerous or deadly weapon.[22]

§ 3793. Principal.—One who is present and encourages an assault and battery is a principal.[23]

Webb v. Gilman, 80 Me. 177, 13 Atl. 688; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768, 9 N. W. 599.

18 Wade v. Thayer, 40 Cal. 578.

19 Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98; Brzezinski v. Tierney, 60 Conn. 55, 22 Atl. 486.

20 Dinsman v. Wilkes, 12 How. 390, 13 L. Ed. 1036. Compare United States v. Freeman, 4 Mason, 505, Fed. Cas. No. 15162; Thompson v. Busch, 4 Wash. C. C. 338, Fed. Cas. No. 13944.

21 Roberts v. Eldridge, 1 Sprague, 54, Fed. Cas. No. 11901; United States v. Colby, 1 Sprague, 119, Fed. Cas. No. 14830; United States v. Lunt, 1 Sprague, 311, Fed. Cas. No. 15643. As to what will justify corporal punishment of seamen, see Morris v. Cornell, 1 Sprague, 62, Fed. Cas. No. 9829; Payne v. Allen, 1 Sprague, 304, Fed. Cas. No. 10855; Sheridan v. Furbur, 1 Blatchf. & H. 423, Fed. Cas. No. 12761.

22 Forbes v. Parsons, Crabbe, 283, Fed. Cas. No. 4929. Compare Dinsman v. Wilkes, 12 How. 390, 13 L. Ed. 1036. For the law governing such liability, see U. S. Rev. Stats. at L., § 5347.

23 Coats v. Darby, 2 N. Y. 517; Bell v. Miller, 5 Ohio, 250; United States v. Ricketts, 1 Cranch C. C. 164, Fed. Cas. No. 16158; Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

§ 3794. **Provocation.**—No words of provocation will justify an assault, although they may constitute a ground for reduction of damages.[24]

§ 3795. **When action lies.**—An action will lie against a steamboat for an assault and battery committed by the mate or other officer of the boat, on the person of a passenger, while such boat is being navigated on the rivers within or bordering on the state.[25] Assault and battery lies for injury to the relative, as for beating, wounding, and imprisoning a wife or servant, by which the plaintiff has sustained a loss.[26] So where the battery, imprisonment, etc., were in the first instance lawful, but unnecessary violence was used.[27] One is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance,—as cantharides,—and concealing the fact, if the other, in ignorance of the fact, eats it, and is injured in health.[28] Acts *mala prohibita* do not become *mala in se*, unless done willfully and corruptly. One who drives over another in negligence merely, is not rendered guilty of a criminal assault and battery by the fact that he does so while violating a city ordinance against fast driving.[29] An action for assault and battery will lie against an infant.[30]

§ 3796. **Willful, malicious.**—It is not necessary in an action for a simple assault and battery to charge in terms that it was "willful" or "malicious" to entitle the plaintiff to maintain his action.[31]

24 Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875; Cushman v. Ryan, 1 Story, 91, Fed. Cas. No. 3515; Scott v. Fleming, 16 Ill. App. 539; Smith v. Bagwell, 19 Fla. 117, 45 Am. Rep. 12; Reid v. State, 71 Ga. 865.

25 Loy v. Steamboat etc., 28 Ill. 412, 81 Am. Dec. 292.

26 Bland v. Drake, 1 Chit. Pl. 167; Fluker v. Georgia etc. Banking Co., 81 Ga. 461, 12 Am. St. Rep. 328, 8 S. E. 529, 2 L. R. A. 843; Daniel v. Swearengen, 6 S. C. 297, 24 Am. Rep. 471. When not under the color of process, see 11 Mod. 180; Schmeider v. McLane, 36 Barb. 495.

27 1 Chit. Pl. 167; Pease v. Burt, 3 Day (Conn.), 485; Elliott v. Brown, 2 Wend. 497, 20 Am. Dec. 644; Boles v. Pinkerton, 7 Dana (Ky.), 453; Hannen v. Edes, 15 Mass. 347; Bennett v. Appleton, 25 Wend. 371.

28 Commonwealth v. Stratton, 114 Mass. 303, 20 Am. Rep. 350.

29 Commonwealth v. Adams, 114 Mass. 323, 19 Am. Rep. 362.

30 Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Vosburg v. Putnay, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

31 Andrews v. Stone, 10 Minn. 72; Sloan v. Speaker, 63 Mo. App. 321. See Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

§ 3797. **Complaint.**—Damages resulting from injuries received in mutual combat may be recovered on complaint in the usual form for assault and battery.[32] A complaint, alleging that defendant assaulted plaintiff, knocked him down, and kicked him in the face and on the body, and that he "thereby seriously wounded and bruised plaintiff, and rendered him sick, sore, and lame, to his damage in the sum of five thousand dollars," constitutes a sufficient allegation that plaintiff had suffered damages to that amount.[33] Averment of actual damage, without charging that the injury was wanton, malicious, gross, or outrageous, is an insufficient pleading to sustain an award of exemplary damages.[34]

§ 3798. **Alleging the facts.**—It is held that in an action to recover damages for an assault the complaint or petition must allege the facts which constitute the assault, and that it is not sufficient to allege that the defendant unlawfully "assaulted" the plaintiff, what constitutes an assault being a question of law for the court.[35] On the other hand, a general allegation that the defendant "assaulted" the plaintiff, standing alone, has been held sufficient.[36] An allegation that defendant at a certain time and place willfully and maliciously beat the plaintiff with a stick, causing her great pain, suffering, and mental anguish, to her damage in the sum of one thousand dollars, is sufficient.[37]

§ 3799. **Conductor of car.**—The right of a car conductor on a railroad to expel a passenger for non-payment of the fare, must be exercised in such a manner as is consistent with the safety of the passenger's life. He must first stop the car, and, if he attempts to eject him without stopping the car, the passenger has the same right to repel the attempt that he has to resist a direct attempt to take his life.[38] Although a person may be wrongfully upon the cars, the conductor must use reasonable care and prudence in re-

32 McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168.

33 Pennington v. Caughey, 145 Cal. 10, 78 Pac. 227.

34 Iaeger v. Metcalf (Ariz.), 94 Pac. 1094; Sullivan v. Oregon R. & N. Co., 12 Or. 392, 53 Am. Rep. 364, 87 Pac. 508; Badostain v. Grazider, 115 Cal. 425, 47 Pac. 118.

35 Stivers v. Baker, 87 Ky. 508, 9 S. W. 491.

36 Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308. See, also, Brzezinski v. Tierney, 60 Conn. 55, 22 Atl. 486.

37 Long v. McWilliams, 11 Okla. 562, 69 Pac. 882.

38 See Sanford v. Eighth Avenue R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286.

moving him.[39] In removing a trespasser from a train, the employee in charge may use such force as appears reasonably necessary;[40] but he must exercise reasonable care to avoid unnecessary injury to the person expelled, and for failure to use such care the company is liable.[41]

§ 3800. **Corporation.**—An action of trespass for assault and battery will lie against a corporation, if it has power to authorize the act done, and has done so; and a servant of the company may be joined as a defendant.[42]

§ 3801. **Damages.**—In cases of injury to the person from negligence of a conductor of a car, the law does not prescribe any fixed or definite rule of damages, but, from necessity, leaves their assessment to the good sense and unbiased judgment of the jury.[43]

§ 3802. **Exemplary damages.**—A railroad company may be charged with exemplary damages for injuries done with force or malice to a passenger by a conductor of the company.[44] The facts justifying an award of exemplary damages must be pleaded in the complaint, either expressly or by necessary implication.[45] Exemplary damages may be allowed, although the money extent of the actual damage is not shown or found.[46]

§ 3803. **Master and servant.**—The master is liable for the servant, if he acts within the scope of his authority.[47] The relation of conductor on a car and the company for whom he is acting as conductor is that of master and servant, and the relation being established, all else is mode and manner, and as to that the master is responsible.[48]

39 Kline v. Central Pacific R. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

40 Clark v. Great Northern Ry. Co., 37 Wash. 537, 79 Pac. 1108.

41 Klenk v. Oregon Short Line R. Co., 27 Utah, 428, 76 Pac. 214.

42 Brokaw v. New Jersey R. & T. Co., 32 N. J. L. 328, 90 Am. Dec. 659; National Bank v. Graham, 100 U. S. 702, 25 L. Ed. 750.

43 Aldrich v. Palmer, 24 Cal. 513; cited in Wheaton v. North Beach etc. R. R. Co., 36 Cal. 590.

44 Baltimore etc. R. R. Co. v. Blocher, 27 Md. 277. See Hamilton v. Great Falls St. Ry. Co., 17 Mont. 334, 42 Pac. 860, 43 Pac. 713.

45 Iaeger v. Metcalf (Ariz.), 94 Pac. 1094; Sullivan v. O. R. & N. Co., 12 Or. 392, 53 Am. Rep. 374, 7 Pac. 508.

46 McConathy v. Deck, 34 Colo. 461, 83 Pac. 135, 4 L. R. A. (N. S.) 358.

47 Kline v. Central Pacific R. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

48 Id.

§ 3804. **Forcible ejection.**—If a person be of mature years, the mere words of the driver ordering him to get off could not be regarded as a forcible ejection of the plaintiff from the car at a time when it was dangerous to leave it; but if a child of ten years of age was so ordered, his obedience would be naturally expected, without regard to the risk he might incur, and in respect to a child so young the command would be equivalent to compulsion.[49]

§ 3805. **Mutual negligence.**—If the plaintiff be in the wrong, yet if his wrong or negligence is remote,—that is, does not immediately accompany the transaction from which his injury resulted,—the defendant cannot excuse himself on the score of mutuality, nor absolve himself from his obligation to exercise reasonable care and prudence in what he may do. So the entry on a car, if an accomplished fact, is only a remote cause of the injury inflicted by a subsequent ejection from the car; nor did it absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train.[50] Mutual or co-operating negligence, which deprives one party of any right of action against the other, is when the act which produced the injury would not have occurred but for the combined negligence of both. But where the negligence of one party would produce injury in any event, with or without the negligence of the other, then it becomes a mere question of adjustment of damages.[51] Where negligence exists on both sides, that of the plaintiff must have contributed to the injury, or it will not excuse the defendant.[52]

§ 3806. **Removing trespassers.**—A man cannot lawfully push another off his land without first requesting him to get off.[53] Where a tenant sublets to another in violation of the lease, and a guest of the latter was dispossessed by the owner without legal process, and in so doing the landlord's agent took the visitor by the arm and led him off the premises, only nominal damages

49 Lovett v. Salem etc. R. R. Co., 9 Allen, 561; cited in Kline v. Central Pacific R. R. Co. of California, 37 Cal. 400, 99 Am. Dec. 282.

50 Kline v. Central Pacific R. R. Co., 37 Cal. 400, 99 Am. Dec. 282.

51 Thomas v. Kenyon, 1 Daly, 132.

52 Haley v. Earle, 30 N. Y. 208.

53 Thompson v. Berry, 1 Cranch C. C. 45, Fed. Cas. No. 13943. See Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892.

could be recovered in an action for assault.[54] Mechanics in charge of a house which they are building have a right to remove gently persons coming into the building without authority, if they will not depart upon request.[55] The abuse of legal authority which will make a person a trespasser *ab initio*, is the abuse of some special and particular authority given by law; and the doctrine does not apply to the case of an agent in a factory who uses improper force in ejecting a disorderly person employed there.[56] An officer who makes a legal arrest cannot be held liable for assault and battery where the evidence fails to show that he used unnecessary force.[57]

§ 3807. Arrest.—The circumstances of the arrest should not be set out in the complaint. If so set forth, they may be stricken out upon motion.[58]

§ 3808. Circumstances.—Allegations of the circumstances in detail on a charge of false imprisonment and assault, in connection with an illegal combination and conspiracy, were allowed in a great measure to stand.[59]

§ 3809. Mitigation of damages.—In an action for assault, or for false imprisonment, evidence in mitigation of damages may be given without being pleaded.[60] So evidence in mitigation may be given under a general denial.[61] Insulting language may be shown in evidence in mitigation.[62] And when the acts done or words spoken are a portion of a series of provocations, frequently repeated and continued down to the time of the assault, they may be proven.[63] But no provocation, it would seem,

54 Shaffer v. Austin, 68 Kan. 234, 74 Pac. 1118.

55 United States v. Bartle, 1 Cranch C. C. 236, Fed. Cas. No. 14531.

56 Esty v. Wilmot, 15 Gray, 168.

57 Baker v. Barton, 1 Colo. App. 183, 28 Pac. 88.

58 Eddy v. Beach, 7 Abb. Pr. 17; Shaw v. Jayne, 4 How. Pr. 119.

59 Molony v. Dows, 15 How. Pr. 261. See Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

60 Travis v. Barger, 24 Barb. 414; Hays v. Berryman, 6 Bosw. 679. See, however, Foland v. Johnson, 16 Abb. Pr. 235.

61 Kneedler v. Sternberg, 10 How. Pr. 68; Dunlap v. Snyder, 17 Barb. 561; Mitchell v. Cody, 26 N. Y. 781, 6 Misc. 307.

62 Cushman v. Ryan, 1 Story, 91, Fed. Cas. No. 3515; Castner v. Sliker, 33 N. J. L. 95; Dolan v. Fagan, 63 Barb. 73; Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Millard v. Truax, 84 Mich. 517, 22 Am. St. Rep. 705, 47 N. W. 1100.

63 Stetlar v. Nellis, 60 Barb. 524, 42 How. Pr. 163.

amounting to less than a justification, will render the defendant liable to less than compensatory damages.[64] But circumstances which amount to a complete justification are not admissible in evidence in mitigation unless pleaded.[65] Aggravated circumstances need not be denied; they are not traversable.[66] In an action for damages for an assault and battery, a libel published by the plaintiff and concerning the defendant does not constitute a counterclaim. The objection to such counterclaim is not waived by a failure to demur, and evidence to support it is inadmissible.[67] The trial, conviction, and punishment of defendant in a criminal action on the same battery is no ground for mitigation of even the exemplary damages.[68]

§ 3810. **Justification of assault.**—A previous threat alone, and unaccompanied by any immediate demonstration of force at the time of the rencounter, will not justify or excuse an assault. But if there be at the time such a demonstration of force as would induce a well-founded belief in the mind of a reasonable person that his adversary was on the eve of executing his threat, and that his only means of escaping from death or great bodily injury was immediately to defend himself against the impending danger, the law of self-defense would justify him in the use of whatever force was necessary to avert the threatened peril.[69] In an action for assault and battery, and false imprisonment, a special plea of justification, which states matters which occurred subsequent to the suit, is bad on demurrer.[70]

§ 3811. **Justification of assault.**—One is justified in using violence in defending himself against violence, but he must not exceed what is necessary to self-defense.[71] An assault cannot

64 Birchard v. Booth, 4 Wis. 67; Dresser v. Blair, 28 Mich. 501; Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 94 Pac. 606, 17 L. R. A. (N. S.) 455.

65 Watson v. Christie, 2 Bos. & Pul. 224; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

66 Schnaderbeck v. Worth, 8 Abb. Pr. 37; Gilbert v. Rounds, 14 How. Pr. 46; Lane v. Gilbert, 9 How. Pr. 150.

67 Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

68 Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668.

69 People v. Scoggins, 37 Cal. 684; Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

70 Lockington v. Smith, Pet. C. C. 466, Fed. Cas. No. 8448.

71 People v. Williams, 32 Cal. 280; People v. Campbell, 30 Cal. 312; Scribner v. Beach, 4 Denio, 448, 47 Am. Dec. 265.

be justified as made in self-defense, unless the danger of injury is so manifest and pressing that no other reasonable means of self-protection are immediately available.[72]

§ 3812. **Mutual violence.**—Where violence is committed on both sides, there cannot be a recovery by both parties in cross-action. The party who first recovers may plead that recovery in the suit against himself for the same affray. Hence the party first attacked is not entitled to maintain an action, if he uses violence in repelling the assault exceeding what is required for self-defense.[73] Where parties fight by mutual consent, although they are guilty of a breach of the criminal law, the consent of either does not deprive him of his civil remedy, and each may recover of the other all the damages from any injury sustained in the fight.[74]

§ 3813. **Preserving the peace.**—A person who witnesses an affray may, during its continuance, and for the purpose of putting a stop thereto, lay hands upon those engaged in the affray.[75]

§ 3814. **Defense of house, land, etc.**—One in the peaceable possession of house or lands, and having the right so to be in possession, will be justified in using all necessary force to defend his possession against any forcible attempt to expel him.[76] The son of the owner, acting under the latter's authority, has the same right.[77] A wife has the right to fight in the necessary defense of her husband, the child in defense of his parent, the

72 Keyes v. Devlin, 3 E. D. Smith, 518; Kent v. Cole, 84 Mich. 579, 48 N. W. 168; Higgins v. Minaghan, 78 Wis. 602, 23 Am. St. Rep. 428, 47 N. W. 941, 11 L. R. A. 138.

73 Cockroft v. Smith, Salk. 642; Zouch v. Thompson, 1 Ld. Raym. 177; Hannan v. Edes, 15 Mass. 347; Elliott v. Brown, 2 Wend. 497, 20 Am. Dec. 644.

74 McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168; Milam v. Milam, 46 Wash. 468, 90 Pac. 595.

75 Noden v. Johnson, 16 Q. B. 218; Timothy v. Simpson, 6 Car. & P. 500. That an officer who makes a legal arrest cannot be liable for assault and battery where the evidence fails to show that he used unnecessary force, see Baker v. Barton, 1 Colo. App. 183, 28 Pac. 88.

76 Corey v. People, 45 Barb. 262; Parsons v. Brown, 15 Barb. 590; Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; Bliss v. Johnson, 73 N. Y. 529; Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 94 Pac. 606, 17 L. R. A. (N. S.) 455.

77 Tribble v. Frame, 7 J. J. Marsh. 599, 617, 23 Am. Dec. 439. See, also, Woodman v. Howell, 45 Ill. 367, 92 Am. Dec. 221.

servant in defense of his master, and reciprocally; but if a father and his adversary are engaged in a fight on equal terms, the son's interference is not justifiable.[78] A ticket of admission to a place of public amusement is held to be only a revocable license.[79] Where one is peaceably in the house of another for a lawful purpose, as for the purpose of serving a subpœna, he may use such force as is necessary to overcome any force used to prevent it, being liable only for any excess of violence.[80]

§ 3815. **Justification of master.**—The master or commander of a vessel, in general, is not liable for chastisement inflicted on a seaman or marine, where he acted under a sincere conviction that it was necessary to enforce discipline or compel obedience to orders, and not from passion or revenge.[81] So, where the master acts believing from the circumstances that there is immediate danger from a mutiny.[82]

§ 3816. **Justification of conductor.**—A conductor of a train is protected in putting out of the cars a passenger who has refused to pay his fare.[83] He is limited to the use of just so much force as may effect that object, and no more,[84] and it

78 State v. Johnson, 75 N. C. 174.

79 Burton v. Scherpf, 1 Allen, 133, 79 Am. Dec. 717; McCrea v. Marsh, 12 Gray, 211, 71 Am. Dec. 745; Wood v. Ledbitter, 13 Mees. & W. 838.

80 Hager v. Danforth, 20 Barb. 16; reversing 8 How. Pr. 435.

81 Dinsman v. Wilkes, 12 How. 390, 13 L. Ed. 1036; United States v. Freeman, 4 Mason, 505, Fed. Cas. No. 15162; Thompson v. Busch, 4 Wash. C. C. 338, Fed. Cas. No. 13944; Thorne v. White, Pet. Adm. 168, Fed. Cas. No. 13989.

82 Roberts v. Eldridge, 1 Sprague, 54, Fed. Cas. No. 11901; United States v. Colby, 1 Sprague, 119, Fed. Cas. No. 14830; United States v. Lent, 1 Sprague, 311, Fed. Cas. No. 15643. As to what degree of misconduct, or circumstances of provocation, on the part of a seaman, will justify corporal punishment or correction by an officer, see Morris v. Cornell, 1 Sprague, 62, Fed. Cas. No. 9829; Payne v. Allen, 1 Sprague, 304, Fed. Cas. No. 10855; Sheridan v. Furbur, Blatchf. & H. 423, Fed. Cas. No. 12761. As to instruments and modes of punishment, see Benton v. Whitney, Crabbe, 417, Fed. Cas. No. 1335; Schelter v. York, Crabbe, 449, Fed. Cas. No. 12446; Forbes v. Parsons, Crabbe, 283, Fed. Cas. No. 4929; United States v. Cutler, 1 Curtis, 501, Fed. Cas. No. 14910; Saunders v. Bukup, Blatchf. & H. 264, Fed. Cas. No. 12373; Shorey v. Rennel, Sprague, 407, Fed. Cas. No. 12806. See Noden v. Johnson, 2 Eng. L. & Eq. 201.

83 People v. Jillson, 3 Park. Cr. 234; McClure v. Philadelphia etc. R. R. Co., 34 Md. 532, 6 Am. Rep. 345; Fink v. Albany etc. R. R. Co., 4 Lans. 147. That conductor has implied authority to eject a trespasser from train, see International etc. Ry. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039.

84 Hibbard v. New York etc. R. R. Co., 15 N. Y. 455.

must be consistent with the safety of the passenger's life.[85] Thus a railroad company may be held liable for forcibly expelling a person from the cars while the train is in motion, and it is no defense that such person was not rightfully on the train.[86]

§ 3817. **General denial.**—Where a conductor upon a railroad is sued for a battery in forcibly ejecting a passenger, he cannot prove under a general denial the existence of the rules of the company, that they were reasonable, and that his acts were done in conformity with such rules.[87] Nor can defendant prove self-defense under general denial.[88]

§ 3818. **Evidence.**—The fact that plaintiff has been the prosecuting witness in a criminal action based upon the same battery is immaterial, except to show bias of plaintiff, for impeaching purposes. If malice is alleged and exemplary damages asked, evidence of defendant's wealth at the time of the trial is admissible. The burden of proof of self-defense is upon the defendant. There is no presumption that a bodily injury is justifiable. The publication of defamatory matter can be used as a set-off against exemplary damages, but not against actual damages.[89] In an attempt to commit a felony, the question of assault is not necessarily involved; but in an assault with intent to commit a felony, the assault is an essential element.[90] Evidence showing motive and intent is admissible on the question of exemplary damages.[91]

85 Sanford v. Eighth Ave. R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Illinois etc. R. R. Co. v. Sutton, 53 Ill. 397.

86 Law v. Illinois Cent. R. R. Co., 32 Iowa, 534; Sanford v. Eighth Ave. R. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Harrold v. Winona etc. R. R. Co., 47 Minn. 17, 49 N. W. 389; Morris v. Atlantic Ave. R. Co., 116 N. Y. 552, 22 N. E. 1097; Kline v. Central Pacific R. R. Co., 39 Cal. 587; Jackson v. Second Ave. R. R. Co., 47 N. Y. 274, 7 Am. Rep. 448.

87 Pier v. Finch, 29 Barb. 170.

88 Iaeger v. Metcalf (Ariz.), 94 Pac. 1094.

89 Marriott v. Williams, 152 Cal. 705, 125 Am. St. Rep. 87, 93 Pac. 875.

90 Ross v. State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

91 Walker v. Chanslor, 153 Cal. 118, 126 Am. St. Rep. 61, 94 Pac. 606, 17 L. R. A. (N. S.) 455.

FORMS—FOR ASSAULT AND BATTERY.

§ 3819. Complaint—For actual and punitive damages.

Form No. 1031.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the defendant violently and maliciously did assault the plaintiff, and struck him several blows, and also tore the clothes from the plaintiff's person [describe the violence used, and its consequences]; to his damage in the sum of . . . dollars.

Wherefore, the plaintiff demands judgment for . . . dollars, his damages aforesaid, for exemplary damages and for the costs of this action.

§ 3820. Complaint—Short form.

Form No. 1032.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . . 19. . , at the . . ., the defendant assaulted and beat him, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3821. Married woman, allegation of assault by.

Form No. 1033.

That on the . . . day of . . ., 19. . , the defendant C. E., she being then, as now, the wife of the defendant E. F. [continue as in preceding form].

§ 3822. Complaint—With special damages.

Form No. 1034.

[TITLE.]

The plaintiff complains, and alleges.

I. That on the . . . day of . . ., 19. . , at . . ., the defendant assaulted and beat the plaintiff until he became insensible.

II. That the plaintiff was thereby disabled from attending to his business for weeks thereafter, and was compelled to pay . . . dollars for medical attendance, and has been ever since dis-

abled [from using his left arm; or, otherwise, state the damage, as the case may be], to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3823. **Complaint against corporation for damages caused by assault and forcible ejection from car.**

Form No. 1035.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant was, and now is, a corporation, duly organized under and pursuant to the laws of this state, and was the owner of a certain railroad known as the . . . railroad, with the tracks, cars, and other appurtenances thereunto belonging, and was a common carrier of passengers from . . . to . . .

II. That on the . . . day of . . ., 19. . , at . . ., the defendant with unnecessary violence assaulted the plaintiff and forcibly ejected him from one of its cars.

III. That the plaintiff was thereby disabled from attending to his business for . . . weeks thereafter, and has ever since been disabled from using [his left foot, or otherwise], and was compelled to pay . . . dollars for medical attendance, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3824. **Complaint for assault and false imprisonment—Short form.**

Form No. 1036.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the defendant assaulted and beat the plaintiff, and imprisoned him for . . . hours, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3825. **The same—Fuller form.**

Form No. 1037.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the defendant assaulted the plaintiff, and charged him with [state what offense], and gave

him into the custody of a policeman, and forced and compelled him to go to a police station, and there caused him to be imprisoned, and caused him to be kept in prison for a long time, until he was afterwards brought in custody before one of the police magistrates of . . ., and the defendant then again charged him with the said offense; but the said magistrate dismissed the said charge, and caused him to be discharged out of custody.

II. That the plaintiff thereby suffered damage in the amount of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3826. Complaint for assault on servant or child.

Form No. 1038.

[TITLE.]

The plaintiff complains, and alleges:

That on the . . . day of . . ., 19.., defendant made an assault upon A. B., the servant [son, daughter, or wife] of the plaintiff, and so beat, wounded, and ill-treated him [or, her] that he [or, she] was rendered sick and unable to perform labor, and so remained for . . . months, during all of which time the plaintiff was deprived of the services of the said A. B., and was obliged to expend . . . dollars for medical attendance and nursing for said A. B., to the damage of plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3827. General denial.

Form No. 1039.

[TITLE.]

The defendant answers to the complaint:

That the defendant has not committed the acts alleged, or any one of them [or, the defendant denies each and every allegation thereof].

§ 3828. General denial—Battery.

Form No. 1040.

[TITLE.]

The defendant answers to the complaint:

That the defendant did not strike nor wound the plaintiff.

§ 3829. **General denial—Self-defense.**

Form No. 1041.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff first assaulted the defendant, who thereupon necessarily committed the acts complained of, in self-defense.

§ 3830. **Acts done to preserve the peace.**

Form No. 1042.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant did not strike or wound the plaintiff.

II. That at the time mentioned in the complaint the plaintiff made an assault on one B., and was then and there beating him.

III. That thereupon the defendant, in attempting to preserve the peace, and prevent the plaintiff from further so doing, gently laid his hands upon the plaintiff, by which plaintiff suffered no injury.

IV. That the acts above mentioned are the same of which the plaintiff complains.

§ 3831. **Defense of possession of dwelling.**

Form No. 1043.

[TITLE.]

The defendant answers to the complaint:

I. [Deny beating and wounding.]

II. The defendant further alleges that at the time mentioned in the complaint the defendant was lawfully possessed of [here designate the dwelling].

III. That the defendant being so possessed thereof, the plaintiff was unlawfully therein, and [state unlawful acts he was doing].

IV. That thereupon the defendant, in defense of the possession of his dwelling, gently laid his hands upon the plaintiff in order to remove him, as he lawfully might.

V. That the acts above mentioned are the same of which the plaintiff complains.

§ 3832. Defense of possession of dwelling—Resistance of entry.

Form No. 1044.

[TITLE.]

The defendant answers to the complaint:

I and II. [As in preceding form.]

III. That the plaintiff then and there, with force and violence, attempted to break into the said dwelling [or other possession], without the leave and against the will of the defendant.

IV. That the defendant thereupon, in order to preserve the peaceable possession thereof, resisted the plaintiff's entrance, and in doing so necessarily assaulted and beat the plaintiff, as he lawfully might; and if the plaintiff sustained any damage, it was occasioned by his own wrong.

V. That the acts above mentioned are the same of which the plaintiff complains.

§ 3833. Justification by captain of vessel.

Form No. 1045.

[TITLE.]

The defendant answers to the complaint:

I. That as to the alleged assaulting, beating, and ill-treating the plaintiff, the defendant was, at the time thereof, captain of the ship called the . . .

II. That the plaintiff was then on board of said ship as a seaman. [State excuse for beating him, such as mutiny, etc.]

III. Wherefore the defendant, for the preservation of the peace, and to preserve due order on said ship, [state what was done].

§ 3834. Justification of removing plaintiff from railroad car for non-payment of fare.

Form No. 1046.

[TITLE.]

The defendant answers to the complaint:

I. That the defendant was, before and at the time when the said supposed grievances were committed, the conductor and had charge of a passenger train on the railroad of the . . . railroad company, running from . . . to . . .

II. That one of the regulations of said . . . railroad company was that no person should be permitted to be and remain on such train without having a ticket therefor, duly obtained of its authorized agents.

III. That at the time mentioned in the complaint the plaintiff was on the said train, without having a ticket therefor as aforesaid, and then and there refused to purchase a ticket or to pay his fare.

IV. That the defendant then and there requested the said plaintiff to leave the said train, which the plaintiff refused to do; whereupon the defendant then and there gently laid his hands upon the plaintiff, and removed him from the train, doing no unnecessary violence, as he lawfully might do; which is the same act complained of by the plaintiff.

CHAPTER CVI.

FOR FALSE IMPRISONMENT.

§ 3835. Arrest without proof.—A person who without bad faith or malice has, upon oath or otherwise, merely stated his case to a magistrate having jurisdiction of the offense supposed to have been committed, and of the person accused, is not liable to an action for false imprisonment upon the consequent arrest of the accused, although such arrest is not warranted by the law or the facts in the case.[1] One identifying another as one who looks like the man who sold a certain ticket to him, and not having advised the arrest, cannot be held for false imprisonment; but the officer who relies upon such identification, and arrests the plaintiff upon a telegram, in spite of the fact that a resident of the city and an acquaintance of the officer, who had known plaintiff for thirty years, told the officer he did not have the right man, is liable in damages for false imprisonment.[2]

§ 3836. Circumstances of arrest.—The particular instrumentality by which the plaintiff was deprived of his liberty should not be set out in the complaint. If the circumstances of the arrest are set forth, they may be struck out upon motion.[3]

§ 3837. Corporation.—A corporation may be sued in trespass for false imprisonment.[4] The act of a conductor in having a passenger arrested is the act of the carrier, where such arrest is made in the interest of the carrier.[5]

1 Von Latham v. Libby, 38 Barb. 339; citing Carratt v. Morely, 1 Ad. & E. (N. S.) 18; Barber v. Rollinson, 1 C. & M. 330; West v. Smallwood, 3 Mee. & W. 418, 6 Man. G. & S. 365; Van Rensselaer v. Akin, 22 Wend. 552, disapproving Comfort v. Fulton, 13 Abb. Pr. 276; Livingston v. Burroughs, 33 Mich. 511.

2 Miller v. Fano, 134 Cal. 103, 66 Pac. 183.

3 Eddy v. Beach, 7 Abb. Pr. 17; Shaw v. Jayne, 4 How. Pr. 119. As to what extent such allegations are allowed to stand, see Molony v. Dows, 15 How. Pr. 266.

4 Owsley v. Montgomery etc. R. R. Co., 37 Ala. 560; Gillingham v. Ohio River R. R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, 14 S. E. 243, 14 L. R. A. 798; Lynch v. Metropolitan El. Ry. Co., 90 N. Y. 77, 43 Am. Rep. 141.

5 Elser v. Southern Pacific Co., 7 Cal. App. 493, 94 Pac. 852.

§ 3838. **Election of remedy.**—A plaintiff has an election of remedy between an action for false imprisonment and malicious prosecution, where either form is admissible.[6]

§ 3839. **False imprisonment defined.**—False imprisonment is the unlawful violation of the personal liberty of another.[7] Neither malice nor, ordinarily, want of probable cause is an element of the right to recover for false imprisonment.[8] As a crime, false imprisonment is not felony under the laws of California.[9]

§ 3840. **False imprisonment, what it avoids.**—One who obtains possession of personal property by threat of wrongful imprisonment acquires no title, and such transaction is void.[10] An error of judgment on the part of the magistrate will not render the process issued by him void.[11]

§ 3841. **Malice.**—Malice and falsehood are essential ingredients in an action for malicious prosecution, but are not essential to an action for false imprisonment, in which, however, the element of want of probable cause is necessary.[12] Malice will generally be inferred from the want of probable cause, at least so far as to sustain the action.[13]

§ 3842. **Principal and agent.**—Where a private person takes any part in the unlawful imprisonment of another, he becomes a principal in the act, and is liable for the trespass; but where he merely communicates facts or circumstances of suspicion to officers, leaving them to act upon them on their own judgment and responsibility, he is not liable.[14] A shopkeeper is not liable for the act of his superintendent and clerks in calling a policeman and causing the arrest and search of a woman suspected of stealing goods, if done without his authority, express or im-

6 Von Latham v. Libby, 38 Barb. 339, 17 Abb. Pr. 237; Brown v. Chadsey, 39 Barb. 253.

7 Cal. Pen. Code, § 236. See, also, State v. Lunsford, 81 N. C. 528.

8 Kroeger v. Passmore, 36 Mont. 504, 93 Pac. 805, 14 L. R. A. (N. S.) 988.

9 People v. Ebner, 23 Cal. 158.

10 Richards v. Vanderpoel, 1 Daly, 71.

11 Von Latham v. Libby, 38 Barb. 339, 17 Abb. Pr. 237.

12 Platt v. Niles, 1 Edm. 230.

13 McCarthy v. DeArmit, 99 Pa. St. 63.

14 7 Car. & P. 373; Burns v. Erben, 26 How. Pr. 273; Brown v. Chadsey, 39 Barb. 253; Lark v. Band. 4 Mo. App. 186; Taaffe v. Slevin, 11 Mo. App. 507.

plied.[15] If a passenger is removed from a train by a policeman at request of the conductor, and imprisoned, the act of the conductor is the act of the carrier, and the carrier becomes liable if the arrest is wrongful.[16]

§ 3843. **Against an officer.**—If an officer holding a search-warrant which permits the arrest of the party having stolen property in his control does not make search, as required by law and the warrant, but immediately arrests one suspected, such arrest is without authority, and the officer is civilly liable therefor, while the person securing issue of the warrant is not.[17]

§ 3844. **Sufficient averment.**—In order to sustain a charge for false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence, or laid hands on him, or shut him up in a jail or prison; but it is sufficient to show that the defendant, at any place or time, in any manner, restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he desired.[18] Submission to the threatened and reasonably apprehended use of force is not to be considered as consent to restraint.[19] Neither malice nor want of probable cause need be proved to sustain the action. Evidence tending to show that the plaintiff was restrained of his liberty at the defendant's instance, by reason of process which the magistrate had no authority to issue, is sufficient.[20]

§ 3845. **Void process.**—One who procures the arrest and imprisonment of another upon void process is liable in an action for false imprisonment; and mere good faith in making the affidavit by virtue of which the arrest is made is no defense.[21]

15 Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448.

16 Elser v. Southern Pacific Co., 7 Cal. App. 493, 94 Pac. 852.

17 Ton v. Stetson, 43 Wash. 471, 86 Pac. 668.

18 Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. 381; Hawk v. Ridgway, 33 Ill. 473; Harkins v. State, 6 Tex. App. 452.

19 Bingham v. Lipman, 40 Or. 363, 67 Pac. 98.

20 Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

21 Painter v. Ives, 4 Neb. 122; Hallock v. Dominy, 14 N. Y. Sup. Ct. 52; Sheldon v. Hill, 33 Mich. 171; Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

§ 3846. **Want of jurisdiction.**—Where one is arrested, tried, and convicted of an act which, if it were an offense, was one of which the court had no jurisdiction, his imprisonment cannot afterwards be justified by showing that the evidence at the trial would have convicted him of another offense which was triable in that court.[22]

§ 3847. **Where and when action lies.**—Though the original arrest be warrantable, an action for false imprisonment lies for any subsequent oppression or cruelty.[23] Actions for malicious prosecution require different rules, both of pleading and evidence, and are essentially distinct.[24] A cause of action for malicious prosecution and one for false imprisonment may be united in the same complaint.[25] Where imprisonment only is complained of, the action is for false imprisonment.[26]

§ 3848. **Damages.**—If plaintiff suffers no actual damages by reason of the arrest, though it be a technical false imprisonment, there being no malice or oppression, only nominal damages can be recovered.[27] Evidence of having been confined with criminals, and compelled to sleep without adequate clothing, is admissible.[28] Physical inconvenience, mental suffering, and humiliation of mind are elements of general and compensatory damages.[29]

§ 3849. **Who liable.**—Where a person has been arrested upon a criminal charge, without any competent evidence of his guilt, the magistrate and prosecutor are jointly liable to an action for false imprisonment.[30] A probate judge, having jurisdiction of the person and subject-matter, is justified in issuing a commitment, supported by a judgment of his court.[31] The action dies with the death of the wrongdoer.[31a]

22 De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95; Wait v. Green, 5 Park Cr. 185.

23 1 T. R. 536; Esp. Dig. 332; Doyle v. Russell, 30 Barb. 300.

24 Brown v. Chadsey, 39 Barb. 253.

25 Marks v. Townsend, 97 N. Y. 590; Castro v. Uriarte, 2 N. Y. Civ. Proc. Rep. 210.

26 Burns v. Erben, 26 How. Pr. 273.

27 Maher v. Wilson, 139 Cal. 514, 73 Pac. 418; Cal. Civ. Code, § 3360.

28 Miller v. Fano, 134 Cal. 103, 66 Pac. 183.

29 Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

30 De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95; Comfort v. Fulton, 13 Abb. Pr. 276; Truesdell v. Combs, 33 Ohio St. 186. But see, for qualification of this statement, Von Latham v. Libby, 38 Barb. 339; McCall v. Cohen, 16 S. C. 445, 42 Am. Rep. 641.

31 Comstock v. Eagleton, 11 Okla. 487, 69 Pac. 955, 196 U. S. 99, 49 L. Ed. 402, 25 Sup. Ct. 210.

31a Harker v. Clark, 57 Cal. 245.

§ 3850. **Special damage.**—Allegation of special damage by reason of the imprisonment may be inserted in the complaint.[32] In an action for false imprisonment against a justice of the peace, it was held that the plaintiff could not recover in damages the amount of costs incurred by him in an unsuccessful application for his discharge on a writ of *habeas corpus,* such costs not having been alleged as special damages in the complaint.[33] Expenses of securing release on *habeas corpus* are proper items of special damage.[34]

§ 3851. **Change of venue.**—In an action for false imprisonment, the defendant has a right to have the case transferred to the county of his residence.[35]

§ 3852. **Sufficiency of complaint.**—A complaint against a justice of the peace for false imprisonment in punishing the plaintiff for contempt must aver in terms that the acts constituting the imprisonment were without or in excess of his jurisdiction, or facts from which a want of jurisdiction appears. The allegations that the acts constituting such imprisonment were done "wrongfully" or "unlawfully" are mere conclusions of law, and tender no issue, where no facts are averred to show the acts complained of to be wrongful or unlawful.[36] The complaint should allege facts showing that the imprisonment was extrajudicial or without legal process,[37] and also facts showing that the criminal action had terminated.[38] The complaint must show that the arrest was unlawful, and an allegation that the arrest was maliciously procured is insufficient.[39] A complaint in an action against a justice of the peace, alleging that the plain-

32 Molony v. Dows, 15 How. Pr. 266. But in the same case allegations of aggravating circumstances were struck out.

33 Spence v. Neynell, 2 New Mag. Cas. 19. Contra, Williams v. Garrett, 12 How. Pr. 456. As to punitive damages, see Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682; Pearce v. Needham, 37 Ill. App. 90.

34 Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

35 Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. 381. See Yore v. Murphy, 10 Mont. 304, 311, 25 Pac. 1039; Williams v. Keller, 6 Nev. 141.

36 Going v. Dinwiddie, 86 Cal. 633, 25 Pac. 129.

37 Gelzenleuchter v. Niemeyer, 64 Wis. 321, 54 Am. Rep. 616, 25 N. W. 442; King v. Johnston, 81 Wis. 578, 51 N. W. 1011.

38 McDaniel v. Nelms, 96 Ga. 366, 23 S. E. 407; West v. Hayes, 104 Ind. 251, 3 N. E. 932; Lowe v. Wartman, 47 N. J. L. 413, 1 Atl. 489.

39 Cunningham v. Electric Light Co., 17 N. Y. Supp. 372.

tiff was arrested upon a warrant issued by the defendant upon a complaint charging the plaintiff with refusing to return a sum of money claimed to have been overpaid her, and further alleging a conviction and the issue of a committal by the defendant, and her imprisonment thereon, shows that the plaintiff was charged with the commission of an act which did not constitute a crime, and states a cause of action against the defendant for false imprisonment.[40] Where the complaint charges false imprisonment by an arrest void *ab initio,* it is a material variance to admit evidence of an arrest lawfully made, but which afterwards became unlawful imprisonment by reason of a refusal to receive bail.[41] To admit evidence of any act by which a lawful imprisonment becomes unlawful, the facts should be alleged in the complaint, so that the defendant may be informed of the nature of the charge against him and come prepared to meet it by proof.[42]

Where plaintiff alleged that defendants unlawfully "conspired" for the purpose of extorting money from her, that she was induced to enter their office, where she was charged with larceny and threatened with arrest, and was locked in the store and kept there from six until eleven o'clock, and that defendants extorted money from her, the complaint is not bad for duplicity; as a series of unlawful acts aimed at, and contributing to, the injury complained of may be averred.[43]

Alleging the arrest and imprisonment; that defendant acted unlawfully, without right or authority, against the will of plaintiff; that by means of said false imprisonment plaintiff was injured in his credit, prevented from attending to his business, suffered mental anguish, and was compelled to expend a certain sum for expenses in securing his discharge on *habeas corpus,*— all to his damage in a certain sum,—states a cause of action good as against general demurrer.[44]

§ 3853. **Defense.**—The only defenses which may be interposed are a denial of the imprisonment and a justification thereof.[45]

40 De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95.

41 Neimitz v. Conrad, 22 Or. 164, 29 Pac. 548.

42 Ocean Steamship Co. v. Williams, 69 Ga. 251.

43 Bingham v. Lipman, Wolfe & Co., 40 Or. 363, 67 Pac. 98.

44 Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

45 Kroeger v. Passmore, 36 Mont. 504, 93 Pac. 805, 14 L. R. A. (N. S.) 988.

It is a good defense for assault and battery that the complainant had committed petit larceny, and that the alleged assault consisted in arresting him therefor.[46] So private persons may be justified for an assault in arresting persons in the act of committing a felony.[47]

§ 3854. **Pleading justification.**—In trespass to persons, a justification under civil process, mesne or final, must be pleaded specially by the party in whose favor it is issued. Such a justification does not sustain the plea of not guilty. And the rule is the same whether the defendant made the arrest or only directed it to be made.[48] The burden of proving justification is on defendant.[48a]

§ 3855. **General denial.**—In an action for malicious arrest, a general denial puts in issue the want of probable cause.[49] The denial must be positive. A denial on information and belief will not be allowed.[50]

§ 3356. **How pleaded.**—In an answer in an action for malicious prosecution, it is superfluous to set forth facts showing probable cause.[51] And if the allegation of want of probable cause be denied, it is redundant to allege probable cause as a separate defense.[52]

§ 3857. **Justification under legal process.**—The defense that the imprisonment was under lawful process must be specially pleaded.[53] An answer justifying under a warrant must show that the arrest was the same trespass as charged in the complaint.[54] It has been held that to exempt one from liability for causing the arrest on mesne process, it must be apparent not only that he believed, but also that he had reason to believe, the essential facts averred in his affidavit, as in the instance

46 People v. Adler, 3 Park Cr. 249.

47 People v. Wolven, 7 N. Y. Leg. Obs. 89; People v. McArdle, 1 Wheel. Cr. 101.

48 Coats v. Darby, 2 N. Y. 517.

48a Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. 381.

49 Dreux v. Domec, 18 Cal. 83; Rost v. Harris, 12 Abb. Pr. 446; Radde v. Ruckgaber, 3 Duer, 685; Simpson v. McArthur, 16 Abb. Pr. 302.

50 Lawrence v. Derby, 15 Abb. Pr. 346.

51 Radde v. Ruckgaber, 3 Duer, 684.

52 Rost v. Harris, 12 Abb. Pr. 446.

53 Allen v. Parkhurst, 10 Vt. 557; Wilson v. Railway Co., 20 N. Y. Supp. 852.

54 Young v. Warder, 94 Ind. 357.

that the debtor was about to leave the state.[55] In Indiana, it is not necessary to a constable's justification of an arrest under a *capias ad respondendum,* issued by a justice, that the writ should be supported by affidavit.[56] But it is otherwise if the justification be attempted by the party or the justice.[57] Where, in an action for false imprisonment, the defendant, by special plea, set up legal process in justification of the imprisonment charged, and then averred that he did not arrest the plaintiff, but that the latter voluntarily gave bail, it was held that the plea was bad for duplicity.[58] Simply pleading a justification, without denying the want of probable cause, admits the latter.[59] In an action for false imprisonment, unless the defendant is an officer, the answer should state the circumstances, from which the court may judge whether the suspicion was reasonable.[60] As to what constitutes sufficient probable cause to justify a prosecution for larceny, see case cited in note.[61] A justice, justifying his imprisonment of another, must show that he fills the office not merely *de facto,* but *de jure.*[62]

§ 3858. **Waiver of right of action.**—The right of action for false imprisonment may be lost by a waiver thereof. Thus, where the plaintiff was arrested upon an execution improperly issued, and instead of being discharged from execution by the defendant, after three months' confinement, obtained his liberation under the act for the relief of debtors, it was held that he thereby waived the error and affirmed the execution.[63] So where a defendant in an action was arrested under a judge's order, and offered bail to the plaintiff's attorneys, and induced them to examine and accept bail, it was held a waiver of any objection to his having been held to bail.[64] An agreement not to bring an action for false imprisonment, if founded on a good consideration, is binding.[65]

55 Gee v. Patterson, 63 Me. 49.

56 Davis v. Bush, 4 Blackf. 330.

57 Id. See Goodwine v. Stephens, 63 Ind. 112; Wilts v. Holt, 95 Ind. 469.

58 Stanton v. Seymour, 5 McLean, 267, Fed. Cas. No. 13298.

59 Morris v. Corson, 7 Cow. 281.

60 Mure v. Kaye, 4 Taunt. 34.

61 Haupt v. Pohlmann, 16 Abb. Pr. 301.

62 Newman v. Tiernan, 37 Barb. 159. As to necessity of a full and special plea of justification, when interposable, see Brown v. Chadsey, 39 Barb. 253.

63 Reynolds v. Church, 3 Caines, 274. See Fuller v. Bowker, 11 Mich. 204.

64 Dale v. Radcliffe, 25 Barb. 333.

65 See Wentworth v. Bullen, 9 Barn. & Cress. 840.

FORMS—FALSE IMPRISONMENT.

§ 3859. Complaint—Common form.

Form No. 1047.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant imprisoned him for . . . days [or, hours, as the case may be], without probable cause [state special damages, if any], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3860. Complaint—Another form.

Form No. 1048.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by force, compelled the plaintiff to go with him to the police office [or otherwise], and there imprisoned him, and then and there detained him restrained of his liberty for the space of . . . days, without probable cause, and without any right or authority so to do, and against the will of the plaintiff, whereby the plaintiff was bruised and wounded, and was also injured in his credit, and was prevented from attending to his business during that time, and was compelled to pay . . . dollars for costs and counsel fees in obtaining his discharge, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3861. Complaint for false imprisonment under order of arrest, void for want of jurisdiction.

Form No. 1049.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., the defendant wrongfully and maliciously commenced an action against the plaintiff in the . . . court of . . . county, state of . . ., and caused to be issued out of said court a certain pretended order of arrest in said action, and placed the same in the hands of L. M., the sheriff of said county, for service, and caused the plain-

tiff to be arrested by the said sheriff, and held to bail in the sum of . . . dollars; and that the plaintiff was unlawfully imprisoned by the said sheriff under the said pretended order of arrest for the space of . . . days.

II. That the said order of arrest was illegal and unauthorized, for the reason that the said . . . court had no jurisdiction to issue said order in that [here set forth the facts showing the want of jurisdiction, or other facts showing that the process was void]; and that on the . . . day of . . ., 19.., said pretended order of arrest was duly vacated and set aside by order of the said court, for the reason that the same was issued without jurisdiction and was void.

III. That the plaintiff, at the time of said arrest, was engaged in business at the city of . . . as a [state business], and was compelled to give up said business by reason of said unlawful arrest, and was injured in his good name and credit among his friends and fellow-townsmen, and suffered greatly in body and mind by reason of the disgrace and humiliation of said arrest and imprisonment, and was also put to expense in the sum of . . . dollars, in securing his discharge from imprisonment.

IV. That by reason of the premises the plaintiff has suffered damages in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3862. Denial of arrest.

Form No. 1050.

[TITLE.]

The defendant answers to the complaint:

That the defendant did not cause said order of arrest [or, warrant] to be issued.

§ 3863. Denial of want of probable cause.

Form No. 1051.

[TITLE.]

The defendant answers to the complaint:

That the defendant did not falsely or maliciously, or without probable or reasonable cause, cause the plaintiff to be arrested; nor did he cause plaintiff to be arrested at all.

§ 3864. Justification of arrest upon suspicion of felony.

Form No. 1052.

[TITLE.]

The defendant answers to the complaint:

I. That immediately before the time mentioned in the complaint a felony was committed. [Briefly state the felony and causes of suspicion against the plaintiff.]

II. That thereupon the defendant, who was then and there sheriff of the county of . . ., having reasonable cause to suspect the plaintiff of having committed such felony, arrested him and brought him before J. P., a justice of the peace of . . . [or other magistrate], to be dealt with according to law.

III. That the above acts are the same of which plaintiff complains.

§ 3865. Justification by officer of arrest for breach of the peace.

Form No. 1053.

[TITLE.]

The defendant answers to the complaint:

I. That at the time mentioned in the complaint [here state a breach of the peace on the part of the plaintiff, according to the fact].

II. Thereupon the defendant Y. gave charge of the plaintiff to the defendant Z. [the officer], who was a constable [or other officer of the peace], and [who then and there had view of the said breach of the peace committed by the plaintiff].

III. That the defendant Z., at the request of the defendant Y., and the defendant Y. assisting the defendant Z., then and there gently laid their hands upon the plaintiff, in order to take him into the custody of such officer, and carry him before a justice of the peace [or other magistrate], for examination concerning the premises, and to be dealt with according to law.

IV. That the acts above mentioned are the same of which plaintiff complains.

§ 3866. Justification by officer, of arrest under criminal process.

Form No. 1054.

[TITLE.]

The defendant answers to the complaint:

I. That before and at the time of the committing of the alleged trespasses, he, the said defendant, was a constable [or, sheriff] within and for the town [or, county] of . . .

II. That a warrant duly issued by one A. B., under his hand and seal, and directed to any constable [or, sheriff] of said . . ., which then was delivered to this defendant as such constable [or, sheriff] to be executed; whereby he was commanded to arrest the said plaintiff and bring him forthwith before said justice [or state before whom], there to answer to the charge of having feloniously stolen and carried away the goods and chattels of one . . ., to the value of . . . dollars. [Set forth the tenor of the writ or warrant according to its effect.]

III. That the said A. B. then was a justice of the peace, within and for the town of . . ., duly elected and qualified, and acting as such.

IV. That by virtue of the said warrant so issued, he, the said defendant, did arrest the said plaintiff, and had him in his custody until he was discharged. [Or state facts.]

§ 3867. Justification by officer of the same.

Form No. 1055.

[Title.]

The defendant answers to the complaint:

I. That at and immediately before the time mentioned in the complaint the defendant was a constable in the town of . . . [designate other official character].

II. That he was then informed by [here state sources of information], that a felony had been committed, in the robbery of [or, state felony, and the grounds for suspicion of the plaintiff].

III. That thereupon, believing such information to be true, and acting thereon, as was his duty to do, he arrested him, and brought him before J. P., a justice of the peace of . . ., [or other magistrate], to be dealt with according to law.

IV. That the above acts are the same of which plaintiff complains.

CHAPTER CVII.

MALICIOUS PROSECUTION.

§ 3868. Causes of action not assignable.—Causes of action arising out of personal torts which do not survive to the personal representatives of a party, are not assignable.[1] So a cause of action for a malicious prosecution is not assignable.[2] Actions for malicious prosecutions are not favored in law, though upheld when the proper elements of malice and want of probable cause are shown.[3]

§ 3869. Conspiracy.—When two or more persons are sued for a joint wrong done, it may be necessary to prove a previous combination between them in order to secure a joint recovery; but it is not necessary to aver this previous combination in the complaint, and, if averred, it is not to be considered as of the gist of the action.[4] A conspiracy alleged and proved will overcome the presumption arising from conviction.[5] An allegation that the defendants have fraudulently confederated and conspired together for the purpose of harassing the plaintiff, by prosecuting separate suits against him for the same cause, and that such suits have been commenced and are prosecuted in pursuance of such conspiracy, is not sufficient to sustain an action or uphold an injunction, when the defendants claim adversely to each other, as well as to the plaintiff, and no direct fraud is charged, the plaintiff merely averring his belief of such conspiracy, because the defendants have brought separate actions for the same cause, and by the same attorney. Fraud in such

1 Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Gould v. Gould, 36 Barb. 270; Hoyt v. Thompson, 5 N. Y. 347; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146; Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108; Sanborn v. Doe, 92 Cal. 152, 27 Am. St. Rep. 101, 28 Pac. 105; Murray v. Buell, 76 Wis. 657, 20 Am. St. Rep. 92, 45 N. W. 667; Averill v. Longfellow, 66 Me. 237. That it is otherwise in Iowa, see Vimont v. Chicago etc. Ry. Co., 64 Iowa, 513, 71 N. W. 31, 21 N. W. 9.

2 Lawrence v. Martin, 22 Cal. 173.

3 Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937.

4 Herron v. Hughes, 25 Cal. 560.

5 Russell v. Chamberlain, 12 Idaho, 299, 85 Pac. 926; Carpenter v. Sibley, 153 Cal. 215, 126 Am. St. Rep. 77, 94 Pac. 879, 15 L. R. A. (N. S.) 1143.

a case is not to be presumed; and the conspiracy should be distinctly averred.[6]

§ 3870. **Conspiracy, averments in action of.**—In an action for a conspiracy the rule is to allow a great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred, even so far as to allow the individual acts of the conspirators to be averred. So far as the allegations of such acts are scandalous, they should be stricken out, unless they appear to relate to the foundation of the plaintiff's action.[7] In an action charging the defendant with a conspiracy to prosecute the plaintiff for a crime, and a malicious prosecution in pursuance of the conspiracy, the alleged malicious prosecution is the gist of the action.[8] A complaint for malicious prosecution against two defendants alleging that they jointly "procured the arrest of plaintiff on a false charge," and "that in procuring the arrest and prosecution of the plaintiff the defendants acted maliciously and without probable cause," sufficiently charges a joint responsibility, although other allegations show that one defendant only swore to the complaint to obtain the warrant for the plaintiff's arrest and prosecution.[9]

§ 3871. **Jurisdiction.**—If a complaint shows that the arrest was without jurisdiction, it may be good as alleging a trespass, without averring a determination in favor of plaintiff.[10]

§ 3872. **Several causes of action united.**—An action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person,[11] as for libel or slander.[12]

§ 3873. **When action will lie.**—An action for a malicious prosecution will lie where an affidavit for a search-warrant is made before a justice maliciously and without probable cause, although the magistrate refuse to issue the warrant.[13] Where a com-

6 McHenry v. Hazard, 45 Barb. 657.

7 Mussina v. Clark, 18 Abb. Pr. 188.

8 Taylor v. Bidwell, 65 Cal. 489, 4 Pac. 491.

9 Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022.

10 Steel v. Williams, 18 Ind. 161; Searll v. McCracken, 16 How. Pr. 262.

11 Cal. Code Civ. Proc., § 427.

12 Watson v. Hazzard, 3 Code Rep. 218; Martin v. Mattison, 8 Abb. Pr. 3.

13 Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693.

plaint charged a crime, and the prosecution was instituted before a tribunal having jurisdiction, and a warrant regular upon its face was issued, and the defendant was arrested, an action brought by him for malicious prosecution will be sustained, although the complaint was not signed by the complainant.[14] An action for malicious prosecution will lie against a creditor who effected the arrest and imprisonment of his debtor by alleging that the demand was greater in amount than it truly was, so as to hinder the debtor from getting bail. It is true that in order to sustain an action for malicious prosecution the law requires that the proceedings which form the subject of complaint should have been maliciously instituted and carried on without any reasonable or probable cause;[15] but there would ordinarily be but little difference in the injury produced to the defendant, whether the unfounded prosecution was carried on without any demand whatever to justify it, or whether it was coupled with a claim of real merit.[16]

§ 3874. **When action will not lie.**—One cannot maintain an action for the malicious prosecution of either a civil or criminal proceeding to which he was not a party.[17] An action in a case for malicious prosecution will not lie for causing a person to be arrested on a criminal warrant, charging an act which is not a crime, but merely a trespass, as the warrant was void, and the proper remedy for an arrest on such a warrant is trespass.[18] *Bona fide* acts of a party on advice given by counsel, after a full and fair statement of the facts, are evidence of a probable cause, however erroneous the advice may be.[19] Such an action does not lie where the alleged malicious suit was founded on a

14 Chapman v. Dodd, 10 Minn. 350; Forster v. Orr, 17 Or. 447, 21 Pac. 440.

15 Van Meter v. Bass, 40 Colo. 78, 90 Pac. 637, 18 L. R. A. (N. S.) 49.

16 Phillips on Evidence, 261; 3 Barn. & Cress. 139; Dronefield v. Archer, 7 Eng. Com. Law, 177, 26 Eng. L. & Eq. 200; Sommer v. Wilt, 4 Serg. & R. 19; O'Donnel v. Seybert, 13 Serg. & R. 54; Brown v. McIntyre, 43 Barb. 344. See Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400.

17 Duncan v. Griswold, 92 Ky. 546, 18 S. W. 354. See Kinsey v. Wallace, 36 Cal. 462; Dreux v. Domec, 18 Cal. 83.

18 Kramer v. Lott, 50 Pa. St. 495, 88 Am. Dec. 556. But see Dennis v. Ryan, 63 Barb. 145; Newfield v. Copperman, 47 How. Pr. 87.

19 Richardson v. Virtue, 2 Hun, 208; Eastman v. Keasor, 44 N. H. 518. See Jackson v. Linnington, 47 Kan. 396, 27 Am. St. Rep. 300, 28 Pac. 173; Adams v. Bicknell, 126 Ind. 210, 22 Am. St. Rep. 576, 25 N. E. 804.

just claim, although such claim was smaller than that for which the suit was brought, when it does not appear that property was attached to a greater value than the amount of such claim.[20]

§ 3875. **Conviction.**—The fact that the plaintiff was convicted by a jury is conclusive, and, if apparent in the complaint, will be fatal to the suit for damages,[21] in absence of fraud and conspiracy.[22] Binding the accused over to answer to the higher court makes a *prima facie* case of probable cause, subject to overthrow on ground of fraud only.[23] Nor will a reversal for error of law prevent the application of the rule. The only exception is when fraud in obtaining a conviction, by means which prevented the plaintiff from setting up his defense, is set up and proved. In a complaint of this nature, an averment of matter tending to show the defendant's motive was held not to be irrelevant.[24] Nor does suffering default have this effect where probable cause existed at the first.[25]

§ 3876. **Corporation.**—An action for malicious prosecution will lie against a corporation if it has power to authorize the act done, and has done so;[26] and especially so, if the corporation profited financially on account of the criminal prosecution.[27] A corporation is not liable to such an action, but may be sued in trespass for false imprisonment.[28]

§ 3877. **Damages.**—The jury are the proper judges of the amount of damages to be allowed in actions for malicious prosecution,[29] so long as their allowance is reasonable and not exces-

20 Grant v. Moore, 29 Cal. 644.

21 Miller v. Deere, 2 Abb. Pr. 1.

22 Russell v. Chamberlain, 12 Idaho, 299, 85 Pac. 926; Carpenter v. Sibley, 153 Cal. 215, 126 Am. St. Rep. 77, 94 Pac. 879, 15 L. R. A. (N. S.) 1143.

23 Putnam v. Stalker, 50 Or. 210, 91 Pac. 363.

24 Brockleman v. Brandt, 10 Abb. Pr. 141. See Boogher v. Hough, 99 Mo. 183, 12 S. W. 524.

25 Gordon v. Upham, 4 E. D. Smith, 9.

26 Vance v. Erie Ry. Co., 32 N. J. L. 334, 90 Am. Dec. 665; Hussey v. Norfolk etc. R. R. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Williams v. Planter's Ins. Co., 57 Miss. 759, 34 Am. Rep. 494; Carter v. Howe Machine Co., 51 Md. 290, 34 Am. Rep. 311. See "Assault and Battery," ante, chap. cv.

27 Nickelson v. Cameron Lumber Co., 39 Wash. 569, 81 Pac. 1059.

28 Owsley v. Montgomery R. R. Co., 37 Ala. 560.

29 Chapman v. Dodd, 10 Minn. 350; Charlton v. Markland, 36 Wash. 40, 78 Pac. 132.

sive.[30] Injury to reputation, and being prevented from disposing of property, which is maliciously attached, are elements of damage.[31] Injury to the plaintiff's feelings, caused by the arrest, may be proved under the general allegation of damages, and need not be specially pleaded.[32] Evidence of the general bad reputation of the plaintiff is admissible in reduction of damages.[33]

§ 3878. **Exemplary damages** may be awarded plaintiff, though they are not claimed in that name in the complaint.[34]

§ 3879. **Wrongful attachment—Defective complaint.**—In an action for maliciously issuing and prosecuting a writ of attachment, a defect, if any, in the complaint, in not alleging that it was issued without probable cause, and stating instead that it was issued out of wantonness, is cured by the verdict when the defect was not pointed out.[35] Where the complaint in an action for damages for a malicious attachment upon a debt that had been paid before the attachment suit was commenced alleges that judgment was rendered and entered in favor of the defendant in the attachment suit, such allegation is sufficient, and it is unnecessary to allege further that the judgment was in full force and effect, and not vacated, set aside, reversed, or appealed from.[36] A complaint in an action for malicious attachment that does not allege the want of probable cause is fatally insufficient.[37]

§ 3880. **Essential averments.**—In an action for malicious prosecution the plaintiff must aver and must prove an entire want of probable cause of the accusation, and actual malice of the defendant in preferring it,—that is, malice in fact, as distinguished from malice in law.[38] Both malice and want of probable cause are essential, and must be stated and proved; also, that the prosecu-

30 Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33; Phelps v. Cogswell, 70 Cal. 201, 11 Pac. 628; Stuart v. Hoffman, 68 Cal. 381, 9 Pac. 451.

31 French v. Guyot, 30 Colo. 222, 70 Pac. 683.

32 Shatto v. Crocker, 87 Cal. 629, 25 Pac. 921; Jackson v. Bell, 5 S. Dak. 257, 58 N. W. 671.

33 Fitzgibbon v. Brown, 43 Me. 169. See, also, White v. Tucker, 16 Ohio St. 468.

34 Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33.

35 Levey v. Fargo, 1 Nev. 415.

36 Carter v. Paige, 80 Cal. 390, 22 Pac. 188.

37 Witascheck v. Glass, 46 Mo. App. 209; Moody v. Deutsch, 85 Mo. 237. See Mitchell v. Silver Lake Lodge, 29 Or. 294, 45 Pac. 798.

38 Bulkeley v. Smith, 2 Duer, 261; Besson v. Southard, 10 N. Y. 236.

tion is at an end, and how it was concluded.[39] An averment that the prosecution was without probable cause is indispensable, and its omission is fatal,[40] the want of probable cause being the primary question in such actions.[41] For, though malicious, the defendant is not liable unless there be a want of probable cause.[42] The necessity of the concurrence of all three of the above elements—that is, want of probable cause, malice in fact, and actual determination in favor of the plaintiff—is maintained in numerous cases.[43]

Upon alleging that a prosecution was commenced against plaintiff, that it was instituted by defendant, that it was malicious and without probable cause, that it has been finally terminated in plaintiff's favor, a cause of action is stated;[44] as also do the following allegations: that defendant, having unlawfully come into possession of plaintiff's note, after maturity, had maliciously, without authority or probable cause, and for the purpose of injuring plaintiffs' business and credit, brought suit thereon, and caused attachments to issue on certain property of plaintiffs, whereby they were put to expense in defending the action, were unable to dispose of the property, and were injured in business and credit.[45]

§ 3881. Complaint—Example.—The cause of action may be stated thus: That defendant filed with the justice an information accusing plaintiff of arson, and caused a warrant to be issued; that the said acts were malicious and without probable cause; that defendant caused plaintiff to be imprisoned and examined and held over to the district court, and employed detectives to

39 Brown v. Chadsey, 39 Barb. 253; Hull v. Vreeland, 42 Barb. 543; S. C., 18 Abb. Pr. 182; McKown v. Hunter, 30 N. Y. 625; Ritter v. Ewing, 174 Pa. St. 341, 34 Atl. 584; Porter v. Johnson, 96 Ga. 145, 23 S. E. 123.

40 Lohrfink v. Still, 10 Md. 530.

41 Grant v. Moore, 29 Cal. 644; Duncan v. Griswold, 92 Ky. 546, 18 S. W. 354.

42 Payson v. Caswell, 22 Me. 212; Wood v. Weir, 5 B. Mon. 544; Leidig v. Rawson, 1 Scam. 272, 29 Am. Dec. 354.

43 Vanderbilt v. Mathis, 5 Duer, 304. See, also, as to pleading, Davis v. Clough, 8 N. H. 157; Weinberger v. Shelly, 6 Watts & Serg. 336; Horton v. Smelser, 5 Blackf. 428; Cole v. Hanks, 3 T. B. Mon. 208. See, also, Richardson v. Virtue, 2 Hun, 208; Brown v. Willoughby, 5 Colo. 1; Anderson v. How, 116 N. Y. 336, 22 N. E. 695; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937.

44 Schrieber v. Clapp, 13 Okla. 215, 74 Pac. 316.

45 French v. Guyot, 30 Colo. 222, 70 Pac. 583.

attend at the examination and testify against plaintiff, and that the detective procured certain persons who gave false testimony; that the defendants employed special counsel, and induced the justice of the peace to hold plaintiff to the district court and fix his bail at a sum which he could not furnish, and that thereafter, when plaintiff appeared in the district court ready to be tried, the county attorney, after consulting with defendants, moved the court to discharge said plaintiff, and it was done.[46]

The fraud which may be the basis for an action for malicious prosecution need not be such extrinsic fraud as would be necessary for relief from the judgment of conviction, and the presumption arising from plaintiff's conviction is overcome in the complaint by alleging that defendants conspired to falsely charge plaintiff with crime, and had him convicted by securing false testimony and intimidating the jury.[47]

§ 3882. **Facts only must be alleged.**—In an action for malicious prosecution, only the substantial matter constituting the action —that is, facts, and not the evidence of facts—need be set out.[48] The point of inquiry in such an action is whether there was in fact probable cause for the prosecution, and not whether the defendant had probable cause to believe there was.[49]

§ 3883. **Gist of action.**—The action lies against several defendants, and the gist of the action is the malicious prosecution.[50] Where wrong and injury is done by a malicious suit, it is held to be immaterial, upon principle, whether the court had jurisdiction or not to entertain such suit, in order to recover for the malicious prosecution.[51]

§ 3884. **Indebtedness.**—The averment of no indebtedness may be omitted, in a suit maintained for maliciously suing out an attachment.[52]

46 Russell v. Chamberlain, 12 Idaho, 299, 85 Pac. 926.

47 Carpenter v. Sibley, 153 Cal. 215, 126 Am. St. Rep. 77, 94 Pac. 879, 15 L. R. A. (N. S.) 1143.

48 Dreux v. Domec, 18 Cal. 83.

49 Hickman v. Griffin, 6 Mo. 37, 34 Am. Dec. 124.

50 Dreux v. Domec, 18 Cal. 83; Taylor v. Bidwell, 65 Cal. 489, 4 Pac. 491.

51 Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019, 10 L. R. A. 621.

52 Tomlinson v. Warner, 9 Ohio, 103.

§ 3885. **Joint agency, allegation of.**—In a suit against three defendants for malicious prosecution, the complaint averred that "defendants, contriving and maliciously intending to injure the plaintiff," etc., falsely, maliciously, and without probable cause, procured him to be indicted for murder, it was held that the complaint sufficiently avers a joint agency on the part of defendants in instituting the prosecution.[53]

§ 3886. **Malice.**—Malice and falsehood are essential ingredients in an action for malicious prosecution.[54] Malice, as well as want of probable cause, is necessary to sustain an action for malicious prosecution.[55] Malice, in its legal sense, means a wrongful act, done intentionally, without just cause or excuse.[56] Malice means that a wrongdoer not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrongful when he did it.[57] Malice cannot be presumed in a prosecution where the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law.[58] Malice, like fraud, is to be inferred from facts and circumstances.[59] A petition which omits to state that the prosecution was malicious, and that the plaintiff was acquitted, is insufficient.[60] Public policy and security require that prosecutors should be protected by the law from civil liabilities, except in those cases where the two elements, malice in the prosecutor, and want of probable cause for the prosecution, both occur.[61] If one person arrests another for the commission of a crime, under the belief that the person arrested has committed the crime, the person making the arrest cannot be said to act maliciously, although he may act unlawfully.[62]

53 Dreux v. Domec, 18 Cal. 83.

54 Platt v. Niles, 1 Edm. 230; Smith v. Liverpool etc. Ins. Co., 107 Cal. 432, 40 Pac. 540.

55 Riney v. Vanlandingham, 9 Mo. 816; Frissell v. Relfe, 9 Mo. 859; Emerson v. Cochran, 111 Pa. St. 619, 4 Atl. 498; Lavender v. Hudgens, 32 Ark. 763; Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. 204.

56 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

57 Witascheck v. Glass, 46 Mo. App. 209.

58 Sears v. Hathaway, 12 Cal. 277.

59 Lyon v. Hancock, 35 Cal. 376.

60 Mooney v. Kennett, 19 Mo. 551, 61 Am. Dec. 576; Freymark v. McKinney Bread Co., 55 Mo. App. 435; Collins v. Campbell, 18 R. I. 738, 31 Atl. 832.

61 Potter v. Seale, 8 Cal. 217; Russell v. Chamberlain, 12 Idaho, 299, 85 Pac. 926.

62 Lyon v. Hancock, 35 Cal. 372; Griswold v. Griswold, 143 Cal. 617, 77 Pac. 672.

§ 3887. **Motive.**—In an action for malicious prosecution, the complaint may aver matter tending to show the defendant's motive; e. g. a malicious publication by him procured to be made concerning the prosecutor—such as would be proper to prove at the trial as showing special injury. Such averments should not be stricken out on motion, as the plaintiff cannot be deemed aggrieved by them.[63]

§ 3888. **Probable cause.**—Probable cause may be defined as a suspicion, founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.[64] It is a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.[65] The question of probable cause does not depend upon whether an offense has been committed, nor upon the guilt or innocence of the accused, but upon the prosecutor's belief of the truth of the charge made by him. If circumstances are shown sufficient to warrant a cautious man in the belief of the truth of the charge he makes, it is enough.[66] And from the want of probable cause malice may be inferred,[67] though it cannot be presumed therefrom,[68] and is a mixed question of law and fact.[69] It is a question for the court, but the jury must decide upon the facts.[70]

§ 3889. **Probable cause, when it exists.**—If the defendant had a cause of action in the case alleged, although for a much less

63 Brockleman v. Brandt, 10 Abb. Pr. 141.

64 Potter v. Seale, 8 Cal. 217; Hall v. Hawkins, 5 Humph. 357; Faris v. Starke, 3 B. Mon. 4; Payson v. Caswell, 22 Me. 212; McLellan v. Cumberland Bank, 24 Me. 566; Holburn v. Neal, 4 Dana, 120; Smith v. Liverpool etc. Ins. Co., 107 Cal. 432, 40 Pac. 540; Johnston v. Meaghr, 14 Utah, 426, 47 Pac. 861.

65 Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Clement v. Major, 1 Colo. App. 297, 29 Pac. 19; Brown v. Willoughby, 5 Colo. 1; McClafferty v. Philp, 151 Pa. St. 86, 24 Atl. 1042; Jones v. Jones, 71 Cal. 89, 11 Pac. 817.

66 Smits v. Hogan, 35 Wash. 290, 77 Pac. 390; Scanlan v. Cowley, 2 Hilt. 489. See, also, Foote v. Milbier, 46 How. Pr. 38; Farnam v. Feeley, 56 N. Y. 451; Carl v. Ayers, 53 N. Y. 14; Harkrader v. Moore, 44 Cal. 144.

67 Whitehead v. Jessup, 2 Colo. App. 76, 29 Pac. 916; Lunsford v. Dietrich, 86 Ala. 250, 11 Am. St. Rep. 37, 5 South. 461; Grant v. Moore, 29 Cal. 644; Cunningham v. Moreno, 9 Ariz. 300, 80 Pac. 327.

68 Griswold v. Griswold, 143 Cal. 617, 77 Pac. 672.

69 Grant v. Moore, 29 Cal. 644.

70 Brant v. Higgins, 10 Mo. 728; Leahey v. March, 155 Pa. St. 458, 26 Atl. 701; Charlton v. Markland, 36 Wash. 40, 78 Pac. 132.

amount than claimed, there was probable cause, and the court should grant a nonsuit.[71] So a judgment against the plaintiff after trial on the merits is sufficient evidence of probable cause, though subsequently reversed; not, however, conclusive, if impeached for fraud.[72] Where two actions have been abandoned, by the plaintiff's failure to appear at the adjourned day, and a new action has been commenced before another justice for the same demand, which is still pending, the litigation is not terminated, and want of probable cause cannot be inferred solely from the discontinuance of the former suits.[73] A committal to await the action of the grand jury is not conclusive evidence of probable cause.[74]

§ 3890. **Privileged charges.**—As to the remedy by action for malicious prosecution, for false and malicious charges preferred in legal proceedings, and deemed privileged from an action for defamation, see the case cited in the note.[75]

§ 3891. **Special damages.**—Expenses of counsel made necessary by a malicious prosecution are to be specially alleged.[76]

§ 3892. **What must be shown.**—To sustain an action for malicious prosecution, the plaintiff must show affirmatively that the prosecution was malicious, and without probable cause, both concurring.[77] The order of proof being within the discretion of the court, it may be required that plaintiff prove want of probable cause before introducing evidence of damage.[78]

§ 3893. **Dismissal.**—An immediate dismissal by a magistrate of a prosecution when commenced is, it would seem, *prima facie* proof of the want of probable cause.[79] Entry of *nolle prosequi*

71 Grant v. Moore, 29 Cal. 644.

72 Palmer v. Avery, 41 Barb. 290; Ross v. Hixon, 46 Kan. 550, 26 Am. St. Rep. 123, 26 Pac. 955, 12 L. R. A. 760.

73 Palmer v. Avery, 41 Barb. 290.

74 Haupt v. Pohlman, 16 Abb. Pr. 301.

75 Perkins v. Mitchell, 31 Barb. 461.

76 Strang v. Whitehead, 12 Wend. 64; Eastin v. Bank of Stockton, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106.

77 Cook v. Walker, 30 Ga. 519; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Joiner v. Ocean Steamship Co., 86 Ga. 238, 12 S. E. 361; Porter v. Johnson, 96 Ga. 145, 23 S. E. 123; Otis v. Sweeney, 48 La. Ann. 940, 20 South. 229; Palmer v. Palmer, 46 N. Y. Supp. 829; Anderson v. Coleman, 53 Cal. 188; Smith v. Liverpool etc. Ins. Co., 107 Cal. 432, 40 Pac. 540.

78 Cunningham v. Moreno, 9 Ariz. 300, 80 Pac. 327.

79 Gould v. Sherman, 10 Abb. Pr. 411.

was held insufficient for that purpose.[80] And in case of civil actions, starting the same action three times, and dismissing it each time without trial, is sufficient to warrant suit for malicious prosecution, judgment on the merits of the case in favor of defendant not being essential.[81] If defendant procured the dismissal, no just reason being shown therefor, it is evidence to show want of probable cause, and malice.[82]

§ 3894. **Acquittal essential.**—An action for malicious prosecution cannot be maintained until the plaintiff has been acquitted, or the prosecution is finally terminated in his favor. The determination of the prosecuting officer never to bring the indictment to trial, for the reason that he deems the charge entirely unsupported, is not sufficient.[83] The plaintiff's acquittal must be alleged. An allegation that he has been discharged is not sufficient.[84] It is not enough to aver that the prosecuting officer declared the complaint frivolous, and refused to try it.[85] The rule that the prosecution must have terminated favorably to the plaintiff does not apply in case of an attachment against his property, sued out in his absence, and which he had no opportunity to defend.[86] Generally, a criminal prosecution may be said to have terminated—1. Where there is a verdict of not guilty; 2. Where the grand jury ignores a bill; 3. Where a *nolle prosequi* is entered; and 4. Where the accused has been discharged from bail or imprisonment.[87] And in actions for malicious prosecutions for crime the complaint must allege facts showing that the criminal action had terminated.[88] But it has been held that in

80 Bacon v. Townsend, 2 Code Rep. 51; Hall v. Fisher, 20 Barb. 441; Brown v. Lakeman, 12 Cush. 482, 6 Mod. 261. Contra: Yocum v. Polly, 1 B. Mon. 358, 36 Am. Dec. 583. Compare Graves v. Dawson, 130 Mass. 78, 39 Am. Rep. 429; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; Bell v. Matthews, 37 Kan. 686, 16 Pac. 97.

81 Hurgren v. Union Mutual Life Ins. Co. (Cal.), 69 Pac. 615, 141 Cal. 585, 75 Pac. 168.

82 Id. See Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703.

83 Grant v. Moore, 29 Cal. 644; Murphy v. Ernst, 46 Neb. 1, 64 N. W. 353; Masterson v. Brown, 72 Fed. 136, 18 C. C. A. 481; Thomason v. Demotte, 9 Abb. Pr. 242, 18 How. Pr. 529. See Forster v. Orr, 17 Or. 447, 21 Pac. 440.

84 Morgan v. Hughes, 2 Term Rep. 225; Bacon v. Townsend, 2 Code Rep. 51; Hibbing v. Hyde, 50 Cal. 206.

85 Thomason v. Demotte, 9 Abb. Pr. 242.

86 Bump v. Betts, 19 Wend. 421.

87 Lowe v. Wartman, 47 N. J. L. 413, 1 Atl. 489. See Peterson v. Toner, 80 Mich. 350, 45 N. W. 346; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Horn v. Sims, 92 Ga. 421, 17 S. E. 670.

88 Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; King v. Johnston, 81 Wis. 579, 51 N. W.

an action to recover damages for the malicious abuse of process in a civil action, it is not necessary that the complaint shall aver a judicial determination of the action in which such process issued.[89]

§ 3895. **Defenses.**—It is no defense in a suit for malicious prosecution, that the complaint sworn to, charging plaintiff with a public offense, does not state facts legally sufficient to constitute the offense;[90] and especially is this so if no such question was raised in the prosecution.[91] It is a good defense in suit for malicious prosecution of a civil action, that there has been no arrest of plaintiff's person nor seizure of his property, nor special injury, which would not result in all similar causes of action.[92] Defendant cannot shield himself by his mistake in not giving the right name of plaintiff and the code name of the crime alleged in the criminal complaint, the plaintiff being the person intended, and having been arrested under the name given.[93]

§ 3896. **Defense—Legal advice.**—Where defendant presents the matter thoroughly to the district attorney or other licensed attorney, in good faith, and such attorney advises the commencement of a criminal action, there is no action for malicious prosecution,[94] even though there were other exculpatory facts which diligent inquiry might have disclosed,[95] unless it is shown that he did not act upon such advice, but upon a fixed determination of his own.[96] The full facts must have been fairly stated.[97]

§ 3897. **Burden of proof.**—The burden of proving malice and the lack of probable cause is upon plaintiff.[98] If the proof tends to show absence of probable cause, a *prima facie* case is estab-

1011; Commonwealth v. McClusky, 151 Mass. 488, 25 N. E. 72; Lawrence v. Cleary, 88 Wis. 473, 60 N. W. 793; Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703.

89 Sneeden v. Harris, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389. See Mayer v. Walter, 64 Pa. St. 283; Emery v. Ginnan, 24 Ill. App. 65.

90 Harrington v. Tibbet, 143 Cal. 78, 76 Pac. 816.

91 Kerstetter v. Thomas, 36 Wash. 620, 79 Pac. 290.

92 Abbott v. Thorne, 34 Wash. 692, 101 Am. St. Rep. 1021, 76 Pac. 302, 65 L. R. A. 826.

93 Cochran v. Bones, 1 Cal. App. 729, 82 Pac. 970.

94 Van Meter v. Bass, 40 Colo. 78, 90 Pac. 637, 18 L. R. A. (N. S.) 49; Wyatt v. Burdette, 43 Colo. 208, 95 Pac. 336.

95 Putnam v. Stalker, 50 Or. 210, 91 Pac. 363.

96 Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33.

97 Cochran v. Bones, 1 Cal. App. 729, 82 Pac. 970.

98 Wyatt v. Burdette, 43 Colo. 208, 95 Pac. 336; Simmons v. Gardner, 46 Wash. 282, 89 Pac. 887.

lished, and the burden is then upon defendant to rebut the same by showing probable cause and want of malice,[99] or by showing that he made a full and fair statement of the facts to his attorney, and acted upon his advice.[100]

FORMS—MALICIOUS PROSECUTION.

§ 3898. Complaint—Common form.

Form No. 1056.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant obtained a warrant for the arrest of this plaintiff from . . . [a police justice of the said city, or as the case may be], on a charge of . . ., and the plaintiff was arrested thereon, and imprisoned for . . . days [or, hours], and gave bail in the sum of . . . dollars to obtain his release.

II. That in so doing the defendant acted maliciously and without probable cause.

III. That on the . . . day of . . ., 19.., the said justice dismissed the complaint of the defendant, and acquitted the plaintiff [or, the grand jury of the county of . . . ignored the bill against the plaintiff; or, otherwise, show a termination favorable to him].

IV. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him [or, that in consequence of the said arrest, the plaintiff lost his situation as clerk to one A. B.], and has been otherwise injured in his good name and reputation, and whereby, and by means whereof, he hath sustained damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3899. Complaint—Fuller form.

Form No. 1057.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant appeared before . . ., a justice of the peace of said county [or,

99 Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33.

100 Wyatt v. Burdette, 43 Colo. 208, 95 Pac. 336.

the police judge of said city], and charged the plaintiff, before said justice, with having feloniously stolen a certain . . ., of the defendant; and procured said justice to grant a warrant for the arrest of the plaintiff upon said charge.

II. That in so doing, the defendant acted maliciously and without probable cause.

III. That the said justice issued said warrant accordingly, and the plaintiff was arrested and imprisoned under the same for . . . [days or hours, and gave bail in the sum of . . . dollars to obtain his release].

IV. That on the . . . day of . . ., 19.., the plaintiff was examined before the said justice for the said supposed crime, and the said justice adjudged him not guilty, and fully acquitted him of the same; and that since that time the defendant has not further prosecuted said complaint, but has abandoned the same.

V. That the said charge and the arrest of the plaintiff thereunder were extensively published in several public newspapers, among others the . . ., as the plaintiff believes, through the procurement of the defendant.

VI. That by means of the premises the plaintiff was injured in his person, and prevented from attending to his business, and paid . . . dollars costs, counsel fees in defending himself, and . . . in obtaining bail; and he lost his situation as servant of . . .; and many persons, whose names are unknown to the plaintiff, hearing of the said arrest, refused to employ him, and whereby also he has been injured in his good name and reputation, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 3900. Complaint for procuring plaintiff to be indicted.

Form No. 1058.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant caused and procured the said plaintiff to be indicted by the grand jury, then and there impaneled and sworn by the . . . court, in and for the county of . . ., to inquire of crimes within and for the said county and prosecuted and caused to be prosecuted the said indictment against the said plaintiff.

II. That in so doing, the defendant acted maliciously and without probable cause.

III. That afterwards, to-wit, at the . . . term of the said . . . court, begun and held on the . . . day of . . ., 19.., at the courthouse in . . ., in the said county of . . ., the said plaintiff was in due manner and by due course of law acquitted of the said premises in the said indictment charged upon him, by a jury of the said county of . . ., whereupon it was then and there adjudged by the said court that the said plaintiff go hence thereof without day, and the said plaintiff was then and there discharged of and from the premises in said indictment specified, as by the record and proceeding thereof remaining in said court appears.

IV. [State special damages.]

[Demand of Judgment.]

§ 3901. Complaint for obtaining indictment on which a nolle prosequi was afterwards entered.

Form No. 1059.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant procured C. D., then the district attorney in and for the county of . . ., in this state, to issue subpœnas for the purpose of compelling and procuring the attendance of witnesses, among others, one A. B., at the . . . court held on the day last mentioned, at . . ., in said county, before the grand jury and persons serving as grand jurors at such term of the . . . court, for the purpose of procuring an indictment to be found against the plaintiff, as hereinafter more fully stated.

II. That in so doing the defendant acted maliciously and without probable cause, and intended thereby to injure the plaintiff in his good name and credit, and to bring him into public disgrace, and to cause him to be imprisoned, and to impoverish and injure him.

III. That the defendant at said term of the . . . court, complained of the plaintiff before the grand jury, and falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff to the grand jury with having [state charge preferred].

IV. That said charge was and is wholly false and untrue, which the defendant then and at all times since well knew.

V. That defendant falsely and maliciously, and without probable cause, procured the grand jury aforesaid to find and present

to the said . . . court an indictment against the plaintiff for said alleged [state pretended charge].

VI. That defendant falsely and maliciously, and without probable cause, procured a bench warrant, directed to the sheriff or any constable of the said county of . . . , for the arrest of the plaintiff upon the aforesaid indictment, to answer the charges therein made against him as aforesaid, to be issued by the . . . court of said county of . . . ; and afterwards, on or about the . . . day of . . . , 19. . , caused the plaintiff to be arrested and to be kept in custody, restrained of his liberty for the space of . . . months, and to give bail in the sum of . . . dollars to obtain his release.

VII. That the plaintiff did appear at the said term of said . . . court, ready and willing to then and there stand trial upon the aforesaid indictment against him, pursuant to and as required by said bond; whereupon the aforesaid district attorney, after consulting and advising with the defendant, and at his request, and by his instructions, did then and there move the said court that the plaintiff be discharged out of custody, and be fully discharged and acquitted of the said indictment and of the supposed offense therein charged against him, and be no further prosecuted thereon; whereupon the said court, having heard and considered all that the said defendant and the people, by the aforesaid district attorney, could say or allege against the plaintiff touching and concerning the said supposed offense, did then and there adjudge, order, and determine that the plaintiff be discharged out of custody, and be fully discharged and acquitted of the said indictment, and be not further prosecuted thereon.

VIII. That the said indictment, complaint, and prosecution are, and each of them is, wholly ended and determined in favor of this plaintiff.

IX. [Special damage, if any, as in other cases.]

[Demand of Judgment.]

§ 3902. Complaint for maliciously suing out writ of attachment.

Form No. 1060.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . . 19. . . at . . . , the defendant caused and procured to be sued out of the . . . court, in and for

the county of . . . , a certain writ of attachment, in a certain action then and there pending, wherein the said A. B. was plaintiff, and the plaintiff herein was defendant, directed to the sheriff of said county, commanding said sheriff [here state substance of the said writ], and delivered the same to the said sheriff, and caused and required the said sheriff to levy said writ of attachment on the store of goods, wares, and merchandise of the said plaintiff, and took the same into his possession, and the said defendant afterwards applied to the said . . . court [or to Hon. C. D., judge of said court], and obtained an order from said court [or judge] for the sale of said goods and merchandise, and caused said sheriff to sell the same at a great sacrifice.

II. That in so doing the defendant acted maliciously and without probable cause, and unjustly contrived and intended to injure the said plaintiff and break up his business—he, the said plaintiff, then being engaged in business of a merchant.

III. That the said action of the said defendant afterwards came on for trial at the . . . term of said court, 19. . , and was tried, and a verdict and judgment rendered in favor of this plaintiff, to the damage of this plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3903. The same—Where attachment vacated.

Form No. 1061.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19. . , the defendant, maliciously intending to injure the plaintiff, falsely and without probable cause, made and verified an affidavit for attachment against the property of the plaintiff, in a certain action then brought by said defendant against the plaintiff in the . . . court, to recover the sum of . . . dollars.

II. That thereupon said defendant maliciously and without probable cause, caused a writ [or, warrant] of attachment to be issued out of said court and levied upon plaintiff's property, to-wit: [describe the property levied upon], which said property was thereupon taken into the possession of [the sheriff] of . . . county.

III. That afterward, on the . . . day of . . ., said attachment, on motion of the plaintiff, was vacated and set aside, and said goods returned to the possession of the plaintiff.

[Or, III. That thereafter, and before the commencement of this action, upon a trial duly had of the issue raised by the said affidavit of attachment, and the traverse thereof duly made by this plaintiff, it was finally adjudged and determined by the said court that no ground existed for the issuance of the said writ [or, warrant] of attachment, and the said attachment was discharged by said court, and said property was returned to the possession of the plaintiff.

[DEMAND OF JUDGMENT.]

§ 3904. Complaint for malicious arrest where judgment of acquittal was rendered.

Form No. 1062.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant, maliciously intending to injure the plaintiff, made affidavit, and procured one A. B. to make an affidavit, in an action brought against this plaintiff by . . ., in which he alleged [set forth the grounds of the false arrest]; and that upon said affidavits the defendant caused to be issued an order of arrest against this plaintiff, under which the plaintiff was arrested and imprisoned for the space of . . ., and compelled to give bail in the sum of . . . dollars.

II. That in so doing the defendant acted maliciously and without probable cause.

III. That on the . . . day of . . ., 19.., said order was vacated by said court, upon the grounds that [set forth the grounds on which it was vacated].

[Or, III. That on the . . . day of . . ., 19.., such proceedings were had in such action, that it was finally determined in favor of this plaintiff, and judgment was rendered for him therein.]

IV. [Special damage.] That many persons, whose names are unknown to plaintiff, hearing of the arrest, etc. [as in form No. 1056], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

CHAPTER CVIII.

LIBEL AND SLANDER.

§ 3905. Libel and slander—Definition of.—Slander or libel is an infringement of the absolute rights of persons, as the character of persons is undoubtedly one of their absolute and personal rights.[1] A libel is a written or printed slander.[2] Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.[3] Libel is both a public wrong or crime, and a private wrong or tort, cognizable by the common law. The remedy for the public wrong is by indictment or criminal information. The remedy for the private wrong is a civil action now known as an action, or the action, of or for libel.[4] The rule is generally laid down that a publication is libelous when its necessary effect is to diminish the plaintiff's reputation for respectability, impair his condition, and abridge his comforts, by exposing him to disgrace and ridicule.[5] In every slander there are two acts, composing and publishing. In every libel there are three acts, composing, writing, and publishing. So every publication of language concerning a man or his affairs, which as a necessary, or a natural and proximate, consequence occasions

1 Holt on Libel, 15.

2 1 Hilliard on Torts, ch. 7, 32.

3 Cal. Civ. Code, § 45. See, also, Cal. Pen. Code, § 248; Gage v. Robinson, 12 Ohio, 250; Fisher v. Patterson, 14 Ohio, 418; Cole v. Neustader, 22 Or. 191, 29 Pac. 550; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

4 Townshend on Slander and Libel, 22.

5 Hunt v. Bennett, 4 E. D. Smith, 647. For definition of libel, see Townshend on Slander and Libel, 31; Burr. Law Dict.; 1 Hilliard on Torts, ch. 8, 313; Holt on Libel, 213; 1 Mence on Libel, 125; Steele v. Southwick, 9 Johns. 214; Cooper v. Greeley, 1 Denio, 347; White v. Nicholls, 3 How. 266, 11 L. Ed. 591; Armentrout v. Moranda, 8 Blackf. 426; Bridge v. Austin, 4 Mass. 115; Commonwealth v. Clap, 4 Mass. 163, 167, 3 Am. Dec. 212; Cary v. Allen, 39 Wis. 482; Hand v. Winton, 38 N. J. L. 122; Byers v. Martin, 2 Colo. 605; Williams v. Godkin, 5 Daly, 499; Williams v. Davenport, 42 Minn. 393, 18 Am. St. Rep. 519, 44 N. W. 311; Winchell v. Argus Co., 69 Hun, 354, 23 N. Y. Supp. 650.

pecuniary loss to him is *prima facie* a slander, if the publication be oral; and a libel, if it be by writing.[6]

§ 3906. **Gist of action.**—Pecuniary loss to the plaintiff is the gist of the action for slander or libel.[7] If the language published has not occasioned the plaintiff pecuniary loss, actual or implied, no action can be maintained. And actual loss must be shown to have been sustained.[8] Whether or not matter is libelous, so as to be actionable, depends upon the style, scope, spirit, and motive of the publication, taken in its entirety, and the inquiry is into the natural effect of it, not only upon the public generally, but upon the neighbors and friends of the person aimed at.[9] Evidence of pecuniary loss is unnecessary to a right of action for a libelous charge of attempt to commit murder.[10] A complaint which alleges in substance that defendant intended by the written publication complained of thereby to charge, and to have it understood and believed, that plaintiff was a person engaged in making accounts which he never paid or intended to pay, and was dishonest and wholly unfit and unworthy of credit, that said publication was understood by those to whom it was made as conveying such meaning and charge against the plaintiff, and that such publication was made without cause, and out of pure malice, sufficiently states a cause of action, as against a general demurrer.[11]

§ 3907. **Published.**—"Published," *ex vi termini*, imports a speaking in the presence of a third party.[12] And this averment is sufficient, without averring specially in the presence of others.[13] That the words were spoken would be sufficient, if accompanied by an averment implying publication to a third person.[14] Sending a defamatory letter, sealed, by mail to plaintiff, who reads it to another, is not a publication by the writer.[15]

6 Townshend on Slander and Libel, 68; Tonini v. Cevasco, 114 Cal. 266, 46 Pac. 103.

7 Townshend on Slander and Libel, 57.

8 Borthwrich on Libel, 4.

9 Moffat v. Cauldwell, 3 Hun, 26; Sanuerson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105.

10 Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345.

11 Ingraham v. Lyon, 105 Cal. 254, 38 Pac. 892.

12 Duel v. Agan, 1 Code Rep. 134.

13 Burton v. Burton, 3 G. Greene, 316.

14 Taylor v. How. Cro. Eliz. 861; Sesler v. Montgomery, 78 Cal. 486, 12 Am. St. Rep. 76, 21 Pac. 185, 3 L. R. A. 653.

15 Lyon v. Lash, 74 Kan. 75, 88 Pac. 262.

§ 3908. **Several liability.**—As a general rule, an action of slander will not lie against two persons, as every speaker must be sued separately,[16] although it seems that where the words are alleged to have been uttered in pursuance of a conspiracy between two or more defendants the action may be maintained.[17]

§ 3909. **Slander defined.**—Slander is the imputation—1. Of some temporal offense, for which the party may be indicted and punished in the temporal courts; 2. Of an existing contagious disorder, tending to exclude the party from society; 3. Of an unfitness to perform an office or employment of profit, or want of integrity in an office of honor; 4. Of words prejudicing a person in his lucrative profession or trade; 5. Of any untrue words occasioning actual damage;[18] slander being an unwritten or unprinted libel.[19] It is also defined to be "the publishing of words in writing or by speaking, by reason of which the person to whom they relate becomes liable to suffer some corporal punishment or to sustain some damage."[20] Slander is a private wrong or tort, cognizable by the common law, the remedy for which is a civil action, formerly known as an "action on the case for words," and now as "an action, or the action, of or for slander."[21]

Under the codes, slander is generally defined as a false and unprivileged publication other than libel, which—1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease; 3. Tends directly to injure him in respect to his office or business by imputing something therewith which tends to lessen his profits; 4. Imputes to him impotence or want of chastity; or 5. Which, by natural consequences, causes actual damage.[21a]

§ 3909a. **Allegations material.**—Libel is a false and unprivileged publication in writing, etc., which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him

16 Malone v. Stilwell, 15 Abb. Pr. 421.

17 1 Chit. Pl. 74; Bull. N. P. 5; Forsyth v. Edmiston, 2 Abb. Pr. 430.

18 1 Hilliard on Torts, ch. 7, p. 33.

19 1 Hilliard on Torts, ch. 7, p. 32.

20 Bac. Abr.

21 Townshend on Slander and Libel, 22.

21a Cal. Civ. Code, § 46.

in his occupation; and the existence of malice is not a necessary ingredient to entitle a recovery.[22] The material allegations in an action of libel, where the words are defamatory on their face, and in the English language, are—(1) that the defendant with malice or wrongfully (2) published, (3) of and concerning plaintiff, (4) these false words. In slander, instead of alleging, (2) "published," it is customary to allege "that he spoke in the presence and hearing of divers persons,"[23] although the word "published" imports, *ex vi termini*, a speaking in the presence and hearing of somebody.[24] From a libel, damage is always implied by law; whereas some kinds of slander only are actionable without proof of special damage.[25] The definition of libel in the code does not affect the mode of pleading in actions of this character.[25a]

§ 3909b. Allegations material—Intent—Motive.—There may or may not be any intent, good or bad; but intent or no intent, the liability is for the act and its consequences, not for the intent. The usual ground upon which the liability is placed is that the law presumes every one to intend the necessary and natural consequences of his acts.[26]

The intent with which the action is done is by no means the test of liability of a party to an action of trespass.[27] *Bona fides* will not protect a magistrate who does an illegal act.[28] It is immaterial with what motive a man does an unlawful act.[29] So an assault and battery, committed with a purpose to ridicule the plaintiff or bring him into contempt, partakes of the nature of libel; and in order to recover damages for the injury to reputation, as well as for that to the person, the complaint should be for assault and battery, but should aver intent to defame and injury to reputation in addition to the usual averments in actions

22 Mont. Civ. Code, § 32; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215; Byrne v. Funk, 38 Wash. 506, 80 Pac. 772.

23 Wood v. Gilchrist, 1 Code Rep. 117; Anonymous, 3 How. Pr. 406.

24 Duel v. Agan, 1 Code Rep. 134. See, also, Lettman v. Ritz, 3 Sandf. 734; Dehaix v. Lehind, 1 Code Rep. (N. S.) 235.

25 Wilson v. Fitch, 41 Cal. 363.

25a Dixon v. Allen, 69 Cal. 527, 11 Pac. 179. See Cal. Code Civ. Proc., § 461.

26 Haire v. Wilson, 9 Barn. & Cress. 643; Viele v. Gray, 10 Abb. Pr. 1; 1 Esp. N. P. Cas. 226; Root v. King, 7 Cow. 613.

27 Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234; Percival v. Hickey 18 Johns. 257, 9 Am. Dec. 210; Tremain v. Cohoes Co., 2 N. Y. 164, 51 Am. Dec. 284; Safford v. Wycoff, 1 Hill, 11. But see Edwards v. Burris, 60 Cal. 157.

28 Prickett v. Greatrex, 1 New Mag. Cas. 543; 7 Law Times, 139.

29 Amick v. O'Hara, 6 Blackf. 258.

for assault and battery.[30] Thus, averments of the business of the parties, that the assault was for the purpose of compelling the plaintiff to give up his business, and of bringing him into disgrace and ridicule, and that the assault, etc., caused him to be ridiculed by, etc., though not essential to a cause of action, are not immaterial. The motives and intent, and the consequences resulting, are material on the question of damages.[31]

§ 3910. Allegations material—Language set out.—The complaint should set out the very words published.[32] The true term to be used to indicate that the very words are set forth is "tenor."[33] It is not enough to state its purport;[34] and when the words were published in a foreign language, the foreign words must be set forth in the original,[35] together with a translation into English.[36] To set forth the foreign words alone, or their translation alone, is not sufficient.[37] The rule that the exact language used should be set out does not render it necessary to set forth the whole of the matter published,[38] but an extract of the particular passage complained of;[39] although it is not error for the court to require the complaint to be made more definite by incorporating copies of the entire article.[40] And if the whole article is set out and alleged to be false, it is not necessary to point out the portion of it which is charged to be libelous.[41] The specific words in which slander

30 Compare Sheldon v. Carpenter, 4 N. Y. 579, 55 Am. Dec. 301; Watson v. Hazzard, 3 Code Rep. 218.

31 Root v. Foster, 9 How. Pr. 37.

32 Wesley v. Bennett, 5 Abb. Pr. 498; Rundell v. Butler, 7 Barb. 260; Forsyth v. Edmiston, 2 Abb. Pr. 430; Finnerty v. Barker, 7 N. Y. Leg. Obs. 317; Sullivan v. White, 6 Ir. L. Rep. 40; Whitaker v. Freeman, 1 Dev. 271; Lee v. Kane, 6 Gray, 495; Taylor v. Moran, 4 Metc. (Ky.) 127; Commonwealth v. Wright, 1 Cush. 46; Branaman v. Hinkle, 137 Ind. 496, 37 N. E. 546; Germ-Proof Filter Co. v. Pasteur-Chamberland Filter Co., 81 Hun, 49, 30 N. Y. Supp. 584; Schubert v. Richter, 92 Wis. 199, 66 N. W. 107.

33 Commonwealth v. Wright, 1 Cush. 46; Wright v. Clements, 3 Barn. & Ald. 503.

34 Wood v. Brown, 6 Taunt. 169, 1 Eng. Com. Law, 560.

35 Zenobia v. Axtell, 6 T. R. 162.

36 Townshend on Slander and Libel, 412. See Schild v. Legler, 82 Wis. 73, 51 N. W. 1099; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

37 Wormouth v. Cramer, 3 Wend. 394; Lettman v. Ritz, 3 Sandf. 734; Keenholts v. Becker, 3 Denio, 346; Kerschbaugher v. Slusser, 12 Ind. 453; Hickley v. Grosjean, 6 Blackf. 351; Rahauser v. Schwerger Barth, 3 Watts, 28.

38 Deyo v. Brundage, 13 How. Pr. 221; Culver v. Van Anden, 4 Abb. Pr. 375; Rhodes v. Naglee, 66 Cal. 677, 6 Pac. 863.

39 Cheetham v. Tillotson, 5 Johns. 430. See Unterberger v. Scharff, 51 Mo. App. 102.

40 McClure v. Review Pub. Co., 38 Wash. 160, 80 Pac. 303.

41 Leonard v. McPherson, 146 Cal. 616, 80 Pac. 1084.

is conveyed must be set forth in the petition in an action of slander; and it is not sufficient to state the effect of the words merely, or to allege that the defendant charged the plaintiff with a particular crime.[42]

§ 3911. Subsequent usage.—In slander, allegations of a subsequent usage of the words complained of are inadmissible. A repetition may be proved without such allegation.[43] If after a recovery has been had in an action for slander or libel special damage occurs, no action can be maintained therefor. The first recovery is a bar to any subsequent action.[44] Ordinarily, the repetition of the language by another than the first publisher is not a natural consequence of the first publication, and, therefore, except in certain cases, the loss resulting from such repetition does not constitute special damage.[45]

§ 3912. Abatement of action.—By the common law, actions of tort die with the person; and this rule applies to actions for slander and libel, except in those states where a different rule is prescribed by the statute.[46] The action for slander of title does not so abate.[46a]

§ 3913. Capacity must be averred.—When the words charged bear relation to the plaintiff in his business or official capacity, such capacity should be averred in a traversable form in the complaint;[47] and the fact of his being engaged in such business or profession at the time the words were spoken should be alleged.[48] In such an action special damages need not be alleged.[49]

42 Taylor v. Moran, 4 Metc. (Ky.) 127; Schubert v. Richter, 92 Wis. 199, 66 N. W. 107.

43 Gray v. Nellis, 6 How. Pr. 290. As to action for repetition of slander, see Haines v. Campbell, 74 Md. 158, 28 Am. St. Rep. 240, 21 Atl. 702.

44 Townshend on Slander and Libel, 231; Cooke on Defamation, 24; Fittler v. Veal, Cas. K. B. 542.

45 Townshend on Slander and Libel, 233.

46 Townshend on Slander and Libel, 389. See 1 W. Saund. 316; Nettleton v. Dinehart, 5 Cush. 543, 544; Walford on Parties, 1392, 1449.

46a Cal. Civ. Code, § 954; Cal. Code Civ. Proc., § 1584.

47 2 Greenleaf on Evidence, § 412; Carroll v. White, 33 Barb. 615.

48 Carroll v. White, 33 Barb. 615. See Cal. Code Civ. Proc., § 460.

49 Butler v. Howes, 7 Cal. 87; McKenzie v. Denver Times, 3 Colo. App. 554, 34 Pac. 577. Compare Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555. As to the responsibility of an editor in respect to comments upon the manager of a theater, see Fry v. Bennett, 3 Bosw. 200, 5 Sandf. 54, 4 Duer, 247.

§ 3914. **Malice, how averred.**—Any form of words from which malice (absence of excuse) can be inferred, as that the publication was made falsely or wrongfully, will suffice;[50] for one meaning of malice is absence of legal excuse.[51] And a pleading may be sufficient without any special averment of malice.[52] So a declaration which charged the publication to be "malicious, injurious, and unlawful" was held sufficient.[53] The averments usual in old precedents—that defendant, well knowing the premises, etc., maliciously intending to injure plaintiff, etc., and to bring him into great scandal and disgrace, and to cause it to be believed that plaintiff had been guilty—are superfluous.[54] So, also, that defendant, on, etc., falsely and maliciously published, etc., the false, malicious, scandalous, and defamatory matter following, is unnecessary. An allegation that the publication was a libel has been held equivalent to an allegation that it was false and malicious.[55] In all cases where the facts are within the knowledge of the defendant, or the statement involved is in itself libelous, a general allegation of malice will be sufficient without any statement of facts and circumstances.[56] So express malice, or want of probable cause need not be averred.[57]

§ 3915. **Malice, when not implied.**—Under the statute of New York and those of other states, in actions against reporters, editors, and proprietors of newspapers for an alleged libel in the report of any judicial, legislative, or other public official proceeding, or of any statement, speech, argument, or debate in the course of the same, malice in publishing the report is not implied by the publication.[58] An accurate report in a newspaper of a debate in Parliament, containing matter disparaging an individual, is not actionable. The publication is privileged on the ground that the

50 Townshend on Slander and Libel, 410.

51 Townshend on Slander and Libel, 85.

52 Opdyke v. Weed, 18 Abb. Pr. 223, notes; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

53 Rowe v. Roach, 1 Mau. & Sel. 304.

54 Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253.

55 Hunt v. Bennett, 19 N. Y. 176. That legal malice may be inferred, see Lick v. Owen, 47 Cal. 252; Byam v. Collins, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. 75, 2 L. R. A. 129; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528. See Childers v. Publishing Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903.

56 Viele v. Gray, 10 Abb. Pr. 1; Howard v. Sexton, 4 N. Y. 157; Buddington v. Davis, 6 How. Pr. 401.

57 Purdy v. Carpenter, 6 How. Pr. 301; Littlejohn v. Greeley, 13 Abb. Pr. 41.

58 See Sandford v. Bennett, 24 N. Y. 20; Cal. Civ. Code, § 47.

advantage of publicity to the community outweighs any private injury; and comments in the newspaper on the debate are so far privileged that they are not actionable so long as they are honest, fair, and justified by the circumstances disclosed in the debate.[59] Malice becomes material only as a basis for greater damages, or in case of the defense of privileged publication, and the jury may infer malice from a libelous publication alone.[60]

§ 3916. Proprietor and publisher, liability of.—In a complaint for libel, it is a sufficient allegation of its publication by the defendant to allege that he was the proprietor of a newspaper in which it was published, without otherwise alleging that he published it or was concerned in its publication.[61] A receiver of a newspaper concern, pending a suit to settle the partnership accounts of its proprietors, will be personally responsible for any publication therein which is improper, although the order of his appointment directs that the defendants may continue to superintend the editorial department.[62] But the assignee of a newspaper establishment, as a collateral security, is not liable for a libel published in it.[63]

§ 3917. Publication, averment of.—Every communication of language from one to another is a publication; but to constitute an actionable publication it is essential that there be a publication to a third person, and the husband or wife of either author or publisher, or of the one whom or whose affairs the language concerns, is regarded as a third person.[64] A statement that the defendant was proprietor of a newspaper, and that the words

59 Wason v. Walter, L. R., 4 Q. B. 73. See, also, Ackerman v. Jones, 37 N. Y. Super. Ct. (5 J. & Sp.) 42; State v. Brady, 44 Kan. 435, 21 Am. St. Rep. 296, 24 Pac. 948, 9 L. R. A. 606; Moore v. Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127, 8 L. R. A. 214.

60 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

61 Hunt v. Bennett, 19 N. Y. 173; affirming 4 E. D. Smith, 647. See Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

62 Marten v. Van Schaick, 4 Paige, 479.

63 As to the general doctrine respecting the liability of publishers and proprietors of newspapers, booksellers, etc., see 2 Greenleaf on Evidence, § 416; 2 Starkie on Slander, 28-34; Dunn v. Hall, 1 Ind. 344.

64 Townshend on Slander and Libel, 90; Wilcox v. Moon, 64 Vt. 450, 33 Am. St. Rep. 936, 24 Atl. 244, 15 L. R. A. 76; Park v. Press Co., 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. 731, 1 L. R. A. 599. See Sesler v. Montgomery, 78 Cal. 486, 12

were published therein, is a sufficient averment of publication.[65] The publication must be alleged; it need not be set forth in any technical form of words,[66] but must be alleged positively, and not by way of recital.[67] The word "published" is the proper and technical term by which to allege publication,[68] but any equivalent allegation will suffice.[69] But to allege that defendant composed, wrote, and delivered a certain libel addressed to the plaintiff was held insufficient.[70] That defendant sent a letter to plaintiff, which was received and read by him, does not show a sufficient publication;[71] it is necessary to allege that it was in fact seen or read (by others).[72] So where the writer reads to a stranger his letter to the plaintiff, before dispatching it, it is a publication.[73]

§ 3918. Joinder of causes of action and parties.—It would seem that plaintiff may unite in one complaint a cause of action for slander with a cause of action for libel or for malicious prosecution.[74] But a cause of action in a plaintiff singly for slander of him in his partnership business cannot be joined with a cause of action in him and his partners jointly.[75] And where a complaint contains several causes of action, each must be separately stated and numbered,[76] and must be complete in itself.[77] Where several are included in the same libel, they may each maintain a separate action for the injury.[78] An action of libel lies against two or more, if the act be joint and be done by all.[79]

Am. St. Rep. 76, 21 Pac. 185, 3 L. R. A. 653.

65 Hunt v. Bennett, 4 E. D. Smith, 647; affirmed, 19 N. Y. 173.

66 Baldwin v. Elphinston, 2 W. Bl. 1037.

67 Donaghe v. Rankin, 4 Munf. 261.

68 Starkie on Slander, 359.

69 Townshend's Slander and Libel, 408; Baldwin v. Elphinston, 2 W. Bl. 1037; Waisted v. Holman, 2 Hall, 172; Hunt v. Bennett, 4 E. D. Smith, 647.

70 Waistel v. Holman, 2 Hall, 172. See Spaits v. Poundstone, 87 Ind. 522, 44 Am. Rep. 773.

71 Lyle v. Clason, 1 Caines, 581.

72 Giles v. State, 6 Ga. 276.

73 Snyder v. Andrews, 6 Barb. 43; M'Combs v. Tuttle, 5 Blackf. 431; Van Cleef v. Lawrence, 2 (N. Y.) City Hall Recorder, 41.

74 Martin v. Mattison, 8 Abb. Pr. 3; Hull v. Vreeland, 42 Barb. 543; 3 Bing. N. C. 950. Or for slander of title, see Cousins v. Merrill, 16 Up. Can. C. P. Rep. 114.

75 Robinson v. Marchant, 7 Q. B. 918.

76 Pike v. Van Wormer, 5 How. Pr. 171.

77 Holton v. Muzzy, 30 Vt. 365; Sinclair v. Fitch, 3 E. D. Smith, 689.

78 Smart v. Blanchard, 42 N. H. 137.

79 Thomas v. Rumsey, 6 Johns. 26; Glass v. Stewart, 10 Serg. & R. 222; Belo v. Fuller, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616.

Where a publication affects a class of persons, no individual of that class can maintain an action.[80] In libel, all who can concur in the publication may be sued together, though the general rule is otherwise as to slander, as words uttered by one are not the words of another.[81] But if one repeats, and another writes, and a third approves what is written, all are liable.[82] Partners may sue for libel upon them, in respect to their business, but can recover only for injury to their firm.[83] For a libel on partners, all the partners may sue together.[84]

§ 3919. **Privileged communications.**—As examples of communications which have been held to be privileged, are the following: A memorial to the postmaster-general, charging fraud against a successful candidate for a contract;[85] a physician granting a certificate of lunacy, pursuant to statute;[86] a charge preferred by one member of a lodge against another;[87] words spoken or written in a legal proceeding, pertinent and material to the subject of the controversy;[88] a written communication from a banker in the country to a mercantile firm in the city, in respect to the pecuniary responsibility of a party whose note had been forwarded for collection,[89] or a communication between officers of a corporation concerning an employee;[90] the withdrawal by an employer of a former recommendation of a discharged employee, unless it is shown to be malicious.[91] The publication of a slander by a murderer at the time of his execution is not privileged.[92] So proceedings before a grand jury are not privileged.[93] The comments on privileged communications are

80 White v. Delavan, 17 Wend. 49. But see Ryckman v. Delavan, 25 Wend. 186; Hardy v. Williamson, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874. That any one of the class may maintain an action, see Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 43 Pac. 112, 35 L. R. A. 611.

81 Forsyth v. Edmiston, 2 Abb. Pr. 430.

82 Thomas v. Rumsey, 6 Johns. 26.

83 Taylor v. Church, 1 E. D. Smith, 279.

84 Taylor v. Church, 8 N. Y. 452. See Taylor v. Church, 1 E. D. Smith, 279.

85 Cook v. Hill, 3 Sandf. 341; Buddington v. Davis, 6 How. Pr. 401.

86 Perkins v. Mitchell, 31 Barb. 461. See Cal. Civ. Code, § 47, subd. 1.

87 Streety v. Wood, 15 Barb. 105.

88 Garr v. Seldon, 4 N. Y. 91; Perkins v. Mitchell, 31 Barb. 461.

89 Lewis v. Chapman, 16 N. Y. 369; reversing 19 Barb. 252.

90 Denver Rub. Warehouse Co. v. Holloway, 34 Colo. 432, 114 Am. St. Rep. 171, 83 Pac. 131, 3 L. R. A. (N. S.) 696; Cal. Civ. Code, § 47, subd. 3.

91 Fowles v. Bowen, 30 N. Y. 20.

92 Sanford v. Bennett, 24 N. Y. 20.

93 McCabe v. Cauldwell, 18 Abb. Pr. 377 But see Cal. Civ. Code, § 47, subd. 2.

not protected, if libelous themselves.[94] So a statement made by one elector of another, imputing a crime to one of the candidates for office, is not a privileged communication.[95] The defendant, in a privileged communication described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it. It was held that such words were not of themselves evidence of actual malice.[96] If a newspaper account is quasi-privileged, as an account of plaintiff's arrest, trial, and acquittal on a charge of burglary, the publisher is not liable in the absence of any indications of malice.[97] An offer to convince plaintiff before his friends, by means of the public records, that plaintiff is a liar, is going beyond privilege, even when made of a public officer in answer to personal attacks upon defendant.[98] A district attorney conducting a criminal case in a justice's court does not have the privilege of charging opposing counsel with perjury or subornation of perjury.[99]

§ 3920. **Satire.**—The distinction between the satirist and the libeler is that one speaks of the species, the other of the individual.[100] So an action for libel will only lie upon words concerning distinguishable persons, and cannot be brought upon words which relate to a class or order of men.[101] But it must

94 Edsall v. Brooks, 26 How. Pr. 426, 17 Abb. Pr. 221.

95 Jarman v. Rea, 137 Cal. 339, 70 Pac. 216.

96 Spill v. Maule, L. R., 4 Exch. 232. For additional communications which are deemed privileged, see Ackerman v. Jones, 37 N. Y. Super. Ct. (5 J. & Sp.) 42; Rude v. Nass, 79 Wis. 321, 24 Am. St. Rep. 717, 48 N. W. 555; Runge v. Franklin, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. 721, 3 L. R. A. 417; Byam v. Collins, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. 75, 2 L. R. A. 129. As to liability of proprietors of a mercantile agency for statements respecting the financial standing and credit of a merchant, see Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322, where it is held they are liable for a false report, though made in good faith. For a case depending upon special facts, see Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360. See, also, Bradstreet Co. v. Gill, 72 Tex. 115, 13 Am. St. Rep. 768, 9 S. W. 753, 2 L. R. A. 405; Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77. That complaint need not aver the alleged libelous publication was not privileged, see Dixon v. Allen, 69 Cal. 527, 11 Pac. 179. See, also, Gudger v. Penland, 108 N. C. 593, 23 Am. St. Rep. 73, 13 S. E. 168.

97 McClure v. Review Pub. Co., 38 Wash. 160, 80 Pac. 303; Cal. Civ. Code, § 47, subd. 4.

98 Byrne v. Funk, 38 Wash. 506, 80 Pac. 772.

99 Carpenter v. Ashley, 148 Cal. 422, 83 Pac. 444.

100 2 Joseph Andrews, p. 5.

101 Sumner v. Buell, 12 Johns. 475.

be manifest upon the face of the publication that the charges made were intended against a class, profession, or order of men, and cannot by possibility impart a personal application tending to private injury.[102]

§ 3921. **Special damages.**—Those damages which are not the necessary consequence of the language complained of must be specially alleged in the complaint.[103] But a complaint in an action for words in writing charging insanity need not allege special damage.[104] So in an action by one of several partners.[105] An action cannot be maintained by an author for a publication disparaging his copyright work, without an allegation of special damages.[106] Special damages consist in the loss of marriage, loss of consortium of husband and wife, loss of emoluments, profits, customers, employment, or gratuitous hospitality, or by being subjected to any other inconvenience or annoyance occasioning or involving a pecuniary loss.[107] Mere apprehension of loss is not such special damage as will maintain an action.[108] Mental distress, physical illness, and inability to labor, occasioned by the aspersion of words not in themselves actionable, are not grounds for special damages.[109]

§ 3922. **Special damages must be alleged.**—Special damages, or those damages which are not the necessary consequence of the language complained of, must be specially alleged in the complaint.[110] A pecuniary loss must be shown to entitle the plain-

102 Ryckman v. Delavan, 25 Wend. 186; reversing White v. Delavan, 17 Wend. 50. See Slayton v. Hemken, 36 N. Y. Supp. 249.

103 Squier v. Gould, 14 Wend. 159; Birch v. Benton, 26 Mo. 155; Johnson v. Robertson, 8 Port. (Ala.) 486; Barnes v. Trundy, 31 Me. 321; Bostwick v. Nickelson, Kirby, 65; Bostwick v. Hawley, Kirby, 290; Shipman v. Burrows, 1 Hall, 399; Harcourt v. Harrison, 1 Hall, 474; Wilson v. Runyon, Wright, 651. See Stewart v. Tribune Co., 40 Minn. 101, 12 Am. St. Rep. 696, 41 N. W. 475; McDuff v. Detroit Evening Journal Co., 84 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. 671.

104 Perkins v. Mitchell, 31 Barb. 461; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051.

105 Robinson v. Marchant, 7 Q. B. 918.

106 Swan v. Tappan, 5 Cush. 104.

107 Townshend on Slander and Libel, 227.

108 Townshend on Slander and Libel, 230; Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Wilson v. Goit, 17 N. Y. 442.

109 Cases of Bradt v. Towsley, 13 Wend. 253, and Fuller v. Fenner, 16 Barb. 333; overruled by Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420, and Wilson v. Goit, 17 N. Y. 442.

110 Townshend on Slander and

tiff to a remedy.[111] The objections that allegations of special damage—e. g. in an action for slander—are not sufficiently specific cannot be raised by demurrer, but only by motion to make more specific.[112] Mental suffering entitles the plaintiff to compensation in an action for slander, and the damages may be enhanced by the fact that the members of the plaintiff's family would suffer by reason of the disgrace imposed upon the plaintiff by the slanderous charge.[113]

In an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, the jury may assess damages for a general loss or decrease of trade. As a general rule, the customers so lost should be named.[114] The loss of a customer is special damage, although if the dealing had taken place the plaintiff would have lost by it.[115]

When the words are in their natural and obvious construction injurious, some damage is to be presumed, and it is not essential to allege special damage; but when the court can discern no injurious meaning in the plain and natural purport of the publication itself, the plaintiff must aver and prove special damage.[116]

§ 3923. **Exemplary damages.**—If the injury was willful or intentional, if the express malice is proved, the jury are at liberty to award damages, not only to compensate the actual and pecuniary loss upon the ground of compensation for mental suffering, public disgrace, etc., but they may further award exemplary dam-

Libel, 428, citing various authorities. See Frolich v. McKiernan, 84 Cal. 177, 24 Pac. 114.

111 Beach v. Ranney, 2 Hill, 309; Herrick v. Lapham, 10 Johns. 281; Hallock v. Miller, 2 Barb. 630; Hersh v. Ringwalt, 3 Yeates, 508, 2 Am. Dec. 392.

112 Hewitt v. Mason, 24 How. Pr. 366.

113 Cahill v. Murphy, 94 Cal. 29, 28 Am. St. Rep. 88, 30 Pac. 195; Childers v. San Jose etc. Pub. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903.

114 Mayne on Damages, 278, 317; 2 Phillips on Evidence, 248; Feise v. Linder, 3 Bos. & Pul. 372; Tobias v. Harland, 4 Wend. 537; Hallock v. Miller, 2 Barb. 630.

115 Storey v. Challands, 8 Car. & P. 234. For cases on the subject of averring special damages in actions of slander, see Hallock v. Miller, 2 Barb. 630; Keenholts v. Becker, 3 Denio, 346; Beach v. Ranney, 2 Hill, 309; Herrick v. Lapham, 10 Johns. 281; Olmstead v. Miller, 1 Wend. 506; Sewall v. Catlin, 3 Wend. 291; Williams v. Hill, 19 Wend. 305; Shipman v. Burrows, 1 Hall, 399; Harcourt v. Harrison, 1 Hall, 474; Ledlie v. Warren, 17 Mont. 150, 42 Pac. 289. For averment of special damages, see Turner v. Foxhall, 2 Cranch C. C. 324, Fed. Cas. No. 14255.

116 Caldwell v. Raymond, 2 Abb. Pr. 193; Stone v. Cooper, 2 Denio, 299; Bennett v. Williamson, 4 Sandf. 60.

ages.[117] In case of gross negligence in publishing, it is error to instruct a jury that mere nominal damages may be awarded for an admitted libel tardily retracted.[118]

§ 3924. **Extrinsic facts.**—Where the actionable quality of language depends upon the capacity of the plaintiff, and the language itself does not disclose that he is in such capacity or occupation, an averment that plaintiff is of such a trade or profession will be sufficient. But where the language is actionable of the plaintiff as an individual also, it is not necessary to allege an inducement.[119] When the words used by the defendant do not of themselves convey the meaning which the plaintiff would attribute to them, and such meaning results only from some extrinsic matter or fact, such extrinsic matter or fact must be alleged in the complaint and proved on the trial. It is therefore necessary for the plaintiff in such case distinctly to aver the extrinsic fact upon which he relies to make the publication libelous.[120] Where the publication is not defamatory on its face, the existence of extrinsic facts rendering it defamatory must be alleged.[121] But where it is not essential, such statement would be mere surplusage.[122] By the statute, it is no longer necessary to state an inducement, in California, in New York, and in Missouri.[123] In Massachusetts, "a distinct averment in regard to the person spoken of, and a clear reference of the calumnious words to that person," is all that is required.[124] In Utah, it is sufficient to state generally that the defamatory matter was published concerning the plaintiff, and, if such allegation be controverted, the plaintiff on the trial must establish that it was so published.[125]

117 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215; Graybill v. De Young, 140 Cal. 323, 73 Pac. 1067.

118 Turner v. Hearst, 137 Cal. 232, 70 Pac. 18.

119 Townshend on Slander and Libel, 400; Gage v. Robinson, 12 Ohio, 250.

120 Caldwell v. Raymond, 2 Abb. Pr. 193. See, also, Cass v. Anderson, 33 Vt. 182; Carter v. Andrews, 16 Pick. 1.

121 Pike v. Van Wormer, 5 How. Pr. 171, 6 How. Pr. 99; Fry v. Bennett, 5 Sandf. 54; Dias v. Short, 16 How. Pr. 322; Blaisdell v. Raymond, 4 Abb. Pr. 446; Carroll v. White, 33 Barb. 615; Culver v. Van Anden, 4 Abb. Pr. 375.

122 Townshend on Slander and Libel, 397.

123 Stieber v. Wensel, 19 Mo. 513. As to Wisconsin, see Van Slyke v. Carpenter, 7 Wis. 173; Cal. Code Civ. Proc., § 460.

124 Miller v. Parish, 8 Pick. 384; Starkie on Slander, 390.

125 Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 43 Pac. 112, 35 L. R. A. 611; Cal. Code Civ. Proc., § 460.

§ 3925. Innuendo.—The office of an innuendo is to explain, not to extend, what has gone before, and it cannot enlarge the meaning of words unless it be connected with some matter of fact expressly averred.[126] An innuendo serves to explain precedent matter, but never to establish a new charge or change the sense of previous words.[127] Nor can it change the ordinary meaning of language,[128] nor introduce new matter.[129] It is only a link to attach together facts already known to the court.[130] It cannot attribute to words a meaning which renders them actionable,[131] without a prefatory averment of extrinsic facts which makes them slanderous.[132] The use of innuendoes is in part retained and in part dispensed with under our system of pleading. If the words used are not libelous *per se*, but are made so by some extrinsic matter alleged by way of inducement, innuendoes are necessary to show the connection of such words with the intrinsic facts. So, also, where the publication is made libelous by reference to extrinsic matter not necessary to be alleged. In such cases the extrinsic fact should be suggested by an innuendo. Where words are not libelous *per se* the extraneous facts must be stated in the introduction or inducement; as an innuendo cannot extend, but can only apply, the words.[133] The employment of the innuendo will be indulged where the convenience of pleading demands it, though in some cases it may not be strictly proper.[134]

§ 3926. Innuendoes, when not essential.—When the language is not in itself applicable to the plaintiff, no innuendo can make it so.[135] But if the plaintiff is designated by another name in the libel, his real name may be designated by an innuendo.[136]

126 Patterson v. Edwards, 2 Gilm. 720; Van Vechten v. Hopkins, 5 Johns. 211, 4 Am. Dec. 339; Brown v. Moore, 35 N. Y. Supp. 736, 90 Hun, 169.

127 Cole v. Neustadter, 22 Or. 191, 29 Pac. 550; Bell v. Publishing Co., 3 Abb. N. C. 157; Grand v. Dreyfus, 122 Cal. 58, 54 Pac. 389.

128 Hays v. Mitchell, 7 Blackf. 117.

129 Nichols v. Packard, 16 Vt. 83; Weir v. Hoss, 6 Ala. 881.

130 Cooke on Defamation, 94.

131 Holton v. Muzzy, 30 Vt. 365.

132 Watts v. Greenlee, 2 Dev. 115; Brown v. Brown, 14 Me. 317; Beswick v. Chappel, 8 B. Mon. 486; Dottarer v. Bushey, 16 Pa. St. 207; Watson v. Hampton, 2 Bibb. 319.

133 Nichols v. Packard, 16 Vt. 83; Brown v. Brown, 14 Me. 317; Harris v. Burley, 8 N. H. 256; Linville v. Earlywine, 4 Blackf. 469; Tappan v. Wilson, 7 Ohio, 190, pt. 1; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

134 See Blaisdell v. Raymond, 4 Abb. Pr. 446; Caldwell v. Raymond, 2 Abb. Pr. 193; De Witt v. Wright, 57 Cal. 576; Stewart v. Wilson, 23 Minn. 449; Wallace v. Bennett, 1 Abb. N. C. 478.

135 Townshend on Slander and Libel, 114, 426.

136 Hays v. Brierly, 4 Watts, 392.

Where it is desired to connect the words charged with the colloquium, or to show the meaning imputed to words libelous *per se*, we consider that innuendoes may be dispensed with; and it will always be unsafe to rely on an innuendo, unsupported by a distinct prefatory averment, to show a libelous meaning not evident from the words used.[137]

§ 3927. **Letter.**—A complaint which alleges that defendant sent a letter to plaintiff, and that the same was, by means of such sending thereof, received and read by plaintiff, and thereby published by plaintiff, is not good; for the letter is presumed to be sealed, and sending a letter is not publication.[138] But reading aloud a letter containing libelous matter amounts to publication.[139]

§ 3928. **Libelous imputations.**—Among imputations which are libelous, are the following: An imputation of the receipt of money for procuring a public appointment; an imputation of insanity;[140] an imputation of corruption against a member of the legislature;[141] a statement of the keeper of an intelligence office reflecting on the business capacity of the partners of a mercantile firm.[142]

§ 3929. **Libelous intent and meaning.**—Where a complaint only averred a libelous intent and meaning on the part of the defendant in the composing and publishing of the words, without averring that they were so understood by those to whom they were published, a demurrer to the complaint on the ground that the written and published words set forth do not constitute a libel should be sustained.[143] If the persons to whom the words were spoken are shown to have known the facts constituting the inducement, they may testify as to what they understood the words spoken to mean.[144]

137 As to proof of libelous meaning by extraneous evidence, and as to sufficiency of innuendo drawn, see Wachter v. Quenzer, 29 N. Y. 547; Butler v. Wood, 10 How. Pr. 222.

138 Lyle v. Clason, 1 Caines, 581.

139 Snyder v. Andrews, 6 Barb. 43; Moore v Francis, 121 N. Y. 199, 18 Am. St. Rep. 810, 23 N. E. 1127, 8 L. R. A. 214.

140 Perkins v. Mitchell, 31 Barb. 461.

141 Littlejohn v. Greeley, 13 Abb. Pr. 41.

142 Taylor v. Church, 8 N. Y. 451. See, further, Townshend on Slander and Libel.

143 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

144 Jarman v. Rea, 137 Cal. 339, 70 Pac. 216.

§ 3930. Of and concerning plaintiff.—Although inducement may be necessary to explain the matter alleged to be libelous, it is enough to state in the declaration that the publication was "of and concerning" the plaintiff.[145] The court assumes the words complained of do in fact refer to the plaintiff.[146] By section 460 of the California Code of Civil Procedure, the averment that the same was published concerning the plaintiff supplies the place of all averments of extrinsic facts which might otherwise be necessary to show the application of the words charged to the plaintiff. This averment is essential, and cannot be supplied by an innuendo.

It is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff on the trial must establish that it was so published or spoken.[147] A general averment that the defamatory matter was published of and concerning the plaintiff is not sufficient, if other allegations setting forth the cause of action show that it was not of and concerning him.[148]

§ 3931. Reputation—Character.—Reputation is the estimate in which an individual is held by public fame in the place where he is known;[149] and it is not necessary to prefix the word "general."[150] The words "character" and "reputation," though often used synonymously, are in fact not synonymous.[151] "Character" is a term convertible with common report.[152] "General char-

145 Townshend on Slander and Libel, 406; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

146 Wesley v. Bennett, 5 Abb. Pr. 498.

147 Cal. Code Civ. Proc., § 460; Mont. Code Civ. Proc., § 751; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215. See, also, N. Y. Code 1877, § 535; Or. B. & C. Codes, § 91; 1 Whitt. Pr. 697; Van Santv. Pl. 271; Craig v. Pueblo Press Pub. Co., 5 Colo. App. 208, 37 Pac. 945; Fenstermaker v. Tribune Pub. Co., 12 Utah, 439, 43 Pac. 112, 35 L. R. A. 611; Petsch v. Dispatch Co., 40 Minn. 291, 41 N. W. 1034; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Wellman v. Sun Printing etc. Assoc., 66 Hun, 331, 21 N. Y. Supp. 577.

148 Fleischmann v. Bennett, 23 Hun, 200, 11 N. Y. 231.

149 Cooper v. Greeley, 1 Denio, 347.

150 French v. Millard, 2 Ohio St. 50.

151 Bucklin v. State, 20 Ohio, 18; French v. Millard, 2 Ohio St. 50. That they are the same, see Kimmel v. Kimmel, 3 Serg. & R. 337, 8 Am. Dec. 655.

152 Id.

acter" is the estimation in which a person is held in the community where he resides.[153] It is the result of general conduct.[154] "Chaste character" means actual personal virtue, not actual reputation.[155]

§ 3932. **Words with covert meaning.**—Words which on their face appear to be entirely harmless may, under certain circumstances, convey a covert meaning wholly different from the ordinary and natural interpretation usually put upon them. To render such words actionable, it is necessary for the pleader to aver that the author of the libel intended them to be understood, and that they were in fact understood, by those who read them, in their covert sense.[156] And when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by facts outside and independent of the publication itself, the knowledge of such facts must be shown by averment to have existed in the breast of the defendant at the time of the publication.[157]

§ 3933. **Ambiguous words.**—Where words are ambiguous and uncertain in their meaning, the complaint must allege such circumstances as will show that they were uttered with a slanderous intent.[158]

§ 3934. **Averments in complaint.**—The New York code has changed the common-law rule of pleading in actions of slander in one particular; that is, although it may be uncertain to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averment showing that they were intended to apply to the plaintiff.[159] So in California; but the averments necessary in common-law pleading to show the meaning

153 See Douglass v. Tousey, 2 Wend. 354, 20 Am. Dec. 616.

154 Sharp v. Scogin, Holt N. P. 541, 3 Am. Law J. (N. S.) 145.

155 Carpenter v. People, 8 Barb. 603; Crozier v. People, 1 Park. Cr. Rep. 453; Safford v. People, Park. Cr. Rep. 474.

156 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672. See, also, Rundell v. Butler, 7 Barb. 260; Wesley v. Bennett, 5 Abb. Pr. 498; Carroll v. White, 33 Barb. 618.

157 Smith v. Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216; Dexter v. Spear, 4 Mason, 115, Fed. Cas. No. 3867; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

158 Pike v. Van Wormer, 5 How. Pr. 171, 6 How. Pr. 99.

159 Pike v. Van Wormer, 6 How. Pr. 99.

of the words must still be made.[160] A complaint which avers that defendant spoke certain words of and concerning the plaintiff, and setting forth the words which appear actionable *per se*, sufficiently states a cause of action.[161]

§ 3935. **Chastity.**—Ordinarily, and in the absence of any statutory provision, words published orally charging a woman with want of chastity are not actionable *per se*.[162] Imputing want of chastity, special damage being averred, to an unmarried female is actionable;[163] also, as against a man,[164] or a married woman.[165] In California, the common-law rule that charging a want of chastity is not actionable *per se* has been changed by the code, whether the words are spoken of a man or woman.[166]

§ 3936. **Continuando.**—In complaint for slander the words spoken should not be alleged with a continuando. Slanderous words spoken at one time constitute one cause of action. The same or other slanderous words spoken at other times constitute other causes of action, but, if relied on, they should be separately pleaded, in separate paragraphs.[167]

§ 3937. **Counts in complaint.**—It is allowable to include in the same declaration divers distinct words of slander of different import.[168] But a new count for another slander cannot be added after the right of action has been barred by the statute of limitations.[169] Under the old rule, the plaintiff was held to strict proof of the words as charged in the declaration; and to meet this rule it was necessary to state the words in a variety of counts adapted to the evidence relied on.[170] Where distinct causes of action upon a charge of slander are not separately

160 Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

161 Malone v. Stilwell, 15 Abb. Pr. 421.

162 Townshend on Slander and Libel, 175 et seq.

163 Fuller v. Fenner, 16 Barb. 333.

164 Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420.

165 Wilson v. Goit, 17 N. Y. 442; Olmstead v. Brown, 12 Barb. 657; Klein v. Hentz, 2 Duer, 633.

166 Cal. Civ. Code, § 46; Hitchcock v. Caruthers, 82 Cal. 523, 23 Pac. 48. See Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Kelley v. Flaherty, 16 R. I. 234, 27 Am. St. Rep. 739, 14 Atl. 876.

167 Swinney v. Nave, 22 Ind. 178.

168 Hall v. Nees, 27 Ill. 411.

169 Smith v. Smith, 45 Pa. St. 403.

170 See Olmstead v. Miller, 1 Wend. 506; Aldrich v. Brown, 11 Wend. 596; Keenholts v. Becker, 3 Denio, 346; Fox v. Vanderbeck, 5 Cow. 513; Howard v. Sexton, 4 N. Y. 157; Rundell v. Butler, 7 Barb. 260.

stated, or not stated with sufficient certainty, these defects are waived by a general demurrer.[171]

§ 3938. **Damages.**—In an action for slander, where words are charged to have been spoken of and concerning a plaintiff as a clerk or tradesman, which it is alleged was his profession, it is unnecessary to allege special damages.[172] Injury is presumed to ensue therefrom, and affords ground for the allowance of at least nominal damages; but if there is no suggestion in the complaint of damages as to an individual, but only as to his business or profession, the recovery is limited to damage to the business.[173]

§ 3939. **Disease.**—With respect to the charge of having a disease, it is actionable to charge having certain diseases, but it has been held not actionable to charge one with having had such diseases.[174] Thus, that a married woman has (in the present tense) a venereal disease;[175] that a man has a venereal disease.[176]

§ 3940. **Entire conversation.**—A count of a petition in an action for slander which sets out the entire conversation in which the slander was spoken contains only one cause of action, although the conversation consists of several parts, each of which is actionable.[177] A complaint in an action for slander which states that the words contained therein are those which the defendant spoke concerning the plaintiff is good, although the style of such words is unusual for a conversation.[178]

§ 3941. **Essential averments.**—In an action for slander, it should be alleged that the defendant spoke the words in the presence and hearing of divers persons. To allege a speaking merely is not sufficient.[179] But in Indiana, by statute, it is suffi-

171 Clugston v. Garretson, 103 Cal. 441, 37 Pac. 469.

172 Butler v. Howes, 7 Cal. 87; Frolich v. McKiernan, 84 Cal. 177, 24 Pac. 114.

173 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

174 Townshend on Slander and Libel, 184; Cal. Civ. Code, § 46, subd. 2.

175 Williams v. Holdredge, 22 Barb. 396.

176 Hewitt v. Mason, 24 How. Pr. 366.

177 Cracraft v. Cochran, 16 Iowa, 301.

178 Hull v. Vreeland, 42 Barb. 543.

179 Style, 70; Starkie on Slander, 360.

cient merely to allege the speaking.[180] Or it is sufficient to allege, "in the hearing of certain persons," naming them;[181] or of certain persons named, and divers others, not naming the others.[182]

§ 3942. **Husband and wife.**—By the statute of New York of 1860 and 1862, a married woman may sue alone and without her husband for slander or libel; and so in Pennsylvania.[183] But a wife cannot sue her husband for slander.[184] If there be no statutory provision to govern such actions, the action should be brought in the name of both husband and wife.[185] And if the husband dies, the action survives to the wife; but if the wife dies before verdict, the action abates.[186] If the words concerning a married woman are actionable because of special damage to the husband, the husband must sue alone,[187] even if the husband and wife live apart under a deed of separation.[188] So for a charge of joint larceny, the husband should sue alone.[189] Where the language published concerns both husband and wife, the husband may sue alone for the injury to him, and the husband and wife may sue jointly for the injury to the wife.[190] For a publication by a married woman, the action must be against her and her husband.[191]

§ 3943. **Joinder of actions.**—A cause of action against the husband for the wrongful act of his wife cannot be joined with a cause of action against him for his own wrongful act. Thus, where the complaint in an action against husband and wife stated a cause of action for slanderous words of the wife, and a further cause of action for slanderous words of the husband,

180 Guard v. Risk, 11 Ind. 156.

181 Burbank v. Horn, 39 Me. 233.

182 Bradshaw v. Perdue, 12 Ga. 510; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489. See Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

183 Rangler v. Hummel, 37 Pa. St. 130. See, also, N. Y. Code, § 450.

184 Freethy v. Freethy, 42 Barb. 641; Tibbs v. Brown, 2 Grant. Cas. 39.

185 Starkie on Slander, 349; Newton v. Rowe, 8 Sc. L. R. 26; Dengate v. Gardiner, 4 Mee. & W. 5; Sayre, 33; Baldwin v. Flower, 3 Mod. 120; Long v. Long, 4 Pa. St. 29.

186 Stroop v. Swarts, 12 Serg. & R. 76. See Style, 138.

187 Saville v. Sweeney, 4 Barn. & Adol. 514; Long v. Long, 4 Pa. St. 29; Starkie on Slander, 351; Fort. 377; 1 Lev. 140; Klein v. Hentz, 2 Duer, 633.

188 Beach v. Rannev, 2 Hill, 309. See Townshend on Slander and Libel, 390. But see Cal. Code Civ. Proc., § 370, subd. 3.

189 Bash v. Sommer, 20 Pa. St. 159.

190 Id.

191 5 Car. & P. 484; 2 Wils. 227; Style, 349; 2 W. Saund. 117.

it was held that the two causes of action were improperly joined.[192]

§ 3944. **Jurisdiction.**—The court has jurisdiction in an action of slander, although the slanderous words were spoken in another state.[193]

§ 3945. **Language in part slanderous.**—Where the complaint sets out language used on a single occasion, a part of which is slanderous and the rest is not, the latter portion will not be stricken out as irrelevant. Though it may not be necessary to allege in the complaint all that was said at the time, it is proper to do so.[194] Plaintiff was not bound, however, to prove all the words charged. If he proved some of them, and those proved were actionable, it was enough.[195] And different sets of words importing the same charge, and laid as spoken at the same time, might under the former practice be included in the same count.[196] If any of the words are actionable, judgment must be for the plaintiff.[197]

§ 3946. **Place and time.** — The place[198] or time of speaking the words [199] is not material; but it must be prior to the commencement of the action.[200]

§ 3947. **Presence and hearing, allegation of.**—The words used must be alleged as having been spoken of and concerning the plaintiff, in the presence and hearing of some person or persons.[201] And the plaintiff may amend on the trial, if defendant is not misled. It is a sufficient allegation in a complaint in an action for slander to show that the words were spoken in the presence and hearing of some person or persons; to state that in

192 Malone v. Stilwell, 15 Abb. Pr. 421.

193 Hull v. Vreeland, 42 Barb. 543.

194 Deyo v. Brundage, 13 How. Pr. 221; Root v. Lowndes, 6 Hill, 518, 41 Am. Dec. 762.

195 Loomis v. Swick, 3 Wend. 205; Purple v. Horton, 13 Wend. 9, 27 Am. Dec. 167. Compare, also, Dioyt v. Tanner, 20 Wend. 190; Genet v. Mitchell, 7 Johns. 120.

196 Rathbun v. Emigh, 6 Wend. 407; Milligan v. Thorn, 6 Wend. 412.

197 Edds v. Waters, 4 Cranch C. C. 170, Fed. Cas. No. 4275.

198 Jefferies v. Duncombe, 11 East, 226.

199 Potter v. Thompson, 22 Barb. 87.

200 Taylor v. Surgingger, 2 Rep. Con. Ct. 367.

201 Anonymous, 3 How. Pr. 406; Wood v. Gilchrist, 1 Code Rep. 117.

certain conversations or discussions defendant did publish, declare, etc., is sufficient, as these words sufficiently imply the presence of hearers, and indicate that the declarations were public and notorious.[202] An allegation on information and belief that on a certain day the defendant spoke in the presence of certain named persons the slanderous words complained of is held sufficient.[203]

§ 3948. **Presumption of malice.**—Where the occasion upon which the words for which an action of slander is brought were spoken repels any presumption of malice, and proof of it is necessary to maintain the action, it is sufficient to aver that they were spoken maliciously, without setting forth in the complaint the facts and circumstances which show the existence of malice.[204] The presumption of malice arising from the use of words libelous *per se* is overcome if the relationship of the sender and receiver is such as to make it privileged.[205] An allegation that the defamatory words spoken of the plaintiff "were false" implies malice on the part of the defendant, and it is not necessary to allege and prove in the first instance that the words were spoken with malice.[206]

When the words published are unambiguous, and not capable of being understood in any other sense than as defamatory to an extent that must necessarily expose the plaintiff to contempt and ridicule, they are by implication of law malicious. It is not necessary to allege in the complaint that the publication was false and malicious. Such an allegation, though common and quite proper, is a mere matter of form, the lack of which is no objection to a pleading.[207] That the words are "libel" is a sufficient allegation of falsehood and malice.[208] So a general averment of malice is sufficient.[209] In an action for libel, it is not indispensable to use the word "maliciously" in the declara-

202 Hurd v. Moore, 2 Or. 85. See Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

203 McKinney v. Roberts, 68 Cal. 192, 8 Pac. 857.

204 Viele v. Gray, 10 Abb. Pr. 1.

205 Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627.

206 Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

207 Hunt v. Bennett, 19 N. Y. 173; Root v. King, 7 Cow. 613; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

208 See above authorities, and Fry v. Bennett, 5 Sandf. 54; Viele v. Gray, 18 How. Pr. 550.

209 Purdy v. Carpenter, 6 How. Pr. 361.

tion. It is sufficient if words of equivalent power or import are used.[210]

§ 3949. **Foreign language.**—Where the slanderous words were spoken in a foreign tongue, they should be set out in the complaint in the original language, accompanied by an averment of their meaning in English, and it should also be alleged that the persons present understood the language used.[211] The complaint is, however, amendable in this respect upon terms.[212] In the case of foreign words, it must be alleged that the persons present understood them.[213] But in Ohio it is held where words are spoken in German, in a German country, it will be presumed that they were understood.[214]

§ 3950. **Ambiguity.**—Where the words themselves are ambiguous, and do not necessarily impute a crime, the innuendo cannot enlarge the meaning of the words spoken beyond the averment of the intention by which the speaking of the words is introduced.[215] It may be averred that the defendant, by means of the words, insinuated and meant to be understood by the hearers as charging the plaintiff with the crime imputed.[216] But if the words are unambiguous, such averment is unnecessary.[217] The actionable words being in the vernacular of the place of publication, and unambiguous, an allegation that they were understood by the persons who heard them to have been applied to the plaintiff is unnecessary.[218] And where the in-

210 White v. Nicholls, 3 How. 266, 11 L. Ed. 591.

211 Keenholts v. Becker, 3 Denio, 346; Wormouth v. Cramer, 3 Wend. 394; Lettman v. Ritz, 3 Sandf. 734; Amann v. Damm, 8 Com. B. (N. S.) 597.

212 Lettman v. Ritz, 3 Sandf. 734.

213 Wormouth v. Cramer, 3 Wend. 394; Starkie on Slander, 360; Zeig v. Ort, 3 Pin. (Wis.) 30; 3 Chand. (Wis.) 26; Amann v. Damm, 8 Com. B. (N. S.) 597.

214 Bechtel v. Shatler, Wright, 107.

215 Weed v. Bibbins, 32 Barb. 315. See Fry v. Bennett, 5 Sandf. 54. As to the office of the innuendo as employed prior to the New York code, consult Mott v. Comstock, 7 Cow. 654, 658; Tyler v. Tillotson, 2 Hill, 507; Butler v. Wood, 10 How. Pr. 222; Tillotson v. Cheatham, 3 Johns. 56, 3 Am. Dec. 459; Van Vechten v. Hopkins, 5 Johns. 211, 4 Am. Dec. 339; Lindsey v. Smith, 7 Johns. 359; Vaughan v. Havens, 8 Johns. 109; Fry v. Bennett, 5 Sandf. 54; Andrews v. Woodmansee, 15 Wend. 232; Cornelius v. Van Slyck, 21 Wend. 70; Croswell v. Weed, 25 Wend. 621.

216 Rundell v. Butler, 7 Barb. 260.

217 Walrath v. Nellis, 17 How. Pr. 72.

218 Rhodes v. Naglee, 66 Cal. 677, 6 Pac. 863.

nuendo extends the meaning, the excess in meaning may be disregarded.[219]

§ 3951. **Tenor, import, and effect.**—It is bad pleading to aver in the complaint that defendant uttered "certain false and defamatory words and statements, of the following tenor and import, and to the following effect; that is to say," etc., though an allegation of their "substance" might be sufficient.[220]

§ 3952. **What words are actionable.**—Publication of an article libelous *per se* gives a *prima facie* right of action.[221] Although words spoken of a party do not necessarily import anything injurious in themselves, yet they may, when taken in connection with other charges made against the party at the same time. The whole being spoken of the party, as a merchant, and with intent to affect his credit, have a very different meaning from their ordinary one, and so taken may sustain an action.[222]

§ 3953. **Words of disgrace.**—Mere words of disgrace, unless written and published, are not actionable.[223]

§ 3954. **Words not per se slanderous.**—Words which do not impeach a schoolteacher in any of the qualities which are essential to an accomplished schoolteacher are not libelous *per se*.[224] In actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and the special damage must be fully and accurately stated.[225]

§ 3955. **Clerk or tradesman.**—In an action for slander, where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which, it is alleged, was his profession, it is unnecessary to allege special damage.[226]

219 Carroll v. White, 33 Barb. 615; Weed v. Bibbins, 32 Barb. 315.

220 Forsyth v. Edmiston, 2 Abb. Pr. 430; Maitland v. Goldney, 2 East, 426; Cook v. Cox, 3 Mau. & Sel. 110. As to the former rules of pleading and evidence in actions of slander, and their operation, see Bisbey v. Shaw, 12 N. Y. 67.

221 Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627.

222 Beardsley v. Tappan, 1 Blatchf. 588, Fed. Cas. No. 1188.

223 Johnson v. Brown, 4 Cranch C. C. 235, Fed. Cas. No. 7375.

224 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

225 Linden v. Graham, 1 Duer, 672; Hallock v. Miller, 2 Barb. 630; Evans v. Harries, 1 Hurl. & N. 251.

226 Butler v. Howes, 7 Cal. 87.

§ 3956. **Dishonesty.**—Imputations charging dishonesty against an individual in connection with his business are slanderous *per se*.[227]

§ 3957. **Ignorance and want of skill.**—Imputations of gross ignorance and want of skill in his profession, as against a physician, are libelous.[228]

§ 3958. **Insolvency.**—An imputation of insolvency against a petty trader is actionable.[229]

§ 3959. **Mechanical trade.**—Words imputing to a mechanic want of skill or knowledge in his craft are actionable *per se*, if they are clearly shown to have been spoken with reference to the plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill.[230]

§ 3960. **Physician.**—Where words are actionable only because spoken of the plaintiff in his business or profession, averments by way of inducement and colloquium should be inserted. If a physician brings an action for the speaking of words which are disgraceful to him in his profession, he must aver in his complaint that he was a practicing physician at the time the words were uttered, and that they were spoken of and concerning him in his profession; otherwise, it is demurrable.[231]

§ 3961. **Names of customers lost.**—As a general rule, the names of persons who have refused to deal with the plaintiff must be stated.[232] But if it is in the nature of things impracticable for him to know them, he may prove general loss of business.[233] It is properly a question of evidence which cannot be settled before the trial.

227 Fowles v. Bowen, 30 N. Y. 20; Morasse v. Brochu, 151 Mass. 567, 21 Am. St. Rep. 474, 25 N. E. 74, 8 L. R. A. 524; Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N. W. 710.

228 Secor v. Harris, 18 Barb. 425; Carroll v. White, 33 Barb. 615; Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457.

229 Carpenter v. Dennis, 3 Sandf. 305.

230 Fitzgerald v. Redfield, 51 Barb. 484, 36 How. Pr. 97.

231 Carroll v. White, 33 Barb. 615; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

232 Linden v. Graham, 1 Duer, 670; Jacobs v. Water etc. Co., 25 N. Y. Supp. 346; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

233 Evans v. Harries, 1 Hurl. & N. 251; Wright v. Coules, 4 Cal. App. 343, 87 Pac. 892.

§ 3962. Corporations.—A corporation aggregate has the capacity to compose and publish a libel, and by reason thereof, when done, becomes liable to an action for damages, by the person of and concerning whom the words are composed and published.[234]

§ 3963. Actionable language.—When language imputes a charge which, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, or imputing to an officer the acceptance of a bribe, though made after his term of office,[235] it is actionable *per se*.[236] And this rule has been followed in most of the states.[237] In some of the states, it seems that all oral language which imputes an indictable offense, or an offense punishable at law, is actionable *per se*,[238] or an indictable offense;[239] while in some other states, to be actionable, it must impute not only an indictable offense, but such for which corporal punishment may be inflicted as the immediate penalty.[240] Words which impute trespass, assault, battery, and the like are not actionable *per se*, and yet those offenses are punishable by indictment.[241]

§ 3964. Words subjecting plaintiff to criminal prosecution.—Words imputing to plaintiff an act subjecting him to a criminal

234 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Missouri Pacific R. R. Co. v. Richmond, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555, 4 L. R. A. 280; Johnson v. St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293.

235 Jarman v. Rea, 137 Cal. 339, 70 Pac. 216.

236 Townshend on Slander and Libel, 152.

237 See Brooker v. Coffin, 5 Johns. 188, 4 Am. Dec. 337; Young v. Miller, 3 Hill, 22. See, also, Wright v. Paige, 36 Barb. 438; Van Ness v. Hamilton, 19 Johns. 367; Alexander v. Alexander, 9 Wend. 141; Hoag v. Hatch, 23 Conn. 585; Andres v. Koppenheafer, 3 Serg. & R. 255, 8 Am. Dec. 647; Todd v. Rough, 10 Serg. & R. 18; Ludlum v. McCuen, 2 Har. (N. J.) 12; Johnson v. Shields, 1 Dutcher (25 N. J. L.), 116; Gage v. Shelton, 3 Rich. 242; Kinney v. Hosea, 3 Har. (Del.) 77; Johnston v. Morrow, 9 Port. (Ala.) 525; Taylor v. Kneeland, 1 Doug. (Mich.) 67; Beck v. Stizel, 21 Pa. St. 522; Billings v. Wing, 7 Vt. 439; 1 Am. Lead. Cas. 113, 3d ed.

238 Poe v. Grever, 3 Sneed (Tenn.), 666; Dunnell v. Fiske, 11 Metc. (Mass.) 551; Edgerly v. Swain, 32 N. H. 481; Tenney v. Clement, 10 N. H. 57; Noyes v. Hall, 62 N. H. 594; De Pew v. Robinson, 95 Ind. 109; Posnett v. Marble, 62 Vt. 481, 22 Am. St. Rep. 126, 20 Atl. 813, 11 L. R. A. 162; Klewin v. Brauman, 53 Wis. 244, 10 N. W. 398.

239 Kinney v. Hosea, 3 Har. (Del.) 77.

240 Birch v. Benton, 26 Mo. 153; Billings v. Wing, 7 Vt. 439.

241 Smith v. Smith, 2 Sneed (Tenn.), 478; Dudley v. Horn, 21 Ala. 379; Billings v. Wing, 7 Vt. 439.

prosecution must also impute moral turpitude, or something infamous or disgraceful, detracting from the character of the offender as a man of good morals.[242] Spoken words, in order to be defamatory of one in respect to his public office, need not import a charge of crime.[243]

§ 3965. Words charging offenses.—Words charging a burning amounting to arson, whether by common law or by statute, are actionable. So of a general charge of forgery; or of a general charge of being a murderer; or of a general charge of being a thief. So of a charge of larceny, or a taking, *animo furandi*, the personal property of another; or of a publication stating that a man is a eunuch,[244] or a common liar,[245] or a "liar and a poltroon," spoken of a public officer;[246] or of a charge of assault with a pistol;[247] or imputations charging a person with being a receiver of stolen goods.[248] So of a direct charge of perjury;[249] or of an imputation of willful perjury in a suit pending.[250] It is not necessary, upon a charge of slander, falsely accusing the plaintiff of setting fire to a warehouse, to allege that the warehouse was consumed or destroyed by the fire.[251]

§ 3966. Construction of words.—In an action for slander, in charging the plaintiff with perjury, if it appears that the words used to express the charge, in the sense in which they would naturally be understood, are such as to convey to the minds of those to whom they are addressed the impression that the

242 Quinn v. O'Gara, 2 E. D. Smith, 388; Pike v. Van Wormer, 5 How. Pr. 171; Dias v. Short, 16 How. Pr. 322; Weed v. Bibbins, 32 Barb. 315.

243 Sillars v. Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680.

244 Eckert v. Van Pelt, 69 Kan. 357, 76 Pac. 909, 66 L. R. A. 266.

245 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

246 Byrne v. Funk, 38 Wash. 506, 80 Pac. 772.

247 Hanson v. Krehbiel, 68 Kan. 670, 104 Am. St. Rep. 422, 75 Pac. 1041, 64 L. R. A. 790.

248 Dias v. Short, 16 How. Pr. 322. As to the imputation of stealing goods, when and where not slanderous per se, and to what extent, see Coleman v. Playsted, 36 Barb. 26; Maybee v. Fisk, 42 Barb. 326; Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757; Frolich v. McKiernan, 84 Cal. 177, 24 Pac. 114.

249 See Townshend on Slander and Libel, 165 et seq., and the cases there cited; Wilbur v. Ostrom, 1 Abb. Pr. (N. S.) 275; Gudger v. Penland, 108 N. C. 593, 23 Am. St. Rep. 73, 12 S. E. 168.

250 Walrath v. Nellis, 17 How. Pr. 72; Baker v. Williams, 12 Barb. 527.

251 Clugston v. Garretson, 103 Cal. 441, 37 Pac. 469.

plaintiff had committed perjury, and that the defendant intended to be so understood by those who heard him, such words will of themselves warrant a verdict for the plaintiff, in case the jury find that they were uttered with the intention above stated, and were so understood; and it is not necessary to give additional evidence that the suit was in a court of competent jurisdiction, or that the plaintiff swore falsely, with a corrupt intent.[252]

§ 3967. **Ambiguous article.**—It may be averred of an ambiguous article that it was published with a particular intent, and was so understood by its readers, and this averment may be proved on the trial.[253] This is more strictly correct than to employ an innuendo for the same purpose.[254]

Where the words alleged in a complaint for libel are fairly susceptible of a construction which would render them libelous, the complaint will be sustained upon demurrer, although the words may also be interpreted so as to be innocent.[255] In an action for libel, where the words complained of are not *per se* libelous, what the defendant intended and understood them to mean by those to whom they were published constitutes a proper subject of averment in pleading and proof on the trial, and if what was so intended and understood by the defendant, and understood by those to whom the words were published, was libelous, the words are actionable.[256]

§ 3968. **Perjury in another state.**—In a declaration for slander, in charging the plaintiff with perjury in another state, it must be averred that by the laws of such other state perjury is an offense to which is annexed an infamous punishment.[257]

Where a complaint in slander alleges that the slanderous words were spoken in a judicial proceeding, the fact alone that the slanderer was prosecutor in such proceeding is no absolute or

252 Kern v. Towsley, 51 Barb. 385.

253 Gibson v. Williams, 4 Wend. 320.

254 Blaisdell v. Raymond, 4 Abb. Pr. 446.

255 Wesley v. Bennett, 5 Abb. Pr. 498.

256 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

257 Sparrow v. Maynard, 8 Jones L. (N. C.) 195. As to the charge of false swearing, and the extent of the responsibility of the defendant, see Wilbur v. Ostrum, 1 Abb. Pr. (N. S.) 275; Nissen v. Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780; Davis v. Davis, 87 Tenn. 200, 10 S. W. 363; Weil v. Israel, 42 La. Ann. 955, 8 South. 826.

presumptive protection against his liability. The complaint need not set forth the language or substance of the testimony delivered by the plaintiff as a witness at a trial, and referred to by the defendant as constituting false swearing, unless the latter, when uttering the slanderous words, specified what the plaintiff did swear, or in what particulars his testimony was false.[258]

§ 3969. Slander of title—Definition—Essential averments.—Slander of title is publishing language, not of the person, but of his right or title to something.[259] When a party is prevented from selling, exchanging, or making any advantageous disposition of lands or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience which he has suffered, but special damage must be shown.[260] The action for slander of title is not restricted to language affecting real property. It lies for slander of title to personal property.[261] To maintain an action for slander of title to lands, the words must be false, must be uttered maliciously, and be followed as a natural and legal consequence by a pecuniary damage, which must be especially alleged and proved;[262] and the name of the person, as above stated, who refused to purchase or make the loan or purchase in consequence of the slander, should be stated in the complaint.[263] Maliciously and falsely publishing that plaintiff's hotel would be changed into a clubhouse, thus causing certain prospective guests not to patronize the hotel, is an actionable slander of plaintiff's busi-

258 Gudger v. Penland, 108 N. C. 593, 23 Am. St. Rep. 73, 13 S. E. 168.

259 Townshend on Slander and Libel, 240. As to the action for slander of title in general, see Gerard v. Dickenson, 4 Co. 18; Hargrave v. Le Breton, Burr. 2422; Earl of Northumberland v. Byrt, Cro. Jac. 163; Vaughan v. Ellis, Cro. Jac. 243; Smith v. Spooner, 3 Taunt. 246; Pitt v. Donovan, 1 Mau. & S. 639; 2 Greenleaf on Evidence, 428. As to what plaintiff must establish, see Like v. McKinstry, 41 Barb. 186. See, also, Townshend on Slander and Libel, 240; and 1 Starkie on Slander, 101.

260 1 Starkie on Slander, 191.

261 Townshend on Slander and Libel, 245. For complaint in an action to recover damages for false statements made by the defendants, in regard to patent and manufactures of the plaintiff, to the injury of his business, see Snow v. Judson, 38 Barb. 210.

262 Kendall v. Stone, 5 N. Y. 14; reversing 2 Sandf. 269; Burkett v. Griffith, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. 527, 13 L. R. A. 707. See Like v. McKinstry, 41 Barb. 186.

263 3 Bing. N. C. 371; Cro Car. 140, Cro. Jac. 484; 3 Keb. 153; Style, 169; Kendall v. Stone, 5 N. Y. 14; Tobias v. Harland, 4 Wend. 537; Saund. Pl. & Ev. 243; Shipman v. Burrows, 1 Hall, 399; Linden v. Graham, 1 Duer, 670; Bailey v. Dean, 5 Barb. 297.

ness.[264] It is not necessary to give the name or description of each guest so driven away.[265]

§ 3970. Slander of title—Damage—Malice—Probable cause.—The damage sought to be recovered must be specially alleged in the complaint, and substantially proved on the trial. It must be a pecuniary damage, and must be the natural and legal consequence of the wrong.[266] When the damages arise from the plaintiff's being precluded from selling or mortgaging the property which is the subject of the slander, it is essential in stating a cause of action to name the person or persons who refused from that cause to loan or purchase. An omission to do so will render the complaint demurrable.[267] It is error for the court to instruct the jury that where a person injuriously slanders the title of another, malice is presumed, or that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature.[268] Malice and damage are both essential requisites to sustain an action from language concerning a thing. To these requisites are usually added a third—that the language is false.[269] To sustain an action for slander of title, there must be want of probable cause, and special damages must be alleged, and that circumstantially. A general allegation of loss will not be sufficient. Nor will a defendant be responsible for what he says or does in pursuance of a claim of title in himself, provided there be good ground for such claim.[270] The averment that it is without probable cause is proper. The action will only lie by reason of prejudice in a sale and in order to show that the words uttered have caused injury, it is, generally, necessary to aver and show that they were uttered pending some treaty or public auction for sale of the property, and that thereby some intending purchaser was prevented from bidding or competing.[271] And it is necessary for the plaintiff to set forth and describe in

264 Wright v. Coules, 4 Cal. App. 343, 87 Pac. 809.

265 Id.

266 Kendall v. Stone, 2 Sandf. 269, 5 N. Y. 14; Burkett v. Griffith, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. 527, 13 L. R. A. 707.

267 Linden v. Graham, 1 Duer, 670, 11 N. Y. Leg. Obs. 185.

268 McDaniel v. Baca, 2 Cal. 326, 56 Am. Dec. 339.

269 Townshend on Slander and Libel, 239.

270 Bailey v. Dean, 5 Barb. 297.

271 Burkett v. Griffith, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. 527, 13 L. R. A. 707.

his complaint, in direct terms, the property respecting which the defamatory statements were made, as well as to aver title thereto, so that it may be shown wherein the defendant had done him an injury.[272]

§ 3971. **Defenses in general.**—In a complaint it is sufficient to state generally that the words were spoken or published concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish on the trial that it was so spoken or published.[273] The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.[274] That the letter containing the defamatory language was intended for the plaintiff himself is held bad.[275] Allegations in a complaint relative to the intent and motives of a libelous publication are not to be deemed material, so as to render it necessary for the defendant to admit or controvert them in his answer.[276] But defendant may be questioned as a witness, as to his motives, and to explain statements, and the source of his information, if the facts are in the issues presented.[277] The answer in an action, before the amendment of the code dispensing with a reply, except in certain cases, averred the truth of the libel sued on; and the reply controverted specific allegations in the answer, and then concluded with a general denial of all matters in the answer not particularly referred to. It was held that the denial was sufficiently specific, and that the issue was the truth of the publication, and the burden was on the defendant.[278]

§ 3972. **Colloquium.**—The office of a colloquium is to point the libel and explain the circumstances which render libelous words which otherwise might be innocent and harmless.[279] The

272 As to complaint sufficiently setting forth a good cause of action for slander of title, see Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703; affirming 37 Hun, 515.

273 Cal. Code Civ. Proc., § 460.

274 Cal. Code Civ. Proc., § 461; Carson v. Mills, 69 N. C. 122.

275 Fox v. Broderick, 14 Ir. C. L. Rep. 453.

276 Fry v. Bennett, 5 Sandf. 54.

277 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

278 Hunt v. Bennett, 4 E. D. Smith, 647.

279 Maynard v. Fireman's Fund Ins. Co., 47 Cal. 210.

extrinsic facts necessary to show the libelous meaning of the words must be set forth in the colloquium, and the innuendo applies the words spoken or published to these facts.[280] The office of the innuendo is to direct to its object the charge made. It can neither enlarge nor restrain the natural import of the words used.[281] If the words used do not convey the sense and meaning where their application is explained by the colloquium, the innuendo cannot aid them.[282] When a libel is not actionable on its face, but has a covert libelous meaning, the subject-matter must be explained, and the true interpretation of the words brought to light by the colloquium, and in such cases the colloquium must be proved.[283] If the libel is actionable on its face, a colloquium is unnecessary, and if alleged need not be proved.[284]

§ 3973. **Damages—Continuing malice.**—If the defendant alleges matter which, if true, would tend to show that the plaintiff was guilty of the crime charged in the slanderous words, not believing, or having no reason to believe, them true, this might properly be considered by the jury as showing a continuing and express malice.[285] Statements made by defendant after suit is instituted, to the effect that he would take plaintiff's license as a teacher away from him, are competent evidence to show malice, but not as a basis for extra compensation.[286]

§ 3974. **Denial and justification.**—The defendant may in one answer set up a general denial of his guilt, and a justification on the ground of truth.[287] As to whether justification and denial are to be considered as inconsistent defenses, the authorities are conflicting.[288] But the defendant cannot, with not guilty as to

280 Wilson v. Fitch, 41 Cal. 378; Nichols v. Packard, 16 Vt. 83; Linville v. Earlywine, 4 Blackf. 469; Tappan v. Wilson, 7 Ohio, 193, pt. 1.

281 Tappan v. Wilson, 7 Ohio, 194, pt. 1.

282 Id.; see Harris v. Zanone, 93 Cal. 59, 28 Pac. 845.

283 Wilson v. Fitch, 41 Cal. 378.

284 Id. See, also, Chamberlin v. Vance, 51 Cal. 75.

285 Chamberlin v. Vance, 51 Cal. 85. See Warner v. Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Tempieton v. Graves, 59 Wis. 95, 17 N. W. 672.

286 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

287 Ormsby v. Douglass, 5 Duer, 665; Payson v. Macomber, 3 Allen (Mass.), 69; Smith v. Smith, 39 Pa. St. 441; Kelly v. Craig, 9 Humph. 215; Cole v. Woodson, 32 Kan. 272, 4 Pac. 321.

288 The following cases treated them as inconsistent: Ormsby v. Douglass, 2 Abb. Pr. 407. And that

the whole complaint, plead a special plea of apology and payment into court as to part of the complaint.[289] In an action for libel, where the answer contained—1. A denial of the publication; 2. A justification; it was held on demurrer to the justification that the denial remained on the record, and raised an issue of fact.[290]

§ 3975. **General denial.**—Evidence of the bad character of the plaintiff, in an action of slander, is not admissible under the general denial,[291] or in breach of promise.[292] But if injury to plaintiff's reputation is alleged defendant may give in evidence the general bad character of the plaintiff.[293] Where a general denial is filed to a paragraph of a complaint for slander and malicious prosecution, and afterwards withdrawn, the facts alleged in such paragraph are to be taken as true.[294] An answer which merely states that the defendant did not utter the words alleged, at the place and time alleged, may be good as a general denial.[295] An averment in the complaint of plaintiff's former good character need not be denied.[296]

§ 3976. **Privileged communication.**—Words spoken or written in a legal proceeding, and material to the controversy, are privileged. No action will lie upon them, and it is not necessary for the defendant to deny the allegation of malice.[297] An allegation in the answer that the words were spoken in a privileged communication raises the issue of malice, upon which the plaintiff is entitled to introduce any competent evidence of express malice as fully as though it had been alleged in the complaint and denied

hypothetical pleading, or a plea that if defendant did speak the words they are true, is bad. See Buddington v. Davis, 6 How. Pr. 401; Anibal v. Hunter, 6 How. Pr. 255. See, also, Lewis v. Kendall, 6 How. Pr. 59; Sayles v. Wooden, 1 Code Rep. (N. S.) 410, 6 How. Pr. 84. They have been held to be not inconsistent in the following cases: Stiles v. Comstock, 9 How. Pr. 48; Buhler v. Wentworth, 17 Barb. 649; Hollenbeck v. Clow, 9 How. Pr. 289. See Lansingh v. Parker, 9 How. Pr. 288; Vaughan v. Havens, 8 Johns. 109.

289 O'Brien v. Clement, 15 Mees. & W. 435, 3 Dowl. & L. 676.

290 But see Parrett Nav. Co. v Stower, 8 Dowl. Pr. Cas. 205.

291 Anonymous, 6 How. Pr. 160.

292 Button v. McCauley, 38 Barb 413.

293 Anonymous, 8 How. Pr. 434; Edwards v. San Jose Print. & Pub. Soc., 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128. Contra: Anonymous, 6 How. Pr. 160.

294 George v. Nelson, 23 Ind. 392.

295 Salinger v. Lusk, 7 How. Pr. 430.

296 Pink v. Catanich, 51 Cal. 420.

297 Garr v. Selden, 4 N. Y. 91. See Suydam v. Moffatt, 1 Sandf. 459; Buddington v. Davis, 6 How. Pr. 401.

in the answer, and other utterances of words of similar import would be competent evidence for that purpose.[298]

§ 3977. Justification.—The truth is a complete defense in civil action for libel.[299] To constitute a justification, the answer must aver the truth of the defamatory matter charged. The averments of facts which merely tend to establish the truth of the matter charged are not sufficient in justification, though they may go in mitigation.[300] If the slanderous words impute a crime to the plaintiff, a defendant who justifies must prove the plaintiff guilty by sufficient testimony to convict the plaintiff of the same charges upon a criminal trial; and this rule has not been changed by section 2061 of the California Code of Civil Procedure.[301] An answer of justification must give color to the extent of admitting, for the purposes of the answer only, the publication complained of.[302] Where an imputation complained of is a conclusion from certain facts, a plea of justification, averring the existence of a state of facts which warrants the inference of the charge, is sufficient.[303] The justification must always be as broad as the charge;[304] and must justify the same words used in the complaint.[305] But this rule does not mean that an answer in justification must be broad enough to embrace every slanderous charge stated in the complaint, and the defendant may justify as to one charge, though he fail as to the

298 Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

299 Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

300 Merk v. Gelzhaeuser, 50 Cal. 633. As to evidence of circumstances in mitigation, see Eviston v. Cramer, 54 Wis. 220, 11 N. W. 556; Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051.

301 Merk v. Gelzhaeuser, 50 Cal. 633.

302 Fidler v. Delavan, 20 Wend. 57; Van Derveer v. Sutphin, 5 Ohio St. 293; Edsall v. Russell, 2 Dowl. (N. S.) 641, 5 S. C. (N. S.) 801; Buddington v. Davis, 6 How. Pr. 402.

303 Paxton v. Woodward, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215.

304 Weaver v. Lloyd, 2 Barn. & Cress. 678, 4 Dowl. & Ry. 230; Stilwell v. Barter, 19 Wend. 487; Cooper v. Barber, 24 Wend. 105; Bissell v. Cornell, 24 Wend. 354; Torrey v. Field, 10 Vt. 353; Burford v. Wible, 32 Pa. St. 95; M'Kinly v. Rob, 20 Johns. 354; Herr v. Bamberg, 10 How. Pr. 130; Loveland v. Hosmer, 8 How. Pr. 215; Sawyer v. Bennett, 20 N. Y. Supp. 45, 835; Tingley v. Times-Mirror, 151 Cal. 1, 89 Pac. 1097.

305 Skinner v. Grant, 12 Vt. 456; Ormsby v. Douglass, 2 Abb. Pr. 407. As to the necessity of averment of special circumstances, in interposing plea of justification, and that general allegation of truth of charge will not avail, see Wachter v. Quenzer, 29 N. Y. 547.

others.[306] And such plea must be certain, specific, and particular, as the code has not changed the former rules on the subject.[307] Pleas of the above nature are rather in the nature of a notice than of an allegation of new matter.[308] Although the facts set forth in a special plea do not amount in law to a justification, yet, if issue be joined thereon, and the facts are found as pleaded, it is error in the judge to instruct the jury that the facts as proved do not in law maintain the issue on the part of the defendant.[309]

§ 3978. **Justification and mitigation.**—Matter in mitigation may be pleaded, either with or without a plea of justification. And a plea of justification, whether proved or not, does not conclude the defendant from the benefit of evidence of mitigating circumstances.[310] Matter in mitigation must be separately stated from matter in justification.[311] But matter which is alleged in justification may also properly be alleged in mitigation of damages.[312] When facts and circumstances are pleaded in mitigation of damages, it is requisite that—1. The facts and circumstances must be such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief in the truth of such charge; 2. It must also appear that the defendant, before and at the time of making the charge, knew such facts and circumstances;[313] and 3. That he was, by reason of the facts and circumstances so set forth, induced to believe in the truth of the charge.[314] Mitigating circumstances set up in an answer in an action for libel are not a defense within the meaning of the code, which requires a pleading to be made definite and certain.[315] In an action for slander, the refusal of the court to strike from the answer an allegation of mitigating circumstances, which came to the knowledge of the defend-

306 Lanpher v. Clark, 149 N. Y. 472, 44 N. E. 182; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701.

307 Billings v. Waller, 28 How. Pr. 97; Tilson v. Clark, 45 Barb. 178.

308 Maretzek v. Cauldwell, 19 Abb. Pr. 35.

309 See Otis v. Watkins, 9 Cranch, 339, 3 L. Ed. 752.

310 Cal. Code Civ. Proc., § 461; Bush v. Prosser, 11 N. Y. 347; Russ v. Brooks, 4 E. D. Smith, 644. But see Gorton v. Keeler, 51 Barb. 475.

311 Follett v. Jewett, 11 N. Y. Leg. Obs. 193.

312 Howard v. Raymond, 11 Abb. Pr. 155.

313 Tingley v. Times-Mirror Co., 151 Cal. 1, 89 Pac. 1097.

314 Townshend on Slander and Libel, 445.

315 Maretzek v. Cauldwell, 19 Abb. Pr. 35; Rocher v. New York Staats Zeitung, 37 N. Y. Supp. 719, 73 N. Y. St. Rep. 393. See Wilson v. Fitch, 41 Cal. 379; Lick v. Owen, 47 Cal. 258.

ant after the speaking of the defamatory words, is not a prejudicial error, if the court subsequently instruct the jury not to consider such circumstances in mitigation.[316] The reply by plaintiff, immediately after the defendant uttered the slanderous words, may be proved by defendant.[317] Facts in mitigation must be pleaded.[318]

§ 3979. **Notice of defense.**—In some states, by statute, a notice or specification of the defense is substituted for a plea in answer. In such case the notice must contain all the material allegations of a plea or answer.[319] Before the code in New York, it was held that matter in justification might be given in evidence under such notice.[320] It seems that a justification, though interposed in good faith, renders the defendant liable for actual damages occasioned by the repetition of the defamatory matter in his answer if not sustained by the evidence.[321] "And in mitigation of any damages to which the plaintiff might otherwise appear entitled, by reason of the publication of said supposed libelous article, this defendant repeats and renews, all and singular, the matters stated under the [second] defense herein, and will give in evidence thereof, in mitigation of damages, as well as in justification," is a sufficient form of notice.[322]

§ 3980. **Truth of publication, how pleaded.**—Truth, as a defense, must be set up by plea or answer.[323] It is an issuable plea,[324] and may be set up, although the power to punish him may be barred by limitation;[325] or although the plaintiff has been tried upon the charge and acquitted,[326] or pardoned.[327]

316 Barkly v. Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. 307. As to what facts may be proved in mitigation of damages, in an action for libel, see Stanley v. Webb, 21 Barb. 148; Heaton v. Wright, 10 How. Pr. 79; Brown v. Orvis, 6 How. Pr. 376; Hamer v. McFarlin, 4 Denio, 509; Graham v. Stone, 6 How. Pr. 15; Snyder v. Andrews, 6 Barb. 43.

317 Bradley v. Gardner, 10 Cal. 371.

318 Howard v. Raymond, 11 Abb. Pr. 155; Mitchell v. Cody, 26 N. Y. Supp. 781, 6 Misc. 307. See Edwards v. San Jose Print. & Pub. Soc., 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. 128.

319 Townshend on Slander and Libel, 444. See Van Derveer v. Sutphin, 5 Ohio St. 293; Brickett v. Davis, 21 Pick. 404; Shepard v. Merrill, 13 Johns. 475; Bissell v. Cornell, 24 Wend. 354.

320 Baker v. Wilkins, 3 Barb. 220.

321 Fulkerson v. George, 3 Abb. Pr. 75.

322 Howard v. Raymond, 11 Abb. Pr. 155.

323 Manning v. Clement, 7 Bing. 367; 2 Greenleaf on Evidence, 424.

324 Woodward v. Andrews, 1 Brev. 310.

325 Van Ankin v. Westfall, 14 Johns. 234.

326 Cooke v. Field, 3 Esp. 133.

327 Baum v. Clause, 5 Hill, 196.

Where the defamatory charge is in general terms, it is not sufficient to set up the answer merely that such charge is true.[328] But facts must be stated showing that it is true.[329] Where the charge is specific, it is sufficient to allege that the charge is true.[330] Where the facts are required to be alleged, they must be stated with certainty.[331] So to justify a charge of crime, the plea or answer must specify the crime with certainty.[332] An averment that it was generally reported that plaintiff had been guilty of the crime charged upon him by the words complained of is irrelevant as a defense, and will be stricken out on motion.[333] The defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.[334] A taking of money from "a special postal fund" is sufficiently proved by showing a taking from "a deposit made there as a cash bond."[335]

FORMS IN LIBEL AND SLANDER.

§ 3981. Complaint for libel—The words being libelous in themselves.

Form No. 1063.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant published a newspaper called the . . . [or, in a letter addressed

328 Van Wyck v. Guthrie, 4 Duer, 268; Holmes v. Catesby, 1 Taunt. 543.

329 Anibal v. Hunter, 6 How. Pr. 255; Sayles v. Worden, 6 How. Pr. 84; Lewis v. Kendall, 6 How. Pr. 59; Buddington v. Davis, 6 How. Pr. 401; Steinman v. Clark, 2 Abb. Pr. 407, 10 Abb. Pr. 132; Fry v. Bennett, 5 Sandf. 69; Lawton v. Hunt, 4 Rich. 258; Billings v. Waller, 28 How. Pr. 97; Robinson v. Hatch, 55 How. Pr. 55.

330 Van Wyck v. Guthrie, 4 Duer, 268. See, also, 1 Roll. Abr. 87; 1 Starkie on Slander, 478; Townshend on Slander and Libel, 438.

331 Id.; Van Ness v. Hamilton, 19 Johns. 349; Riggs v. Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145; Duval v. Davey, 32 Ohio St. 604.

332 Nall v. Hill, Peck, 325.

333 Van Benschoten v. Yaple, 13 How. Pr. 97. See, also, Graham v. Stone, 6 How. Pr. 15. As to what matters may be given in evidence in mitigation, without being pleaded, see Harter v. Crill, 33 Barb. 283; Wilson v. Noonan, 35 Wis. 321; McCoy v. McCoy, 106 Ind. 492, 7 N. E. 188.

334 See Cal. Code Civ. Proc., § 461; Or. B. & C. Codes, § 92; N. Y. Code, 1877, § 535.

335 Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

to C. D.] the following words of and concerning the plaintiff: [Set forth the words used.]

II. That the said publication was false and defamatory.

III. That by means of said false and defamatory publication the plaintiff was injured in his reputation, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3982. Complaint for libel—The words not being libelous in themselves.

Form No. 1064.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is, and was, on and before the . . . day of . . ., 19.., a merchant, doing business in the city of . . .

II. That on the . . . day of . . ., 19.., at . . ., the defendant published a newspaper called the . . . [or, in a letter addressed to E. F.; or otherwise show how published], the following words concerning the plaintiff: ["A. B., of this city, has modestly retired to foreign lands. It is said that creditors to the amount of . . . dollars are anxiously seeking his address."]

III. That the defendant meant thereby that [the plaintiff had absconded to avoid his creditors, and with intent to defraud them].

IV. That the publication was false.

[DEMAND OF JUDGMENT.]

§ 3983. Complaint for libel—By attorney at law.

Form No. 1065.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff was, on and before the . . . day of . . ., 19.., an attorney at law of the several courts of record of the state of . . ., duly admitted to practice therein as such attorney, and had practiced, and still continued to practice as such attorney at law, in the several courts of record in said state of . . ., and had always, as such attorney at law, conducted and demeaned himself with honesty and fidelity, and had never been guilty, or suspected to have been guilty, of any misconduct or malpractice in his said capacity and profession of an attorney at law.

II. That on the . . . day of . . . , 19 . . , at . . . , the defendant published in a newspaper called the . . . , the following words concerning the said plaintiff, and of and concerning him in his said capacity and profession of an attorney at law: [Set forth the words used.]

III. That defendant meant thereby that [state innuendo].

IV. That said publication was false and defamatory, and by means thereof the plaintiff has been and is greatly injured and prejudiced in his reputation aforesaid, and has also lost and been deprived of great gains and profits, which would otherwise have arisen and accrued to him in his said profession and business, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3984. Complaint for libel—By physician.

Form No. 1066.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the plaintiff was a regularly licensed physician, practicing as such at . . .

II. That on the . . . day of . . . , 19 . . , the defendant published in a newspaper called the . . . , the following words concerning the plaintiff: [Set forth the words used.]

III. The said publication was false and defamatory, and by means thereof the plaintiff was injured in his reputation, and in his said good name and credit as a physician, and in his practice as such, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3985. Complaint for libel—Charge of dishonesty, etc., in business.

Form No. 1067.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the plaintiff was a corporation existing by or under the laws of this state, and was engaged in business in the city of . . . , as a banker and stock broker.

II. That the business of this plaintiff as a . . . has always depended largely on the good reputation and credit of this plaintiff,

and on the trust reposed in it, and by its shareholders and the public, in consequence thereof.

III. That the defendant was, at the times hereinafter mentioned, the publisher and proprietor of the . . . , a newspaper published in the city of . . .

IV. That the defendant, well knowing the premises, did, on the . . . day of . . . , 19 . . , compose and publish in said newspaper, concerning the plaintiff, and concerning the premises, the false and defamatory matter following, to-wit: [Here insert the words of libel, innuendoes, etc.]

V. That by reason of the premises, the plaintiff has been injured in its reputation and credit, to its damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3986. Complaint for libel — For words charging official dishonesty.

Form No. 1068.

[TITLE.]

The plaintiff complains, and alleges:

I. That plaintiff was at the times hereinafter mentioned, and still is, a citizen of the state of . . ., of good fame and reputation, and was from the . . . day of . . ., 19.., up to the . . . day of . . ., 19.., the duly elected and qualified city treasurer of the city of . . ., and was performing the duties of said office.

II. That the defendant, knowing the premises, and maliciously contriving to injure the plaintiff, and to deprive him of the confidence and repute of the people of said county, did, on the . . . day of . . ., 19.., maliciously [compose and] publish in a newspaper, printed and published in . . . in said county, of and concerning the plaintiff, the following false and defamatory matter, to-wit: "The city treasurer [meaning the plaintiff] is short in his accounts [meaning that the plaintiff had been guilty of malfeasance in office and could not account for the moneys which had come into his hands as such treasurer]." [Or, insert other language used, with proper innuendoes.]

III. That by means of said false and defamatory publication the plaintiff has been injured in his reputation and good name, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3987. **Complaint for charge of crime—Words not libelous on their face.**

Form No. 1069.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the [dwelling-house] of the defendant had been burned down, and it was suspected that it had been feloniously set on fire.

II. That on the . . . day of . . ., 19.., at . . ., the defendant published in a newspaper called . . ., the following words concerning the plaintiff: "One A. B. kindled the fire, and I can prove it."

III. That the defendant meant thereby that the plaintiff had feloniously set fire to said house.

IV. That the said publication was false and defamatory.

V. That plaintiff hath sustained damage by reason of said false and defamatory publication in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3988. **Complaint for accusing plaintiff of perjury in his answer to complaint.**

Form No. 1070.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the committing of the grievances hereinafter mentioned, the plaintiff had filed his answer in a certain action then pending against him in the superior court of the county of . . ., state of . . ., wherein the defendant herein was plaintiff; and which said answer was verified by this plaintiff.

II. That on the . . . day of . . ., 19.., at . . ., the defendant, well knowing the premises, published and caused and procured to be published, in a newspaper called the . . ., concerning the plaintiff and his said answer, the following words: [here state the libelous matter]; and in a certain other part of the said libel, the following words: [Here state libelous matter.]

III. That said publication was and is false and defamatory, and by reason thereof the plaintiff hath sustained damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3989. Complaint for composing libel not directly accusing plaintiff of perjury.

Form No. 1071.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the committing of the grievances by the defendant hereinafter mentioned, a certain action had been pending in the superior court of the county of . . ., state of . . ., wherein one A. B. was plaintiff and one C. D. was defendant, and which action had been then lately tried in said court, and on such trial the plaintiff herein was examined on oath, and had given his evidence as a witness in behalf of the said A. B.

II. That on the . . . day of . . ., 19.., at . . ., the defendant published in a newspaper called the . . ., the following words concerning the plaintiff and the said action, and concerning the evidence given by the said plaintiff upon the said trial as such witness, that is to say: "He" (meaning the plaintiff) "was forsworn on the trial" (meaning the said trial), and that he, the said plaintiff, in giving his evidence as such witness on said trial, had committed willful and corrupt perjury.

III. That said publication was and is false and defamatory.

IV. That by reason of said false and defamatory publication the plaintiff hath been damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3990. Complaint for libel not directly accusing plaintiff of larceny.

Form No. 1072.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the committing of the grievances hereinafter mentioned, a certain horse of the defendant had been feloniously stolen by some person or persons [or state that the defendant "was possessed of a horse, and had asserted that his horse had been feloniously stolen," or "it had been asserted that his said horse had been feloniously stolen"].

II. That on the . . . day of . . ., 19.., at . . ., the defendant, well knowing the premises, published in a newspaper, called the . . ., the following words concerning the plaintiff: "He is the person who took my horse from the field."

III. That the defendant meant thereby that the plaintiff had feloniously stolen his said horse.

IV. That the said publication was false and defamatory, and by reason of said false and defamatory publication the plaintiff hath sustained damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3991. Complaint for libel by effigy.

Form No. 1073.

[TITLE.]

The plaintiff complains, and alleges:

That on the . . . day of . . . , 19.. , at . . . , the defendant, contriving to injure the plaintiff in his reputation and to bring him into public contempt and ridicule, did in the public street [or, square; or, common] of said . . . wrongfully and maliciously make, and cause to be made, an effigy or figure intended to represent the person of the plaintiff, upon which were inscribed the words "A. B. is a villain," and caused the said effigy to be hung up on a telegraph-pole, in view of the neighbors of the plaintiff, and of the public then and there assembled, by means of which the plaintiff has been greatly injured in his reputation, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3992. Complaint for libel by signs.

Form No. 1074.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the defendant, contriving to injure the plaintiff in his reputation, and to bring him into public contempt, disgrace, and ridicule, did, in the public street of said . . . , wrongfully and maliciously make, and cause to be made, an effigy or figure intended to represent the person of the plaintiff, and hung up and caused to be hung up the said effigy, in the view of the neighbors of the plaintiff, and of the public then and there assembled, by means of which the plaintiff has been greatly injured in his reputation, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3993. Complaint for slander—Words being actionable in themselves.

Form No. 1075.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant spoke, in the hearing of A. B. [or sundry persons], of and concerning the plaintiff, the false and scandalous words following: ["He is a thief"], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3994. Complaint for slander—Words spoken in foreign language.

Form No. 1076.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, in the presence and hearing of divers persons who understood the [German] language, spoke concerning the plaintiff the following words in the said [German] language: [here set forth the words in the German or foreign language]; and which said words signified, and were understood to mean, in the English language: [here set forth a correct translation of the words in English]; and the said [German] words were so understood by the said persons in whose presence and hearing they were spoken.

II. That the defendant meant thereby [set forth innuendo].

III. That the said publication was false and defamatory.

IV. That in consequence [state special damage].

V. That by reason of the speaking and publication of the said false and defamatory words the plaintiff hath been injured in his reputation, to his damage in the sum of . . . dollars. [If special injury as to business is alleged, add, after the word "reputation," the words "and business."]

[DEMAND OF JUDGMENT.]

§ 3995. Complaint for slander—Words not being actionable in themselves.

Form No. 1077.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant said to one C. D., concerning the plaintiff: "He is a young man of remarkably easy conscience."

II. That the plaintiff was then seeking employment as a private secretary of said C. D., and that the defendant meant by said words that the plaintiff was not trustworthy as a private secretary.

III. That the said words were false.

IV. That in consequence of the said words [the said C. D. refused to employ the plaintiff as private secretary], to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3996. Complaint for slander respecting plaintiff's trade.

Form No. 1078.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the commission of the grievances hereinafter mentioned the plaintiff was engaged in business as merchant [or as the case may be], and had always maintained a good reputation and credit as such [merchant].

II. That on the . . . day of . . ., 19. . , the defendant, in the presence and hearing of a number of persons, maliciously, and with intent to cause it to be believed that the plaintiff kept false and fraudulent books of account in his said business, published the following words concerning this plaintiff, and concerning his said business: "He keeps false accounts, and I can prove it." [Or state the words complained of.]

III. That the said words were false.

IV. That in consequence of said words, a number of persons, and in particular [name the persons referred to], who had theretofore been accustomed to deal with the plaintiff in his business aforesaid, ceased to deal with him, and the plaintiff was thereby deprived of their custom, and of the profits which he would otherwise have made by a continuance of such dealing, and was otherwise injured in his reputation, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3997. Complaint for slander of title.

Form No. 1079.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., he was the owner in fee of [state what property], situate in . . . [Describe it particularly.]

II. That on that day, at . . ., the defendant, maliciously and without cause, spoke in the presence of A. B. and others [name them], the following words concerning the plaintiff and his property: [Insert the exact language with innuendoes.]

III. That the said words were false.

IV. That said A. B. [or others, naming them] was then and there negotiating for the purchase of said premises, and that by reason thereof said A. B. [or others] was dissuaded from making such purchase.

V. That by reason of the said words, the said A. B. refused, and still refuses, to purchase the said property from the plaintiff, and the plaintiff has been by reason thereof unable to sell the same, and has been otherwise greatly injured thereby, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 3998. Special averment—Discharge from employ.

Form No. 1080.

That by reason [etc.], one A. B., who had theretofore retained plaintiff in the capacity of . . ., for . . ., afterwards, on . . ., discharged the plaintiff from his employ.

§ 3999. Special averment—Refusal to deal.

Form No. 1081.

That by reason of the committing of the said grievances by the defendant, E. F., G. H. [etc., who had theretofore dealt with the plaintiff in his trade of a . . ., by him then and since carried on], afterwards declined to have any dealings with the plaintiff.

§ 4000. Special averment—Refusal to employ.

Form No. 1082.

That by reason of said slander, one E. F., who before was about to employ, and would have employed the plaintiff as his servant for certain wages, afterwards, and before the commencement of this suit, refused to employ the plaintiff in his service; and the plaintiff from thence remained out of employment for . . . months.

§ 4001. Special averment—Refusal to retain in employ.

Form No. 1083.

That . . . by reason [etc.], one . . ., who otherwise would have retained the plaintiff in the capacity of . . ., in his business of . . ., for wages, afterwards declined so to do; whereby the plaintiff lost [etc.], which would otherwise have accrued to him [etc].

§ 4002. Special averment—Refusal to sell.

Form No. 1084.

That by reason [etc.], one A. B., who would otherwise have sold to the plaintiff certain goods, to-wit, [mention goods], on credit, afterwards refused so to do; whereby [etc.].

§ 4003. Complaint for slander—Charging criminal offense.

Form No. 1085.

[Title.]

The plaintiff complains, and alleges:

I. That at the time of the commission of the grievances hereinafter mentioned, the plaintiff sustained a good name and character among his neighbors and acquaintances, for moral worth and integrity, and was never suspected of the crime of forgery.

II. That on the . . . day of . . ., 19. . , the defendant, in the presence and hearing of a number of persons, spoke the following words concerning the plaintiff: "He is a forger."

III. That the said words were false.

IV. That in consequence of the said speaking of said words the plaintiff has been greatly injured in his good name and reputation, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4004. Complaint for slander — Words directly charging a criminal offense—Several causes of action.

Form No. 1086.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, in a certain discourse which he had with one A. B., in the presence and hearing of divers persons, spoke the following words concerning the plaintiff: [Set forth the words.]

II. That on the . . . day of . . ., 19.., at . . ., the defendant, in a certain other discourse which he then had in the presence and hearing of divers other persons, spoke concerning the plaintiff the following other words: [Set forth the words.]

III. That all said words were false and defamatory.

IV. That in consequence of the said speaking of said words, etc.

[DEMAND OF JUDGMENT.]

§ 4005. Complaint for slander—Words directly charging perjury.

Form No. 1087.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, in a certain discourse which he then had concerning the plaintiff, in the presence and hearing of divers persons, spoke and published concerning the plaintiff the words following: "You perjured yourself."

II. That said words were false.

III. That in consequence of the said words the plaintiff is greatly injured in his good name and reputation, and has been rendered liable to prosecution for perjury, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4006. Complaint for slander—Words charging perjury and containing special inducements.

Form No. 1088.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., a certain action was pending before A. B., a justice of the peace in and for the

county of . . ., wherein C. D. was plaintiff and E. F. was defendant, and in which suit the plaintiff was duly sworn before the said justice, and gave his evidence as a witness, on the trial of said action, and testified that he "did not know that one M. had run away," the fact whether the said M. had run away or not being material in said action.

II. That on the . . . day of . . ., 19.., at . . ., the defendant, in a discourse which he had in the presence and hearing of sundry persons, spoke and published of and concerning the plaintiff, and concerning the said trial and testimony of the plaintiff as a witness in relation to said M., the false and scandalous words following: "He swore to a lie at . . ., in the suit between C. D. and E. F.; he said he did not know that M. had run away, and it was a lie, for he did know it," meaning that the plaintiff, at the trial of the action aforesaid, had, as a witness, sworn falsely, and committed willful and corrupt perjury.

III. That in consequence of said speaking of said words [etc., as in preceding form].

[DEMAND OF JUDGMENT.]

§ 4007. Answer—Slander of title.

Form No. 1089.

[TITLE.]

The defendant answers to the complaint:

I. The defendant avers that the words charged in the complaint to have been spoken, and each of them, were and are true.

II. Defendant denies that, by the words alleged in the complaint to have been spoken by him, the plaintiff was injured in any manner, or to any amount whatever.

III. And the defendant denies that the said words were uttered maliciously.

§ 4008. Denial of inducement.

Form No. 1090.

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff was or is a [physician], either as alleged or otherwise.

§ 4009. Mitigation—Allegation of republication of matter as news.

Form No. 1091.

And in mitigation of damages to which the plaintiff might otherwise appear entitled by reason of the publication of the said supposed libelous article, this defendant alleges that all the matters and things stated under the [second] defense were, on the . . . day of . . ., 19.., at . . ., currently reported and believed in, and were published in a certain newspaper, called the . . ., published in . . ., and were so communicated to this defendant, and were published by him as matters of current public news, the defendant verily believing the same to be true.

§ 4010. Justification — Truth of publication, when charge is specific.

Form No. 1092.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the charge and supposed defamatory words in the complaint set forth are each and all of them true.

§ 4011. Justification—When charge is general.

Form No. 1093.

[TITLE.]

The defendant answers to the complaint, and alleges:

That on the . . . day of . . ., 19.., at . . ., the plaintiff stole from [the defendant one bale of hay], to which the defendant referred when speaking [or printing, or writing] the words stated in the complaint.

§ 4012. Justification of charging plaintiff with corruption and extortion in a public office.

Form No. 1094.

[TITLE.]

The defendant answers the complaint of the plaintiff herein as follows:

For the first defense:

I. The defendant alleges that he has no information or belief sufficient to enable him to answer the allegations contained in paragraph number one of plaintiff's complaint, and therefore

denies that the plaintiff was ever at any time a harbormaster of the port of New York, or was ever duly nominated and appointed such harbormaster, as alleged in the complaint; but defendant admits that at the times referred to in the complaint plaintiff was acting as harbormaster of said port. The defendant admits that the lawfully appointed harbormasters of the port of New York have each of them, within the district to which he is specially appointed and assigned, such power and authority as are in the complaint alleged; but defendant denies knowledge or information sufficient to form a belief, whether the plaintiff ever had lawful right or appointment to exercise such powers and authority as harbormaster.

II. Defendant denies that the plaintiff had, prior to this action, earned or maintained a good reputation, name, or fame, or that he enjoyed the confidence of his superiors, or that of the public or of his neighbors in the duties of said office, or that he enjoyed or maintained a good character or reputation; and defendant says that, at the times hereinafter mentioned, plaintiff had been guilty of the malpractice and misconduct hereinafter mentioned, and of taking the excessive and illegal fees hereinafter mentioned; and that by reason thereof he became, and was, at all the times mentioned in the complaint, a person of bad name, fame, and reputation.

III. Defendant denies all the allegations of the complaint, not hereinbefore specifically admitted.

For the second defense:

I. The defendant, further answering, says, that the said supposed libelous matters set up in the complaint are true of the plaintiff, as follows:

II. That the plaintiff, prior to the . . . day of . . ., 19. . , and while acting, or claiming to act, as harbormaster of the port of New York, was guilty of official misconduct in divers instances.

III. That by a rule prescribed by the captain of the port of New York, pursuant to authority vested in him by law, regulating the conduct of harbormasters, which rule had for a long time been, and still was on the said . . . day of . . ., 19. . , in force, and well known to plaintiff, harbormasters were required to discharge their duties in person, and the appointment of a deputy by any harbormaster was prohibited. But notwithstanding this rule, and in violation thereof, the plaintiff at some time prior

to said last-mentioned day, but at which precise date defendant does not know and cannot state, did corruptly and unlawfully conspire with, and pretend to appoint one N. to act, or pretend to act, as deputy harbormaster under the plaintiff.

IV. That the plaintiff and N. entered into an arrangement and understanding with each other, pursuant to which the plaintiff was accustomed for a long period prior to the . . . day of . . ., 19.., to direct persons applying to him as harbormaster for berths for vessels, to apply to said N., and the said N. was accustomed, with the knowledge and connivance of the plaintiff, to exact illegal and excessive fees for giving berths to vessels of such applicants.

V. That in many instances the plaintiff, and in other instances the said N., under and in pursuance of the aforesaid understanding and agreement between himself and the plaintiff, did exact from persons applying for berths for vessels illegal and excessive fees.

VI. That the plaintiff, on the . . . day of . . ., 19.., unlawfully exacted and received from U. V., coal merchants doing business at . . ., the sum of . . . dollars, for obtaining a berth for the coal-barge Z.; that on or about [etc.], W. X., clerk with Y. & Z., shipping merchants, doing business at . . ., applied to the plaintiff for a berth for the ship Y.; that the plaintiff referred him to said N., who, pursuant to the corrupt and unlawful agreement between N. and the plaintiff above stated, exacted and received from him the sum of . . . dollars, in addition to the fees allowed by law for giving said ship a berth. [Other instances to be stated in a similar way.]

§ 4013. Justification of charge of perjury.

Form No. 1095.

[Title.]

The defendant answers the complaint of the plaintiff herein as follows:

I. That before the speaking [or, publishing] of the words alleged in the complaint, and at a term of the . . . court, duly held at . . ., in the month of . . ., 19.., before one of the judges of the . . . court, upon trial of an action therein pending between one M. N., as plaintiff, and O. P., as defendant, A. B., the plaintiff in this action, appeared as a witness for and on behalf of the

said M. N., and was then and there, in open court, duly sworn, and took oath to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue.

II. That the plaintiff, being so sworn, falsely and willfully and maliciously deposed and gave evidence, among other things, that [here set forth that part of the plaintiff's evidence in which he committed perjury]; and that the said plaintiff then knew the said evidence was false and untrue.

III. That in truth [here negative the plaintiff's evidence, as in an indictment for perjury].

IV. That the truth of the matters hereinbefore stated were material and pertinent to the issue there tried.

V. That this defendant, in charging the plaintiff with perjury, as alleged in the complaint herein, referred to the said evidence so falsely given by the plaintiff as above set forth.

§ 4014. Justification and denial of malice, in charge of larceny.

Form No. 1096.

[TITLE.]

The defendant answers to the complaint:

I. That each and every article in the complaint mentioned as having been charged by defendant to have been stolen by the plaintiff had, at the time mentioned in the complaint, been taken and stolen from the defendant.

II. That the defendant is informed and believes that the plaintiff has been and is guilty of each and every charge in said complaint alleged to have been made against her by the defendant, and that whatever the defendant has said of or concerning the plaintiff, she has said in the full belief of its truth and verity, and in self-vindication and warning to others, and not from any motives of malice towards the plaintiff.

§ 4015. Answer setting up defense and mitigating circumstances.

Form No. 1097.

[TITLE.]

The defendant answers to the complaint:

First. For a defense:

That the publication complained of was true. [If the alleged

libel was not specific in its charges, state the facts upon which it was founded.]

Second. As mitigating circumstances:

I. That on the . . . day of . . ., 19. . , the plaintiff accused one B. C. of burglary at . . .

II. That thereupon an officer of the police of . . . took the said B. C. into custody, and conducted him to a station-house.

III. That while at the station-house the said B. C. made to the captain of police there in command a statement, which is fairly and truly reported in the publication complained of [or, made a statement to the effect that the robbery with which he was charged was planned by the plaintiff, and was effected by him and the plaintiff in concert; that they quarreled over the division of the plunder; and that thereupon the plaintiff charged him with the felony].

IV. That afterwards the plaintiff was arrested by a police officer, and conveyed before J. P., a police justice of the city of . . ., and held to bail by the said justice, to answer the charges of the said B. C.

V. That the publication complained of contained a fair and true statement of the preceding circumstances.

VI. That it was published in a newspaper belonging to the defendant, by his employees, without his knowledge or consent.

VII. That the persons publishing it inserted it as an item of public news, without malice, believing the same to be true.

§ 4016. Justification of privileged publication.

Form No. 1098.

[Title.]

The defendant answers to the complaint, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., an action was tried in the . . . court of . . ., in which . . . was plaintiff, and the plaintiff herein was defendant [or, an indictment having been found against the plaintiff for . . ., he was tried therefor in the . . . court; or otherwise, as the case may be].

II. That the article published in the defendant's newspaper, mentioned in the complaint, was a fair and true report of the testimony of one of the witnesses, named . . ., made in the course of the said trial.

§ 4017. Justification of privileged communication — Another form.

Form No. 1099.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time of publishing the words mentioned in the complaint, an action was pending in the . . . court between [the parties to this action].

II. That at that time this defendant applied to B. C., the judge of the said court, for an order of . . ., and upon his application presented to the said judge an affidavit containing the words complained of, which said affidavit was pertinent to the said application.

III. That the defendant did not in any other way publish the said words.

§ 4018. Justification of privileged communication — Another form.

Form No. 1100

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That he was at the time of uttering the words mentioned in the complaint the [confidential clerk] of . . .

II. That the said . . . inquired of the defendant the character of the plaintiff, with a view of employing him as a clerk [or as the case may be], and the defendant then stated to him the matter referred to in the complaint.

III. That the defendant had probable cause for believing, and did believe, the same to be true.

CHAPTER CIX.

SEDUCTION AND ALIENATION OF AFFECTIONS.

§ 4019. **Criminal conversation.**—An action by the husband, for criminal conversation is an action for injury to the person.[1] The essential injury is the defilement of the marriage-bed; but proof of the alienation of the affections aggravates the offense and the damages recoverable.[2] Where the evidence fails to show that the wife was actually seduced, but that her fall was rather the result of her own licentiousness, there can be no recovery of damages for an actual seduction.[3]

§ 4020. **Contriving and intending.**—The intention is material.[4]

§ 4021. **Marriage.**—In an action for criminal conversation, the plaintiff must prove an actual marriage;[5] but not necessarily by a marriage certificate, where they have children and have lived together as husband and wife for a long time.[6]

§ 4022. **Complaint.**—It is sufficient in a complaint for enticing away the plaintiff's wife, or for seduction, to allege the ultimate facts, without a statement of the acts made use of to accomplish the illegal purpose.[7] By the decided weight of authority, it is now held that a married woman may maintain an action against another woman for alienating her husband's affections, when there is a statute enabling her to sue.[8] The action is based upon the

1 1 Chit. Pl. 137; 2 Chit. Pl. 265; 2 Kent Com. 129; 3 Bl. Com. 138; Delamater v. Russell, 4 How. Pr. 234, 2 Code Rep. 147.

2 Stark v. Johnson, 43 Colo. 243, 127 Am. St. Rep. 114, 95 Pac. 930, 16 L. R. A. (N. S.) 674.

3 Hoggins v. Coad, 58 Ill. App. 58.

4 Hutcheson v. Peck, 5 Johns. 196.

5 Morris v. Miller, 4 Burr. 2057; Peake on Law of Evidence, 300; Phillips on Evidence (7th ed.) 206; Selw. N. P. 14, 16. See, also, 2 Chit. Pl. 643, note f.

6 Stark v. Johnson, 43 Colo. 243, 127 Am. St. Rep. 114, 95 Pac. 930, 16 L. R. A. (N. S.) 674.

7 French v. Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Hodges v. Bales, 102 Ind. 494, 1 N. E. 692.

8 Bennett v. Bennett, 41 Hun, 640, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Warner v. Miller, 17 Abb. N. C. 221; Seaver v. Adams, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; Foot v. Card, 58 Conn. 1, 18 Am. St.

loss of the *consortium,* or conjugal society of the husband;[9] and allegation and proof of adultery is not necessary to sustain the action.[10] A complaint charging that defendant wickedly seduced, debauched, and carnally knew plaintiff is sufficient to charge seduction.[11]

§ 4023. **Allegation that defendant knew.**—In an action for debauching a wife or servant, it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff; though in an action for seducing away or harboring a wife or servant, such allegation and evidence are necessary.[12]

§ 4024. **Connivance.**—The connivance of the father in the act of seduction will wholly bar his action; but where the defense is omitted to be pleaded, it will be waived.[13]

§ 4025. **Daughter temporarily absent.**—This action is maintainable, though the daughter be temporarily absent at the time of seduction.[14]

§ 4026. **Debauching and beating daughter.**—A parent, in that character merely, cannot support an action for debauching or beating his daughter which is only sustainable in respect to the supposed loss of service, some slight evidence of which must in general be adduced.[15]

§ 4027. **Distress of body and mind.**—The fact that the plaintiff has suffered great distress of body and mind is a good ground of damages.[16]

Rep. 258, 18 Atl. 1027, 6 L. R. A. 829.

9 Buckel v. Suss, 28 Abb. N. C. 21, 18 N. Y. Supp. 719; Adams v. Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

10 Id.; Higham v. Vanosdol, 101 Ind. 160. That a wife cannot maintain an action of crim. con. against another woman, see Doe v. Roe, 82 Me. 503, 17 Am. St. Rep. 499, 20 Atl. 23, 8 L. R. A. 833.

11 Peterson v. Crosier, 29 Utah, 235, 81 Pac. 860.

12 Fores v. Wilson, Peake N. P. C. 55; Peake on Law of Evidence, 134; Winsmore v. Greenback, Willes, 577. See 2 Chit. Pl. 642, note e; Hermance v. James, 32 How. Pr. 142; Buckel v. Suss, 28 Abb. N. C. 21, 18 N. Y. Supp. 719.

13 Travis v. Barger, 24 Barb. 614.

14 Lipe v. Eisenlerd, 32 N. Y. 229. See Cal. Code Civ. Proc., § 375.

15 5 East, 45; 5 T. R. 360. See 2 Chit. Pl. 643, note 9; White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

16 Dain v. Wycoff, 7 N. Y. 191.

§ 4028. **Father, action by.**—A father may maintain an action for the seduction of his daughter under twenty-one years of age, although she was not living with him at the time, if he has not by his own act destroyed his right to control her services.[17] So for that of a daughter over twenty-one, and not living with him, if he thereby loses actual services due to him; and services rendered will be presumed to be due if he continues to exercise authority over her, and she to submit.[18] A grandmother may sue and recover both special and exemplary damages, and damages for injury to her feelings and the reputation of her family.[19]

§ 4029. **Female seduced cannot maintain action.**—At common law, the female seduced cannot maintain an action for her own seduction.[20] But by section 374 of the California Code of Civil Procedure, an unmarried female may maintain the action.[21] Under a similar statute in Indiana, it was held that the complaint must allege that the plaintiff was unmarried,[22] but need not allege ability and willingness to marry the defendant.[23] A seduction, where it exists, is frequently alleged in a suit for breach of promise of marriage in aggravation of damages, but not as a separate cause of action. It is doubtful if breach of promise of marriage and seduction could be joined as distinct causes of action, even under a statute authorizing the female to sue for seduction, as the one arises from contract, and the other from tort.

§ 4030. **Full age.**—A father may maintain an action for seduction of his daughter who resides with him, and performs domestic services in return for support, notwithstanding she is of full age, and that no express agreement exists for services.[24]

§ 4031. **Gist of action.**—The loss of service is the gist of the action, and the master can alone sustain the action. If the

17 Greenwood v. Greenwood, 28 Md. 369.

18 Sutton v. Huffman, 32 N. J. L. 58; Lipe v. Eisenlerd, 32 N. Y. 229.

19 Anderson v. Aupperle, 51 Or. 556, 95 Pac. 330.

20 Hamilton v. Lomax, 26 Barb. 615, 6 Abb. Pr. 142.

21 Koenig v. Nott, 8 Abb. Pr. 384.

22 Thompson v. Young, 51 Ind. 599.

23 Swett v. Gray, 141 Cal. 83, 74 Pac. 551.

24 2 T. R. 166; 2 T. R. 4; Irwin v. Dearman, 11 East, 23; Manvell v. Thompson, 2 Car. & P. 303; Moran v. Dawes, 4 Cow. 412; Lipe v. Eisenlerd, 32 N. Y. 229. See Beaudette v. Gagne, 87 Me. 534, 33 Atl. 23; Cal. Code Civ. Proc., § 375.

daughter is not living with her father, he cannot sue for seduction.[25]

§ 4032. **Minor.**—As regards a minor, it seems that one standing *in loco parentis* has a right to maintain an action for seduction.[26]

§ 4033. **Mother, action by.**—Under statutory provision, such action may be maintained by a mother keeping a boarding-house on her separate account, though the father be living at the time, if the father has abandoned his family.[27]

§ 4034. **Nature of action.**—The action is maintainable by a parent as such, or as a master entitled to services of the child.[28]

§ 4035. **Stepfather.**—A stepfather cannot sue for the seduction of his stepdaughter while she is living in the service of another.[29]

§ 4036. **Statute of limitations.**—The statute of limitations does not commence to run against the right of action for the seduction of a minor until she attains her majority.[30]

§ 4037. **Chastity.**—The chastity of plaintiff should be alleged, as to the time of the grievance alleged and all time prior thereto.[31] Her reputation may be evidence of such character.[32]

§ 4038. **Exemplary damages** are recoverable when plaintiff is so related to the one seduced as to receive injury through her dishonor, regardless of malice or no malice of defendant.[33]

25 Briggs v. Evans, 5 Ired. Law (N. C.), 16; Hewit v. Prime, 21 Wend. 79; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Applegate v. Ruble, 2 A. K. Marsh, 128; Gillet v. Mead, 7 Wend. 193, 22 Am. Dec. 578; Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639.

26 Bartley v. Richtmeyer, 4 N. Y. 38 (43), 53 Am. Dec. 338; Bracy v. Kibbe, 31 Barb. 273.

27 Badgley v. Decker, 44 Barb. 577. See, also, Cal. Code Civ. Proc., § 375.

28 Cal. Code Civ. Proc., § 375. For common-law rule see White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

29 Bartley v. Richtmeyer, 4 N. Y. 38, 53 Am. Dec. 338; Bracy v. Kibbe, 31 Barb. 273.

30 Morrell v. Morgan, 65 Cal. 575, 4 Pac. 580.

31 Swett v. Gray, 141 Cal. 83, 74 Pac. 551.

32 Ex parte Vandiveer, 4 Cal. App. 650, 88 Pac. 993.

33 Anderson v. Aupperle, 51 Or. 556, 95 Pac. 330.

FORMS IN SEDUCTION AND ALIENATION.

§ 4039. Complaint for criminal conversation.

Form No. 1101.

[TITLE.]

The plaintiff complains, and alleges:

I. That A. B. is, and at the time hereinafter mentioned was, the wife of the plaintiff.

II. That on or about the . . . day of . . ., 19.. [the day or about the day the first act of adultery can be proved], and on other days after that day, defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of the comfort, society, aid, and assistance of his wife, [forcibly, and without the consent of the said A. B.], wickedly, willfully, and maliciously debauched and carnally knew the said A. B., without the privity or consent of the plaintiff.

III. That by means of the premises, the affection which the said A. B. theretofore had for the plaintiff was alienated and destroyed, and the plaintiff was deprived of the comfort, society, aid, and assistance which he otherwise would have had from the said A. B., and has suffered great distress of body and mind, to his great damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4040. Complaint for alienating affections of plaintiff's husband.

Form No. 1102.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is now, and for ten years last past, has been the wife of one E. F.

II. That in or about the month of . . ., 19.., and while this plaintiff was living, cohabiting with, and being supported by her said husband at . . ., and was so living with him happily as his wedded wife, and enjoying his affection, support, protection, and respect, the defendant, well knowing the said E. F. to be the husband of the plaintiff, and wrongfully intending to injure this plaintiff and deprive her of her said husband's protection, society, aid, and support, willfully, wickedly, and maliciously gained the affections of said E. F., and induced him to have

carnal intercourse with her, and sought to persuade him and entice him by offers of money and otherwise to leave plaintiff without support and go with the defendant to the city of . . .

III. That thereafter, and at various times, between the time aforesaid and the . . . day of . . . , 19. . , the defendant continued her unlawful and wrongful intercourse with said E. F., and on or about said last-mentioned day induced, and unlawfully and maliciously enticed, said E. F. to desert plaintiff, and to leave her without means of support or protection, and to go with said defendant to the said city of . . . , at which place the said defendant has ever since harbored and detained the said E. F., against the will of the plaintiff, and willfully and maliciously debauched him.

IV. That by reason of the premises, the said E. F. has become estranged from plaintiff, and his affections and regard for plaintiff have been destroyed, and plaintiff has been, and still is, wrongfully deprived by the defendant of the comfort, society, support, and protection of her said husband, and the happiness and benefits she otherwise would have received at his hands, and has suffered great distress of mind, body, and estate, to her damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4041. Complaint for enticing away plaintiff's wife.

Form No. 1103.

[TITLE.]

The plaintiff complains, and alleges:

I. That A. B. is, and at the times hereinafter mentioned was, the wife of the plaintiff.

II. That on or about the . . . day of . . . , 19. . , while the plaintiff was living and cohabiting with and supporting her, at . . . , and while they were living together happily as man and wife, the defendant, wrongfully contriving and intending to injure the plaintiff, and to deprive him of her comfort, society, and assistance, maliciously enticed her away from the plaintiff's and her then residence in . . . , to a separate residence in . . . , and has ever since there detained and harbored her, against the consent of the plaintiff.

III. That by reason of the premises the plaintiff has been and still is wrongfully deprived by the defendant of the comfort, society, and aid of his said wife, and has suffered great distress

of body and mind in consequence thereof, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4042. Complaint for debauching daughter.

Form No. 1104.

[TITLE.]

The plaintiff complains, and alleges:

I. That said defendant, unjustly intending to injure said plaintiff, and to deprive him of the services and assistance of the daughter and servant of said plaintiff, did on the . . . day of . . ., 19.., and on divers other days between that day and the commencement of this action, debauch and carnally know the said . . ., then and there, before and since, the daughter and servant of said plaintiff, whereby the said . . . became pregnant and sick with child, and so remained for a long space of time, to-wit, for the space of nine months, thence next following; at the expiration whereof the said . . . was delivered of the child with which she was pregnant, as aforesaid.

II. That by means of the premises, the said . . . for a long space of time, to-wit, [one year], was unable to do the needful business of the said plaintiff, he, the said plaintiff, so being the father and master of the said . . ., and the said plaintiff lost the services of the said . . . during all that time; and the said plaintiff was put to great expense, and did pay out a large sum, to-wit, the sum of . . . dollars, in and about the nursing and taking care of the said . . ., his daughter and servant, and in and about the delivery of said child, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4043. Complaint for seduction of plaintiff's daughter or servant.

Form No. 1105.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, one A. B. was the servant [and daughter] of the plaintiff.

II. That on the . . . day of . . ., 19.., at . . ., the defendant, well knowing the said A. B. to be the servant [and daughter] of the plaintiff, and wrongfully contriving and intending to injure

the plaintiff, and to deprive him of her assistance and service, did wickedly and maliciously, and without the privity or consent of the plaintiff, [forcibly and against the will of the said A. B., abduct her, or entice and persuade the said A. B. to leave the residence and service of this plaintiff, and did] then and there debauch and carnally know her.

III. That by reason of the premises the said A. B. became pregnant and sick with child, and so remained for the space of . . . months; that during that time she was unable to attend to the duties of her service, and the plaintiff was thereby deprived of her service, and was obliged to, and actually did, expend . . . dollars in nursing and taking care of her in her said pregnancy and sickness, and was otherwise greatly injured, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4044. Complaint for seduction by female seduced.

Form No. 1106.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the commission of the grievances hereinafter mentioned, the plaintiff was, and still is, an unmarried woman, and at all times prior thereto had been chaste and virtuous.

II. That on the . . . day of . . ., 19.., at . . ., the defendant, with force and violence, made an indecent assault upon the plaintiff and then and there wickedly seduced, debauched, and carnally knew her, whereby she became sick and pregnant with child, and so remained for a long space of time, to-wit, for the space of nine months; at the expiration of which time, and on the . . . day of . . ., 19.., she was delivered of the child of which she was so pregnant.

III. That by reason of the premises, and in consequence of the seduction aforesaid, the plaintiff has suffered greatly in her health, and became sick, and was prevented for a long space of time, to-wit, for the space of . . . months, from attending to her ordinary business and affairs, and was greatly afflicted in body and mind, and has been put to great expense for medical attendance and nursing, and has been otherwise greatly injured, to her damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

CHAPTER CX.

CONVERSION.

§ 4045. Conversion defined.—The rule is that any unlawful interference with the property of another, or exercise of dominion over it by which the owner is damaged, is sufficient to maintain the action.[1] Every unauthorized assumption of dominion over property in hostility to the right of the true owner is a conversion.[2] The principle is applied to the case of an infant obtaining goods by fraudulent representations as to his age;[3] or to a case of a vendor retaking goods after delivery;[4] or of a factor disobeying instructions of his principal;[5] or of a pledgee of a stock of goods selling without due notice to pledgor;[6] or of a subsequent sale of shares purchased under suspicious circumstances;[7] or of a note deposited by one bank in another for collection, and diverted to payment of antecedent debt;[8] or of money intended for payment of notes, and seized by the holder without giving them up;[9] or of property wrongfully intermixed;[10] or of property seized under void process;[11] or of property to be returned if not paid for by a certain time;[12] or of property obtained by fraudulent representations;[13] or of property obtained in exchange for a void note.[14] A sale of property by insured after an abandonment is a conversion.[15] So a sale of property

1 Latimer v. Wheeler, 1 Keyes, 468.

2 Boyce v. Brockway, 31 N. Y. 490. See, also, Dodge v. Meyer, 61 Cal. 405; Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631; Ramsby v. Beezley, 11 Or. 51, 8 Pac. 288; Union Stock Yard etc. Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888.

3 Eckstein v. Frank, 1 Daly, 334.

4 Huelet v. Reyns, 1 Abb. Pr. (N. S.) 27.

5 Scott v. Rogers, 31 N. Y. 679.

6 Joroslauski v. Saunderson, 1 Daly, 232; Brass v. Worth, 40 Barb. 648; Campbell v. Parker, 9 Bosw. 322; Genet v. Howland, 45 Barb. 560, 30 How. Pr. 360; Clarke v. Meigs, 10 Bosw. 337.

7 Anderson v. Nicholas, 28 N. Y. 600.

8 Potter v. Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

9 McNaughton v. Cameron, 44 Barb. 406.

10 Morgan v. Gregg, 46 Barb. 183.

11 Kerr v. Mount, 28 N. Y. 659; Hicks v. Cleveland, 39 Barb. 573.

12 Person v. Civer, 29 How. Pr. 432.

13 Cary v. Hotailing, 1 Hill, 311, 37 Am. Dec. 323; Olmsted v. Hotailing, 1 Hill, 317; questioned in Roberts v. Randel, 3 Sandf. 707.

14 Loeschigh v. Blum, 1 Daly, 49.

15 Robinson v. United Ins. Co., 1 Johns. 592.

by a manufacturer after delivery to the plaintiff is a conversion.[16] The same is true of a sale by one tenant in common of the entire chattel, followed by exclusive claim and dominion in the purchaser.[17] Where a commission merchant places goods consigned to him for sale in the hands of another for sale it is a conversion;[18] or if a factor pledge the goods of his principal for his own debt.[19] A wrongful taker of goods is liable for their whole value, although the owner had insured them, and has been paid in full.[20] Any intermeddling with the property of another, or exercise of dominion over it, whether by the defendant alone or in connection with others, in denial of the owner's rights, or subversive of his dominion, is a conversion, though the defendant had not the complete manucaption of the property.[21]

§ 4046. **Conversion by agent.**—The omission or refusal to pay over moneys received by a factor, agent, or trustee in the course of his agency or trust will lay the foundation of an action of trover.[22] If an agent, intrusted with the property of his principal, parts with it in a way or for a purpose not authorized, he is liable for a conversion, although there was no wrongful intent on his part.[23] So a misuse of the property pledged by attempting to sell it before time of forfeiture is a conversion.[24] An auctioneer who, in the regular course of his business, receives and sells stolen goods, and pays over the proceeds of the sale to the felon, without notice that the goods were stolen, is not liable to

16 Babcock v. Gill, 10 Johns. 287.

17 2 Kent Com. 350; Barton v. Williams, 5 Barn. & Ald. 395; Wilson v. Reed, 3 Johns. 175; Hyde v. Stone, People v. Rickert, 8 Cow. 230; Mumford v. McKay, 8 Wend. 442, 24 Am. Dec. 34.

18 Moffat v. Wood, Seld. notes Nos. 5, 14; commented on in Roth v. Palmer, 27 Barb. 652.

19 Kennedy v. Strong, 14 Johns. 128. See Henry v. Marvin, 3 E. D. Smith, 71; Nichols v. Gage, 10 Or. 82.

20 Perrott v. Schearer, 17 Mich. 48. For further illustrations as to what constitutes conversion, see Hynes v. Patterson, 95 N. Y. 1; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 34 Am. St. Rep. 579, 32 N. E. 476, 21 L. R. A. 117; Rushin v. Tharpe, 88 Ga. 779, 15 S. E. 830; Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340; Omaha etc. Refining Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925, 5 L. R. A. 236.

21 Bolling v. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, 7 South. 914.

22 Paley on Agency, 79; Weymouth v. Boyer, 1 Ves. Jr. 424; Walter v. Bennett, 16 N. Y. 250; Harris v. Schultz, 40 Barb. 315.

23 Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39; Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184. See Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Anderson v. First Nat. Bank, 5 N. Dak. 80, 64 N. W. 114.

24 Vincent v. Conklin, 1 E. D. Smith, 203.

the true owner for a conversion.[25] A mere agreement between two or more persons to convert the property of another, without an actual intermeddling with it, does not give the owner a cause of action against the parties to the agreement.[26]

§ 4047. **Conversion, allegation sufficient.**—An allegation in the complaint that defendant converted the property to his own use, is sufficient. It is not necessary to state the mode in which the defendant appropriated the property.[27] A declaration in trover for a "tool chest containing divers tools and working utensils," and "trunk containing clothes," held sufficiently certain.[28] A narration reciting all the circumstances attending the seizure and conversion of a bag of gold is immaterial and redundant.[29] It is not necessary to set out the manner in which the defendant converted the property.[30] An allegation in the complaint of the place where the property was taken, in an action to recover possession of personal property, is surplusage.[31] That the defendant took and carried away the goods is equivalent to an averment that he converted the property to his own use.[32] A general allegation that the defendant has wrongfully converted the property is sufficient, and the specific acts constituting the alleged conversion need not be pleaded.[33] An allegation that the defendants, "without leave, forcibly and wrongfully drove away" certain cattle belonging to the plaintiff, and have not returned the same, is sufficient.[34] It is held that a complaint or petition in trover states a cause of action when it alleges that the plaintiff was the owner of the property in question, describing it, and alleging its value, and that the defendants wrongfully took and

25 Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363. See, to same effect, Lewis v. Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735; Frizzell v. Rundle, 88 Tenn. 396, 17 Am. St. Rep. 908, 12 S. W. 918; Higgins v. Lodge, 68 Md. 229, 6 Am. St. Rep. 437, 11 Atl. 846.

26 Herron v. Hughes, 25 Cal. 555.

27 Decker v. Mathews, 12 N. Y. 321, 324.

28 Ball v. Patterson, 1 Cranch C. C. 607, Fed. Cas. No. 814.

29 Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492.

30 Otero v. Bullard, 3 Cal. 189; Decker v. Mathews, 12 N. Y. 321, 324; Austin v. Vanderbilt, 48 Or. 206, 120 Am. St. Rep. 800, 85 Pac. 519.

31 Lay v. Neville, 25 Cal. 545.

32 Hutchings v. Castle, 48 Cal. 152.

33 First Nat. Bank v. St. Croix Boom Corp., 41 Minn. 141, 42 N. W. 861; Smith v. Thompson, 94 Mich. 381, 54 N. W. 168; Norman v. Horn, 36 Mo. App. 419; San Antonio etc. R. R. Co. v. Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457.

34 Warnick v. Baker, 42 Mo. App. 439.

converted it to their own use.[35] Section 1721 of the New York Code of Civil Procedure, providing that if the action is founded upon the wrongful detention of a chattel the complaint must state the facts showing such detention, does not apply to actions of trover.[36]

§ 4048. **Demand.**—It is a general rule that when the possession of property is originally acquired by a tort, no demand previous to the institution of the suit is necessary.[37] Nor is a demand before suit necessary where the conduct of the party is such as to show that demand would be unavailing.[38] And where the defendant denies the plaintiff's title, and pleads ownership and right to the possession in himself or another, he cannot defeat recovery on the ground that the plaintiff did not allege and prove demand before suit.[39] But a demand is necessary where the goods are rightfully in the defendant's possession.[40] In an action against a sheriff for property tortiously taken by him under an attachment or execution against some other person, it is not necessary to allege and prove a demand for its delivery prior to the commencement of the action;[41] as the only purpose of proving a demand in trover and replevin is to show defend-

35 Robinson v. Peru Plow & Wheel Co., 1 Okla. 140, 31 Pac. 988. And see Gregory v. Fichtner, 14 N. Y. Supp. 891, 27 Abb. N. C. 86; Humpfner v. Osborne, 2 S. Dak. 310, 50 N. W. 88; Crews v. Baird, 2 Idaho, 103, 6 Pac. 116; Cortelyou v. Hiatt, 36 Neb. 584, 54 N. W. 964; Brunswick etc. Co. v. Brackett, 37 Minn. 58, 33 N. W. 214; Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Nance v. Georgia etc. Railway Co., 35 S. C. 307, 14 S. E. 629.

36 Barry v. Calder, 48 Hun, 449, 1 N. Y. Supp. 586. As to complaint stating a cause of action for conversion, and not for the enforcement of a trust, see Hoowe v. Kreling, 93 Cal. 136, 28 Pac. 1042.

37 Ledley v. Hays, 1 Cal. 160; Paige v. O'Neil, 12 Cal. 483; Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118; Ham v. Henderson, 50 Cal. 367; Pierce v. Van Dyke, 6 Hill, 613; Pringle v. Phillips, 5 Sandf. 157; Rhoades v. Drummond, 3 Colo. 374; Union Stock Yard etc. Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341, 42 N. E. 888; Tuttle v. Campbell, 71 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384; Kenrick v. Rogers, 26 Minn. 344, 4 N. W. 46; Croft v. Jennings, 173 Pa. St. 216, 33 Atl. 1026.

38 Gottlieb v. Hartman, 3 Colo. 53; Piano Mfg. Co. v. Northern Pacific Elevator Co., 51 Minn. 167, 53 N. W. 202.

39 Rosenau v. Syring, 25 Or. 386, 35 Pac. 844; Raper v. Harrison, 37 Kan. 243, 15 Pac. 219.

40 Cohnfeld v. Walsh, 37 N. Y. Supp. 833. See Hoff v. Coumeight, 35 N. Y. Supp. 1052, 14 Misc. 314.

41 Ledley v. Hays, 1 Cal. 160. And all cases since then to the contrary have been overruled in Boulware v. Craddock, 30 Cal. 190. See, also, Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118.

ant's possession wrongful.[42] Thus, if a sheriff, by virtue of an execution, seizes the property of a person, other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit.[43] Where goods were wrongfully taken by one person, and came rightfully into the possession of another, a demand upon the latter should be averred.[44] So in a case of a bailee in good faith, and where the goods are subsequently wrongfully detained.[45] When a demand is necessary, it is sufficient to make it upon the one who is in the actual possession, and able to comply with it.[46]

§ 4049. **Demand and refusal.**—A demand and refusal are never necessary as evidence of conversion, unless the other acts of the defendant are not sufficient to prove it. Nor are they evidence when it was not in defendant's power to deliver the property when demanded.[47] The demand and refusal are only evidence of the conversion.[48] If the defendant took the plaintiff's property, and refused to return it on demand, there is a conversion, and an allegation of these facts sufficiently shows a conversion.[49] To constitute a demand and refusal an evidence of a conversion, it is sufficient that the goods are in the possession of the agent of the defendant, and the latter on demand refuses to permit his agent to deliver them.[50] A refusal to deliver, retracted before suit brought, ceases to be a conversion.[51]

42 Whitman Gold etc. Min. Co. v. Tritle, 4 Nev. 494.

43 Boulware v. Craddock, 30 Cal. 190; Moore v. Murdock, 26 Cal. 524. See, also, Woodworth v. Knowlton, 22 Cal. 164.

44 Pierce v. Van Dyke, 6 Hill, 613; Ely v. Ehle, 3 N. Y. 506; Tallman v. Turck, 26 Barb. 167.

45 Purves v. Moltz, 5 Rob. 653. As to cases in which previous demand of goods from holder will be essential to render him liable for the conversion, see Chambers v. Lewis, 16 Abb. Pr. 433, 28 N. Y. 454; Hicks v. Cleveland, 39 Barb. 573.

46 Woodworth v. Knowlton, 22 Cal. 164.

47 Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749.

48 State v. Patten, 49 Me. 383; Hunt v. Holton, 13 Pick. 216; Pierce v. Benjamin, 14 Pick. 356, 25 Am. Dec. 396; Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700. See Badlam v. Tucker, 1 Pick. 397, 11 Am. Dec. 202.

49 Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656. See Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 Atl. 109; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 34 Am. St. Rep. 579, 32 N. E. 476, 21 L. R. A. 117; Saratoga etc. Light Co. v. Hazard, 55 Hun, 251, 7 N. Y. Supp. 844; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252.

50 Chambers v. Lewis, 28 N. Y. 454, 16 Abb. Pr. 433.

51 Wells v. Kelsey, 15 Abb. Pr. 53.

§ 4050. **Deposit of money—Non-payment.**—In an action to recover money deposited with the defendant, an averment that the defendant has neglected and refused to pay the money, though requested to do so by the plaintiff, is a sufficient averment of non-payment, and is equivalent to a statement that the defendant had failed and refused to pay.[52] An allegation in a complaint that the plaintiff deposited with the defendants, who were bankers, a sum of money to be sent to a certain other bank, and that the defendants failed to send said sum, but converted it to their own use, does not necessarily imply an intent to claim for a tortious conversion of the money so deposited. Such an allegation, though vaguely worded, imports a contract to pay a sum of money in consideration of a deposit of the amount.[53]

§ 4051. **Election of remedy.**—Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in *assumpsit* for the value of the property.[54] The election between the right to sue in tort or in contract in respect to the same transaction is conclusive, and when made must be abided by on trial and in its after consequences.[55] And the complaint must be framed with precise reference to the specific remedy invoked.[56] An allegation of contract by way of inducement will not vary the nature of an action sounding in tort.[57] And if no demand is necessary in an action to recover certain specific personal property, no demand is necessary in an action brought to recover its value only.[58]

§ 4052. **Gist of the action.**—The conversion is the gist of the action, and without conversion neither possession of property, negligence, nor misfortune will enable the action to be main-

52 Rankin v. Sisters of Mercy, 82 Cal. 88, 22 Pac. 1134; Woodmansee v. Rogers, 82 N. Y. 88.

53 Suksdorf v. Bigham, 13 Or. 369, 12 Pac. 818. As to waiver of tort by not objecting to counterclaim, see Wimmer v. Simon, 9 Utah, 378, 35 Pac. 507.

54 Fratt v. Clark, 12 Cal. 89.

55 Bank of Beloit v. Beale, 34 N. Y. 473; Ransom v. Wetmore, 39 Barb. 104; Wright v. Ritterman, 1 Abb. Pr. (N. S.) 428; People v. Kelly, 1 Abb. Pr. (N. S.) 432; Grocers' Nat. Bank v. Clark, 31 How. Pr. 115; Finlay v. Bryson, 84 Mo. 664.

56 Smith v. Knapp, 30 N. Y. 581.

57 Person v. Civer, 28 How. Pr. 139. As to the effect of an election to waive tort and sue in assumpsit, see Mayor of New York v. Parker Vein S. S. Co., 8 Bosw. 300; Terry v. Munger, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272, 8 L. R. A. 216.

58 Whitman Gold etc. Min. Co. v. Tritle, 4 Nev. 494. Thus where plaintiff waives the tort and sues in

tained.[59] Defendant must have converted the property to his own use, and if not, then any other act to amount to a conversion must be done with a wrongful intent, either express or implied.[60]

§ 4053. **Intent.**—A wrongful intent is not an essential element of the conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it.[61]

§ 4054. **Joinder of parties.**—All the parties in interest should join in the action of trover, and a failure to join may be pleaded in abatement.[62] In an action by the parties whose property has been wrongfully taken under legal process, all who join or participate in the trespass are joint trespassers.[63] In case of joint bailees, demand and refusal by one is not of itself, as in case of partners, a conversion.[64] But the refusal by a partner is a conversion.[65]

§ 4055. **Joint ownership.**—A complaint which avers that the defendant took and carried away "certain goods, chattels, and effects of and belonging to the said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiff.[66]

§ 4056. **Jurisdiction.**—Actions to recover compensation for injuries done to personal property may be maintained wherever jurisdiction of the parties can be obtained.[67]

§ 4057. **Measure of recovery.**—In an action by the pledgee of goods against a stranger for the conversion of pledged property,

assumpsit, the institution of the suit is a sufficient demand, see Dougherty v. Chapman, 29 Mo. App. 233.

59 Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363.

60 Id. See Bigelow v. Heintze, 53 N. J. L. 69, 21 Atl. 109.

61 Perkins v. Smith, 1 Wils. 328; Connah v. Hale, 23 Wend. 462; Beck v. McGillis, 9 Barb. 35; Boyce v. Brockway, 31 N. Y. 490; Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631.

62 Whitney v. Stark, 8 Cal. 514, 68 Am. Dec. 360.

63 Lewis v. Johns, 34 Cal. 629.

64 Mitchell v. Williams, 4 Hill, 13.

65 Holbrook v. Wight, 24 Wend. 169, 35 Am. Dec. 607.

66 Pelberg v. Gorham, 23 Cal. 349.

67 McIvor v. McCabe, 26 How. Pr. 257, 1 Chit. Pl. 243; Com. Dig., Trover, 7; Denton v. Livingstone, 9 Johns. 96, 6 Am. Dec. 264; Beach v. Beach, 2 Hill, 262, 38 Am. Dec. 584; Smith v. Butler, 1 Daly, 508.

the rule is that plaintiff is entitled to recover its full value; but if against the owner, or one acting in privity with him, then only for plaintiff's special interest therein as pledgee. So, also, as against sheriff for conversion of goods pledged; he will be held liable only for plaintiff's special interest in the goods.[68] In Nevada, if personal property is unlawfully seized and converted, the measure of damages is the value of the property at the time of the conversion, and interest from that time to judgment.[69] Plaintiff may recover such value, within the limits of his prayer, though he allege the value at a different time.[70] In California, the damage caused by the wrongful conversion of personal property is presumed to be—1. The value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; 2. A fair compensation for the time and money properly expended in pursuit of the property.[71] Where the whole amount of unliquidated damages, exclusive of interest, claimed in a complaint for the wrongful conversion of wheat, equals or exceeds three hundred dollars, the superior court has jurisdiction of the action, although the value of the wheat converted, and the money spent in pursuit of it, separately considered, do not either of them equal the jurisdictional sum.[72] In California, one having a mere lien on personal property cannot recover greater damages for its conversion, from one having a right thereto superior to his after his lien is discharged, than the amount

68 Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.

69 Carlyon v. Lannan, 4 Nev. 156.

70 Ramirez v. Main (Ariz.), 89 Pac. 508.

71 Civ. Code, § 3336, as amended 1878.

72 Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12. See, generally, as to the measure of damages in trover, Russell v. Huiskamp, 77 Iowa, 727, 42 N. W. 525; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 34 Am. St. Rep. 579, 32 N. E. 476, 21 L. R. A. 117; for conversion of stocks and bonds, Wright v. Bank, 110 N. Y. 237, 6 Am. St. Rep. 356, 18 N. E. 79, 1 L. R. A. 289; Dimock v. United States Nat. Bank, 55 N. J. L. 296, 39 Am. St. Rep. 643, 25 Atl. 926; Budd v. Multnomah etc. Ry. Co., 15 Or. 413, 3 Am. St. Rep. 169, 15 Pac. 659; for conversion of promissory note, Hersey v. Walsh, 38 Minn. 521, 8 Am. St. Rep. 689, 38 N. W. 613; for conversion of ore, Omaha etc. Refining Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925, 5 L. R. A. 236; for conversion of trees carelessly cut on plaintiff's land, Beede v. Lamprey, 64 N. H. 510, 10 Am. St. Rep. 426, 15 Atl. 133; for exemplary damages, San Antonio etc. R. R. Co. v. Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457.

secured by the lien, and the compensation allowed by section 3336 of the Civil Code for loss of time and expenses.[73]

§ 4058. **Offer to restore.**—And if, before suit is brought, the defendant unconditionally offers to restore the property, the object is attained, and the suit is wholly unnecessary.[74] The return of the property after conversion is no bar to the action, but is admissible in mitigation of damages.[75] In such case the plaintiff will not recover the value of the goods, but the damages he has sustained by the wrongful act, which was the conversion.[76]

§ 4059. **Ownership.** — Ownership by the plaintiff must be shown, or a special property with the immediate right of possession.[77] If the plaintiff claims as owner, an allegation that he is owner is sufficient, without stating other facts to show his title.[78] But an equitable title without an immediate right to possession is not sufficient to form ground for this action.[79] It is unnecessary to allege ownership of the goods when the complaint alleges a forcible and wrongful taking,[80] or a vested legal interest,[81] though either allegation of ownership or possession is sufficient.[82] An additional allegation, that the possession was as a mortgagee, does not state a mere conclusion or require the setting out of the mortgage.[83] But an averment that plaintiff is entitled to the possession is insufficient;[84] or that the goods were his property, by order of several attachments duly issued.[85]

73 Civ. Code, § 3338.

74 Savage v. Perkins, 11 How. Pr. 17.

75 Murphy v. Hobbs, 8 Colo. 17, 5 Pac. 637; People v. Bank of North America, 75 N. Y. 547.

76 Bigelow Co. v. Heintze, 53 N. J. L. 69, 21 Atl. 109.

77 Clark v. Skinner, 20 Johns. 465, 11 Am. Dec. 302; McCurdy v. Brown, 1 Duer, 101; Dodworth v. Jones, 4 Duer, 201; Hayes v. Massachusetts Mutual Life Insurance Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

78 Depew v. Leal, 2 Abb. Pr. 131; Burns v. Robbins, 1 Code Rep. 92; Roberts v. Willard, 1 Code Rep. 100; Heine v. Anderson, 2 Duer, 318; Warren v. Dwyer, 91 Mich. 414, 51 N. W. 1062; Reed v. McRill, 41 Neb. 206, 59 N. W. 775.

79 Whitcomb v. Hungerford, 42 Barb. 177.

80 Kissam v. Roberts, 6 Bosw. 154, and cases there cited; Bliss v. Cottle, 32 Barb. 322; Heine v. Anderson, 2 Duer, 318.

81 Pope v. Tucker, 23 Ga. 484. See Hunt v. Pratt, 7 R. I. 286.

82 Kuhland v. Sedgwick, 17 Cal. 123.

83 Harvey v. Lidvall, 48 Or. 558, 87 Pac. 895.

84 Pattison v. Adams, 7 Hill, 126, 42 Am. Dec. 59; Bond v. Mitchell, 3 Barb. 304; Pattison v. Adams, Hill & D. Supp. 426.

85 Vandenburgh v. Van Valkenburgh, 8 Barb. 217.

Although the defendant, before suit, has parted with the possession of the property, the action may be sustained.[86]

§ 4060. **Parties plaintiffs—Who may sue.**—Ordinarily, the owner is entitled to recover his specific property, or its value, and cannot be compelled to accept other property of the same kind and equal value in lieu of that which was converted. But shares of stock in a corporation stand upon a different footing, because they are mere evidences of interest in the business of the corporation; and if all the shares are of equal value, there can be no reason for preferring one share to another.[87] One having possession merely is the owner as against a wrongdoer, and a complaint averring possession and a right of possession in the plaintiff, without a direct averment of ownership or title, is sufficient to support a judgment in favor of the possessor against a trespasser.[88] Nor is it necessary to allege in express terms in the complaint that the plaintiff is the owner of the property, provided that fact appears from the complaint conclusively, when the objection is not taken until after the verdict.[89] A bailee may sue for conversion;[90] also, an administrator.[91] A consignee is in law presumed to be the owner, and may sue.[92] So of an ordinary factor, or a factor in charge of goods, and responsible for their value.[93] The finder of goods may maintain an action against a wrongdoer who subsequently converts them.[94] A husband in joint possession with his wife of chattels purchased by her, may maintain trover against her mortgagee, on the ground that her contracts were void, and he alone was liable for the price.[95] The action of trover depends on legal title, general or special, to support it, and the mortgagor, as against the mortgagee, has no

86 Brockway v. Burnap, 16 Barb. 309; reversing 12 Barb. 347; Savage v. Perkins, 11 How. Pr. 17; Drake v. Wakefield, 11 How. Pr. 106; Ward v. Woodburn, 27 Barb. 346; Van Neste v. Conover, 20 Barb. 547; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259.

87 Atkins v. Gamble, 42 Cal. 86, 10 Am. Rep. 282.

88 Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121.

89 McKay v. Musgrove, 15 Or. 162, 13 Pac. 770. As to sufficient allegation of ownership of the property by the plaintiff, see Berney v. Drexel, 33 Hun, 34, 419.

90 Green v. Clarke, 12 N. Y. 343; Alt v. Weidenberg, 6 Bosw. 176.

91 Ham v. Henderson, 50 Cal. 367. See Levy v. Superior Court, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811.

92 Fitzhugh v. Wiman, 9 N. Y. 559.

93 Gorum v. Carey, 1 Abb. Pr. 285.

94 Mathews v. Harsell, 1 E. D. Smith, 393.

95 Switzer v. Valentine, 10 How. Pr. 109.

title.[96] A partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership.[97] A receiver of partnership effects cannot maintain an action against a person who had converted the assets of the firm before his appointment; he must sue in the name of the firm in whom was the legal right of action.[98] A sheriff may hold a party liable for conversion who wrongfully removes goods levied upon.[99] But such action is only maintainable by him, and not by his deputy.[100] One tenant in common of chattels cannot sue another for the appropriation of his share, when capable of severance;[101] but otherwise, when the conversion is in fact a destruction of the property.[102] If the parties were tenants in common, and the defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and an action for goods, wares, and merchandise sold and delivered will not entitle him to a judgment.[103] Where one tenant in common claims the exclusive ownership, and applies the joint property to his own exclusive use, there is such a conversion as will enable his cotenant to bring trover against him.[104]

§ 4061. **Parties defendant—Who may be sued.**—Where the action is brought against an agent, it is necessary to allege not only that the defendant received the money as agent, but that he converted it in the course of his employment as such.[105] A complaint alleging that the defendant took charge of the plaintiff's hogs, agreeing to deliver them to a designated purchaser upon payment of the purchase price, and that he allowed said purchaser to dispose of part of the hogs without such payment, and himself disposed of the remainder and converted the proceeds, is suffi-

96 Heyland v. Badger, 35 Cal. 404.

97 Buckley v. Carlisle, 2 Cal. 420.

98 Yeager v. Wallace, 44 Pa. St. 294. But see Cal. Code Civ. Proc., § 568.

99 Barker v. Binninger, 14 N. Y. 270.

100 Terwilliger v. Wheeler, 35 Barb. 620.

101 Fobes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 Barb. 333; Tinney v. Stebbins, 28 Barb. 290.

102 Benedict v. Howard, 31 Barb. 569.

103 Williams v. Chadbourne, 6 Cal. 559.

104 Rosenau v. Syring, 25 Or. 386, 35 Pac. 844. See Bolling v. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, 816, note, 7 South. 914.

105 Porter v. Herman, 8 Cal. 619. See, also, Sharp v. Whipple, 1 Bosw. 557.

cient, without objection to the pleading before trial, to sustain a verdict.[105a] Trover will not lie against an agent, where the agent, though wanting in good faith, has acted within the scope of his powers.[106] A mere omission of duty is not enough. Where goods are detained by an agent by direction and command of his principal, trover lies against the principal.[107] So the principal is liable where he receives the benefit of the act of the agent.[108] In a count in trover against a carrier, it is unnecessary to allege his duty as such, if his business is set forth, together with his negligence, and the loss resulting therefrom.[109] A party selling goods twice is guilty of conversion against the first purchaser.[110] Where the defendant contracted with a factor, who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership, and a conversion of the property.[111] Parties who have converted a fund belonging to another to their own use, each taking a part, are liable for the whole amount, and to verdict and judgment accordingly.[112] An infant may be made liable in trover, although the goods converted be in his possession by virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission, but of commission, and is within that class of offenses for which infancy cannot afford protection.[113] One having notice of the claim of the true owner, and who delivers the property to another person, or permits him to take it out of his possession, whereby it is lost to the owner, is liable for its value in trover.[114] Where, without calling on the pledgor to redeem, the pledgee sold the pledge, the same being a chose in action, this was a conversion of the pledge, and the pledgee

105a Lyen v. Bond, 3 Wash. T. 407, 19 Pac. 35.

106 Murray v. Burling, 10 Johns. 172; Peake N. P. C. 49; Severin v. Keppell, 4 Esp. 156; Packard v. Getman, 4 Wend. 613, 21 Am. Dec. 166; Norville v. St. Barbe, 2 Bos. & Pul. 438, 1 Vent. 223; Catlin v. Bell, 4 Camp. 183; McMorris v. Simpson, 21 Wend. 610.

107 Shotwell v. Few, 7 Johns. 302.

108 Olmsted v. Hotailing, 1 Hill, 318; Irving v. Motley, 7 Bing. 543; Cobb v. Dows, 10 N. Y. 355. As to the attorney's liability, see Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

109 Wright v. McKee, 37 Vt. 161.

110 New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 91 Pac. 152.

111 Scriber v. Masten, 11 Cal. 303.

112 Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Mouat v. Wood, 22 Colo. 404, 45 Pac. 389.

113 Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207.

114 Bolling v. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, 7 South. 914.

thereby became liable, in an action for the conversion, for the value of the pledge at the time of the conversion in excess of the demand secured by the pledge, with legal interest thereon from the time of the conversion.[115] The principal is liable for a conversion of goods by his agent.[116] But mere possession by an innocent agent does not of itself constitute a conversion.[117] The agent actually disposing of the goods of another is liable to the real owner, though ignorant of the fraud conducted by his principal.[118] An action of trover may be maintained against a trespasser who is cutting timber, as soon as the timber is cut.[119] Where warehousemen deliver wheat to third persons, who bought from the broker for their own debt, on the ground that they held the storage receipt of defendants to one S., who had loaned money to E. & H. on the wheat as collateral, and had indorsed the receipt, "Deliver to bearer or E. & H.," the defendants knowing at the time of the delivery that E. & H. claimed the wheat as their property, they are liable to E. & H. for a conversion.[120] Where, during the term of a lease, the landlord enters and takes possession of the premises, and converts to his own use removable trade fixtures erected by the tenant for use in his business, the tenant may bring trover against the landlord, unless he has surrendered the premises and abandoned the term.[121]

§ 4062. Possession and right of possession.—The action cannot be maintained without a property in the plaintiff, either general or special.[122] The plaintiff must either have the possession or the immediate right to the possession of the property, to entitle him to recover.[123] The right to possession must be present and immediate.[124] Any right to actual possession at the time of

115 Gay v. Moss, 34 Cal. 125. See, also, Cal. Civ. Code, §§ 3336-3338; Austin v. Vanderbilt, 48 Or. 206, 120 Am. St. Rep. 800, 85 Pac. 519.

116 Chambers v. Lewis, 28 N. Y. 454.

117 Hunt v. Kane, 40 Barb. 638.

118 Dudley v. Hawley, 40 Barb. 397.

119 Sampson v. Hammond, 4 Cal. 184.

120 Hanna v. Flint, 14 Cal. 73.

121 Rosenau v. Syring, 25 Or. 386, 35 Pac. 844.

122 Hotchkiss v. McVickar, 12 Johns. 403; Barton v. Dunning, 6 Blackf. 209; Grady v. Newby, 6 Blackf. 442.

123 Middlesworth v. Sedgwick, 10 Cal. 392; Redman v. Gould, 7 Blackf. 361; Danley v. Rector, 10 Ark. 211, 50 Am. Dec. 242; Kemp v. Thompson, 17 Ala. 9; Purdy v. McCullough, 3 Pa. St. 466; Stephenson v. Little, 10 Mich. 433.

124 2 Greenleaf on Evidence, 522, § 561; Decker v. Mathews, 12 N. Y. 313. See 321; Redman v. Hendricks, 1 Sandf. 32; Wheeler v. Train, 3 Pick. 255; Sharp v. Whittenhall, 3 Hill, 576.

taking is sufficient to form ground of action.[125] The action does not lie in favor of a lessor of chattels during the lessee's right of possession.[126] Possession under a general, or even a gratuitous, bailment is sufficient evidence of title to entitle the bailee to maintain an action of trover against a stranger who intermeddles with the property.[127] Where M. made a bill of sale of goods, then in the possession of G., as keeper for the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant to recover the same, it was held that M. had no title to the property which he could recover in such action, as the mere handing back the bill of sale of M. did not revest the title in him.[128] An averment in the complaint that plaintiff was in possession imports that his possession was lawful.[129] In an action to recover the possession of personal property, it is not necessary to show that defendant had possession in fact of the goods at the time the action was brought. If the defendant had been previously in possession, and was present at the time of a demand upon another person, and refused by him, at the place where the goods were, he cannot set up a defense of the action that he had parted with the possession to such person.[130] It has sometimes been held that trover is founded exclusively on the right of property.[131] The right of property and the right of possession must concur, or the action will not lie. The special property must arise from possession.[132]

§ 4063. **Possession and right of possession—Ownership.**—No action for conversion can be maintained unless the plaintiff shows a general or special ownership in the property converted, and possession, or a legal right to immediate possession, at the time of the conversion.[133] If the plaintiff was not in possession at the

125 Frost v. Mott, 34 N. Y. 253; Bowen v. Fenner, 40 Barb. 383.

126 Triscony v. Orr, 49 Cal. 612.

127 Roberts v. Wyatt, 2 Taunt. 268; Saund. Pl. & Ev. 1151; Bowen v. Fenner, 40 Barb. 383.

128 Middlesworth v. Sedgwick, 10 Cal. 392.

129 Sheldon v. Hoy, 11 How. Pr. 11.

130 Garth v. Howard, 5 Carr. & P. 346.

131 Hostler v. Skull, 1 Tayl. 152.

132 Hotchkiss v. McVickar, 12 Johns. 403; McCurdy v. Brown, 1 Duer, 101.

133 Owens v. Weedman, 82 Ill. 409; Rugg v. Hoover, 28 Minn. 407, 10 N. W. 473; Parker v. First Nat. Bank, 3 N. Dak. 87, 54 N. W. 313.

time of conversion, the complaint must allege that "he was entitled to the immediate possession of the property."[134] A complaint is fatally defective in failing to allege with certainty ownership at the time of the conversion.[135] A complaint by a mortgagee of chattels against a subsequent mortgagee for their conversion does not state facts sufficient to constitute a cause of action when it contains no allegation of actual possession by the plaintiff at the time of the alleged conversion, nor of his right to possession, nor of demand for possession.[136] In trover, an allegation of property in the plaintiff involves an allegation of the right of possession, and proof of title suffices as proof of possession, until the presumption is overcome by contrary evidence. Hence an allegation of the complaint that the "defendant wrongfully took into his possession property of which the plaintiff was the owner," is held to be in substantial conformity with the requirement of good pleading in an action for conversion.[137] A declaration in trover by an assignee need not aver the assignment to him of the right of action to enforce which the suit is brought.[138]

§ 4064. **Purchase from agents.**—If one is intrusted with goods by the owner, with power to sell the same at retail for the owner as his agent or clerk, and if he then sells the goods in payment of his private debt to one who has full knowledge of the owner's title and the agent's relation to the goods, the purchase made with this knowledge amounts to a conversion.[139]

§ 4065. **Value.**—An averment of the value of the property is not material.[140] The value of the goods is not of the substance

134 Kennett v. Peters, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999. See Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, and note, 22 S. W. 813.

135 Id.; Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456; Smith v. Force, 31 Minn. 119, 16 N. W. 704.

136 Binnian v. Baker, 6 Wash. 50. See Kennett v. Peters, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999. But see Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Malcolm v. O'Reilly, 14 Jones & Sp. 222.

137 Kerner v. Boardman, 14 N. Y. Supp. 787, 39 N. Y. St. Rep. 787. See Malcolm v. O'Reilly, 14 Jones & Sp. 222.

138 Warren v. Dwyer, 91 Mich. 414, 51 N. W. 1062. See Hutchinson v. Whitmore, 90 Mich. 255, 30 Am. St. Rep. 431, 51 N. W. 451.

139 Herron v. Hughes, 25 Cal. 555. See Bolling v. Kirby, 90 Ala. 215, 24 Am. St. Rep. 789, 7 South. 914.

140 Bac. Abr., tit. Tresp. 1, 2, and Trov. F. 1; Conoss v. Meir, 2 E. D. Smith, 314.

of the issue, and need not be alleged. Nor is time a material allegation. The wrongful doing of the act is sufficient, without specifying the mode or manner in which it was done.[141] In designating the goods, a description which will identify them is sufficient.[142]

§ 4066. **Value—Continued.**—It is usual to state the value of the property in the complaint; but a complaint will not be deemed deficient, after verdict, which does not state the value of the property.[143]

In Montana, where an action for conversion is brought by a mortgagee of chattels, against an officer who has seized them under an attachment, the value of the property converted must be alleged and proved.[144]

§ 4067. **Who liable.**—It is a matter of no consequence that some other party took the property first, or that defendants purchased from a party who had no authority to sell; it is still a conversion. Somebody else may be also liable, but this does not relieve the defendants from their liability.[145] One who instigates a conversion is as much a principal as the one performing the act of conversion.[146]

§ 4068. **Date of conversion.**—The date of the conversion is not material, and a variance in proof as to the date, if prior to the commencement of the action, will not warrant a reversal of the cause.[147]

§ 4069. **Wrongful and unlawful.**—It is not necessary to designate the acts as "wrongful" or "unlawful" where the facts show an illegal taking of the goods.[148]

141 Richardson v. Hall, 21 Md. 399.

142 Root v. Woodruff, 6 Hill, 418. As to sufficiency of description of the property, see Crocker v. Hopps, 78 Md. 260, 28 Atl. 99; Letner v. Strickland, 89 Ga. 363, 15 S. E. 469; Greenbaum v. Taylor, 102 Cal. 624, 36 Pac. 957.

143 McKay v. Musgrove, 15 Or. 162, 13 Pac. 770. As to allegation of value of mining-stock shares converted, see Herrlich v. McDonald, 80 Cal. 460, 22 Pac. 298.

144 Rocheleau v. Boyle, 12 Mont. 590, 31 Pac. 533.

145 Briggs v. Waugenheim, Cal. Sup. Ct., Oct. T., 1869.

146 Cone v. Ivinson, 4 Wyo. 203, 35 Pac. 933; affirming former decision, 33 Pac. 31.

147 Bancroft Co. v. Haslett, 106 Cal. 151, 39 Pac. 602.

148 Buck v. Colbath, 7 Minn. 310, 82 Am. Dec. 91; Adams v. Corriston, 7 Minn. 456.

§ 4070. **Schedule annexed.**—Where the articles are numerous, they may conveniently be enumerated in a schedule or exhibit annexed to the complaint, and referred to as such. It is not necessary to state their value severally.[149] A petition alleging that the plaintiff held a mortgage on certain sheep, as defendant knew; that the mortgagors, at defendant's instigation, sold and disposed of all the sheep; and that defendant, for the purpose of defrauding the plaintiff, collected and retained the proceeds of the sale, alleges an unlawful sale in hostility to the plaintiff's mortgage, and therefore a tortious conversion by the parties making the sale.[150]

§ 4071. **Bailee holding lien.**—The right of possession of a bailee holding a lien does not preclude the owner from maintaining this action against a third person wrongfully taking the goods from the bailee. Either the owner or the bailee may bring action.[151] And if a pledgee sells the pledge so he cannot restore it, the pledgor need not tender the amount of the debt secured before bringing action.[152]

§ 4072. **Value of note.**—If the plaintiff does not know the exact amount of the note converted, he may state it as "of great value, to-wit, the value of," etc., designating a sum.[153] The amount of the note is *prima facie* the measure of damages.[154]

§ 4073. **Assignment by married woman.**—An assignment by a married woman of certain specific goods and chattels, "as well as all claims and demands for any portion of them," carries the right of action for the previous wrongful taking of any of the assigned goods.[155]

§ 4074. **Assignment for benefit of creditors.**—A general assignment of all property for the benefit of creditors is held to pass a right of action for the conversion of promissory notes.[156]

149 Root v. Woodruff, 6 Hill, 418.

150 Cone v. Ivinson, 4 Wyo. 203, 35 Pac. 933; affirming 33 Pac. 31.

151 Fitzhugh v. Wiman, 9 N. Y. 559; Neff v. Thompson, 8 Barb. 213.

152 Austin v. Vanderbilt, 48 Or. 206, 120 Am. St. Rep. 800, 85 Pac. 519.

153 Bissel v. Drake, 19 Johns. 66.

154 Ingalls v. Lord, 1 Cow. 240; Decker v. Mathews, 5 Sandf. 439.

155 Sherman v. Elder, 24 N. Y. 381.

156 Whittaker v. Merrill, 30 Barb. 389. See Westcott v. Keeler, 4 Bosw. 564.

§ 4075. **Consideration of assignment.**—It is not necessary to allege the consideration of the assignment.[157] A general averment of ownership is sufficient in an action by an assignee before the conversion. It is not necessary to set forth his title in the complaint. Under such an averment, a bill of sale from the former owner may be given in evidence.[158]

§ 4076. **Conversion before assignment.**—Where the complaint charges a conversion of personal property after its assignment to the plaintiff, he cannot recover for a conversion before its assignment. The case is not a variance, but the causes of action are distinct.[159]

§ 4077. **Complaint by assignees—Warrants.**—The complaint averred that defendant wrongfully took and detained from one Johnson certain county warrants owned by the latter; that subsequently Johnson assigned to plaintiff his right in the warrants, and the moneys which might be made by the same; and that, after this assignment, plaintiff demanded the warrants from defendant, who refused to deliver them. It was held that the complaint stated a sufficient cause of action; that, as assignee of Johnson, plaintiff was entitled to recover the warrants or their value, with damages for their detention accruing after their assignment.[160] In an action for the conversion of a city warrant for street improvements, in which the complaint described the same as "Stevens street warrant A. 896," and the proof showed that its number should be "A. 893," the variance is immaterial where the amounts, date of issue, rate of interest, and payee of the two warrants are the same.[161]

§ 4078. **Demand by assignee.**—Such a claim will pass by a general assignment in trust for the payment of creditors. And a new demand by the assignee is unnecessary.[162]

§ 4079. **Power of owner after conversion.**—After the conversion of a chattel or an injury to real or personal property, the

157 Vogel v. Badcock, 1 Abb. Pr. 176.

158 Heine v. Anderson, 2 Duer, 318.

159 Whittaker v. Merrill, 30 Barb. 389.

160 Lazard v. Wheeler, 22 Cal. 139.

161 Roe v. Cutter, 4 Wash. 611, 30 Pac. 663.

162 McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515.

owner may either sell the chattel itself or assign his right of action for the conversion or injury.[163]

§ 4080. **Right of action assignable.**—A right of action of this nature is assignable, and the assignee may sue in his own name.[164]

§ 4081. **Action against assignee.**—Where the defendant is assignee for the benefit of creditors from wrongdoers, it is necessary to allege that defendant has refused to deliver up the property upon demand.[165] But if an actual wrongful conversion of the property is proved, proof of a demand is unnecessary.[166]

§ 4082. **When action lies.**—The administrator may maintain an action for wrongful conversion of the personal estate of the deceased and recover double value therefor.[167] Such an action may be maintained without the aid of section 116 of the probate act;[168] and such section does not give a new right of action, but merely increases the damages.[169]

§ 4083. **Essential averments.**—A complaint in replevin by an executor should show the death of the testator, his leaving a will, the appointment therein of the plaintiff as executor, the probate of the will, the issuance of letters testamentary to the plaintiff, and his qualification and entry upon the discharge of his duties as executor.[170] When the complaint in such an action alleges that the defendant embezzled, alienated, and converted to his

163 Hall v. Robinson, 2 N. Y. 293; Cass v. New Haven R. R. Co., 1 E. D. Smith, 522; Robinson v. Weeks, 1 Code Rep. 311; McGinn v. Worden, 3 E. D. Smith, 355; Wilson v. Cook, 3 E. D. Smith, 252; Howell v. Kroose, 4 E. D. Smith, 357, 2 Abb. Pr. 167; North v. Turner, 9 Serg. & R. 244; Hoyt v. Thompson, 5 N. Y. 347; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515. See Hicks v. Cleveland, 39 Barb. 573; Waldron v. Willard, 17 N. Y. 466.

164 Gradwohl v. Harris, 29 Cal. 150; Cal. Code Civ. Proc., § 367. See Stott v. Franey, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271; Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154.

165 Fuller v. Lewis, 3 Abb. Pr. 383. See, also, Gurney v. Kenney, 2 E. D. Smith, 132.

166 Davidson v. Donadi, 2 E. D. Smith, 121; Pringle v. Phillips, 5 Sandf. 157.

167 Jahns v. Nolting, 29 Cal. 507.

168 Cal. Code Civ. Proc., § 1458.

169 Id. See Levy v. Superior Court, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811, construing this section of the Code of Civil Procedure.

170 Halleck v. Mixer, 16 Cal. 575.

own use the personal estate of the deceased, and prays for double damages, the plaintiff is entitled to recover double damages if the proof sustains the allegation.[171]

§ 4084. **Demand of property.**—In a suit by an administrator for conversion of the property of the estate, under section 116 of the statute to regulate the settlement of estates,[172] the proof as to the right or title or possession of plaintiff and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and the refusal by him to surrender the property, will charge him with a conversion.[173]

§ 4085. **Ownership.**—A complaint in replevin, alleging that F. was seised and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of one thousand dollars, the alleged value of the wood, sufficiently shows plaintiffs' ownership of the wood.[174] In a suit by a seller and owner to recover possession, the general allegations of ownership and right to possession, and unlawful withholding or conversion, are sufficient.[175] In absence of ownership, plaintiff must allege and prove a special ownership in the property, and a right to the immediate possession, at the time of the unlawful taking.[176]

§ 4086. **Bond or written instrument.**—In an action for the conversion of a bond or written instrument, the plaintiff should

171 Jahns v. Nolting, 29 Cal. 507.

172 Cal. Code Civ. Proc., § 1458.

173 Beckman v. McKay, 14 Cal. 250.

174 Halleck v. Mixer, 16 Cal. 574.

175 Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

176 Raymond v. Blanegrass, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976.

name the parties to it, and his declaration should show that it was an instrument in writing, although he cannot be held to an exact description.[177]

§ 4087. **Action defined.**—The action for "claim and delivery of personal property," under the practice of California, is at least commensurate with the action of detinue at common law.[178] Claim and delivery is a statutory remedy provided to enable one to recover the possession of personal property detained, with an alternative remedy, if possession cannot be had.[179] It was formerly the action of replevin.[180] The primary object of the suit is the recovery of the thing itself. The value is recovered only in the alternative that the thing is not returned.[181] And herein lies the difference between this action and the action corresponding with the former action of trover, where an offer before suit is not equivalent to a tender.[182] The plaintiff out of possession cannot sue for property severed from the freehold when the defendant is in possession of the premises from which the property was severed, holding them adversely in good faith under claim and color of title.[183] But by the action of claim and delivery the true owner of land may maintain replevin to recover wood cut on the land by one in possession of the same without color of title.[184] Replevin will not lie for an undivided part of a number of piles of lumber.[185] But the plaintiff in such action may recover distinct parcels, or a part of the separate article sued for, and the defendant prevail as to the others.[186] Replevin is the proper remedy to recover a package of gold sealed up in a leather

177 Pierson v. Townsend, 2 Hill, 550.

178 McLaughlin v. Piatti, 27 Cal. 464.

179 Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414. As to prayer of complaint in this action, see Dennison v. Chapman, 105 Colo. 447, 39 Pac. 61.

180 De Mott v. Hagerman, 8 Cow. 220, 18 Am. Dec. 443.

181 Hunt v. Robinson, 11 Cal. 277.

182 Savage v. Perkins, 11 How. Pr. 17. See Vogel v. Badcock, 1 Abb. Pr. 176; McCurdy v. Brown, 1 Duer, 101.

183 Halleck v. Mixer, 16 Cal. 579; affirmed in Page v. Fowler, 37 Cal. 100; McConnaughy v. Wiley, 33 Fed. 449, 13 Sawy. 148.

184 Kimball v. Lohmas, 31 Cal. 156; Halleck v. Mixer, 16 Cal. 579; Page v. Fowler, 37 Cal. 100. Common-law rule commented on in Page v. Fowler, 28 Cal. 605. See Brewer v. Fleming, 51 Pa. St. 102; Tudor Iron Works v. Hitt, 49 Mo. App. 472; United States v. Steenerson, 50 Fed. 504, 1 C. C. A. 552.

185 Guille v. Fook, 13 Or. 577, 11 Pac. 277.

186 Phipps v. Taylor, 15 Or. 484, 16 Pac. 171.

bag.[187] Replevin does not lie for goods deposited with the plaintiff by a stranger who has no interest in them.[188]

§ 4088. **Allegations essential.**—In an action against a sheriff for the value of a piano seized by him on an execution against the plaintiff, who claimed the same as exempt from execution, an allegation in the complaint that the plaintiff was a pianist, and that he had taught music within three months prior to the time when his piano was seized, is not sufficient to show that teaching music was his business at the time of such seizure.[189] Where the recovery of the property is the primary object of the suit, as in some cases where damages will not compensate plaintiff, he should frame his bill in equity, specifying the reasons therefor, and then a decree can be made to compel specific delivery.[190] For recovery of Mexican money lost in gambling, the money may be described as so many Mexican dollars.[191]

§ 4089. **Cepit—Detinet.**—The distinction must still be preserved between the wrongful taking and the wrongful detention. If the original taking was lawful, the action must be in the *detinet;*[192] and one who, having possession originally lawful, refuses to deliver, is not liable in the *cepit.*[193] If the action of claim and delivery can be said to be an action of replevin, it must be in the *detinet,* and not in the *cepit.*[194] There can be no proper recovery for a conversion upon a complaint stating a cause of action in claim and delivery.[195] So the grantee in a sheriff's deed cannot have replevin in the *cepit* for timber cut by debtor during the period allowed for redemption.[196] Replevin in the *cepit* will only lie where trespass will lie,[197] and only where a

187 Skidmore v. Taylor, 29 Cal. 619.

188 Harrison v. McIntosh, 1 Johns. 380.

189 Tanner v. Billings, 18 Wis. 163, 86 Am. Dec. 755.

190 Nickerson v. Chatterton, 7 Cal. 570.

191 Ramirez v. Main (Ariz.), 89 Pac. 508.

192 Randall v. Cook, 17 Wend. 53.

193 Hymann v. Cook, How. App. Cas. 419.

194 Hawkins v. Roberts, 45 Cal. 38.

195 Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414.

196 Rice v. Baker, 3 Denio, 79.

197 Marshall v. Davis, 1 Wend. 109, 19 Am. Dec. 463; Nash v. Mosher, 19 Wend. 431; Wilson v. Barker, 4 Barn. & Ald. 614; Vin., Tresp. (M.) Pl. 11; Bac. Abr. Tresp. (E.) 2; Bro. Abr. Tresp., Pl. 58; Barrett v. Warren, 3 Hill, 348; Rich v. Baker, 3 Denio, 79.

present right of possession is shown.[198] Replevin in the *detinet* as well as in the *cepit* will lie upon a tortious taking; for plaintiff may waive the force.[199] And in such case, a demand before suit is not necessary.[200]

§ 4090. **Character or capacity.**—It is not necessary to designate a public officer defendant by his official character. He is to be rendered liable in his individual capacity.[201] The deputy may be joined with the principal.[202]

§ 4091. **Claim to property.**—It is the privilege of the plaintiff to claim the delivery of the property at any time before the filing of the answer, but it is not compulsory upon him to do so.[203] And whether he claims it or not before the answer filed does not affect the question of ultimate relief.[204]

§ 4092. **Custody of the law.**—In general, goods in the custody of the law cannot be replevied,[205] even if the execution has been paid and satisfied.[206] If the officer upon an execution against A. seizes the goods of B., the latter may bring replevin.[207] Or, if the judgment was void for want of jurisdiction, replevin lies.[208] And it is held to be an established rule that replevin will lie in any state court of competent jurisdiction, in favor of one who is the owner of goods which had been seized by the sheriff, or any other officer, upon a writ against a third person, where the suit in which the writ issued has been brought in any other of the courts of the state.[209] It is further held that goods

198 Rogers v. Arnold, 12 Wend. 30; Sharp v. Whittenhall, 3 Hill, 576; Wheeler v. Train, 3 Pick. 255; Redman v. Hendricks, 1 Sandf. 32.

199 Cummings v. Vorce, 3 Hill, 282; Pierce v. Vandyke, 6 Hill, 613; Zachrisson v. Ahman, 2 Sandf. 68.

200 Id.; Stillman v. Squire, 1 Denio, 327.

201 Stillman v. Squire, 1 Denio, 327.

202 Waterbury v. Westervelt, 9 N. Y. 598; King v. Orser, 4 Duer, 431.

203 Wellman v. English, 38 Cal. 583.

204 Id.

205 Mills v. Martin, 19 Johns. 7; Ilsley v. Stubbs, 5 Mass. 283; Pearson v. Roberts, Willes, 672; Rex v. Monkhouse, 2 Stra. 1184; 1 Chit. Pl. 160; 3 Bl. Com. 148; Marshall v. Davis, 1 Wend. 109; 19 Am. Dec. 463; Hall v. Tuttle, 2 Wend. 475.

206 Gardner v. Campbell, 15 Johns. 401.

207 Thompson v. Button, 14 Johns. 84. See Gardner v. Campbell, 15 Johns. 401; Judd v. Fox, 9 Cow. 259.

208 Mills v. Martin, 19 Johns. 7.

209 Wilde v. Rawles, 13 Colo. 583, 22 Pac. 897; Carpenter v. Innes, 16 Colo. 165, 25 Am. St. Rep. 255, and note, 256, 26 Pac. 140. See, also, Whitney v. Swensen, 43 Minn. 337,

in the custody of a United States marshal, under attachment issued from a federal court, may be replevied by suit in a state court, by consent of the federal court.[210] But a defendant whose goods are seized by an officer in obedience to the command of legal process cannot maintain replevin against such officer for the goods so taken into legal custody.[211] And this is held to be so, although the property is by law exempt from seizure under the writ.[212] An action of claim and delivery will not lie against an officer who has sold the goods under execution and parted with the possession of them before the commencement of the action.[213] Under the statute of New Mexico,[213a] property seized by an officer under attachment process cannot be recovered in replevin by a third person claiming the right of possession.[214]

§ 4093. **Description of property.**—Certainty in the description of the property is required in replevin; but this rule does not require greater certainty of description than the nature of the property will reasonably admit. A description in the complaint of the property sought to be recovered as "sixty-eight head of hogs on the macadamized road in said county, on the place formerly kept by Wong Hin Soon," is reasonably certain.[215] So of a description as "two thousand pounds of oats, more or less, now situated in a certain granary, on the premises now occupied by defendants."[216] But a description simply as "five hundred and ninety sacks of wheat," was held insufficient.[217] It is not necessary, however, to describe specifically the character of the property, as that it is exempt from sale on execution, any more than it is in an action of trespass or

45 N. W. 609; Willis v. Reinhardt, 52 Ark. 128, 12 S. W. 241; Richards v. Kirkpatrick, 53 Cal. 433.

210 Mitchell v. Smith, 13 Colo. 170, 21 Pac. 1026; Hill v. Corcoran, 15 Colo. 270, 25 Pac. 171.

211 McHugh v. Robinson, 71 Wis. 565, 37 N. W. 426.

212 Hawk v. Lepple, 51 N. J. L. 208, 14 Am. St. Rep. 677, 17 Atl. 351, 4 L. R. A. 48. That it is otherwise in North Dakota, see Wagner v. Olson, 3 N. Dak. 69, 54 N. W. 286.

213 Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414.

213a Comp. Laws 1884, § 1975.

214 Butts v. Woods, 4 N. Mex. 187 (343), 16 Pac. 617.

215 Guille v. Fook, 13 Or. 577, 11 Pac. 277.

216 Hook v. Fenner, 18 Colo. 283, 36 Am. St. Rep. 277, 32 Pac. 614. See, also, Bilby v. Townsend, 29 Neb. 220, 45 N. W. 619; Wood v. Darnell, 1 Ind. App. 215, 27 N. E. 447; Sawyer v. Middlesborough Town Co., 13 Ky. Law Rep. 550, 17 S. W. Rep. 444.

217 Pierce v. Langdon, 3 Idaho, 141, 28 Pac. 401.

trover.[218] An exhibit containing a description of the property, in order to become a part of the complaint, must be annexed and attached thereto, and it is not sufficient to file the same as a separate paper, although referred to in the complaint and alleged to be a part thereof.[219] Mexican money may be described as so many Mexican dollars.[220]

§ 4094. **Special damages.**—The detriment caused by wrongful conversion of personal property is presumed to be, among other things, a fair compensation for the time and money properly expended in the pursuit of the property;[221] but this does not include attorney fees, either as damages or costs in the action.[222] In California, in actions for conversion, recovery cannot be had under section 3333 of the Civil Code, for the damages on a non-contractual obligation, but under section 3336, allowing the value at time of conversion, with interest, or, if prosecution is made with reasonable diligence, the highest market value at any time intervening, without interest, and a fair compensation for time and money expended in pursuit of the property.[223] The interest is allowed as a matter of right.[224]

§ 4095. **Damages.**—In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damage is the fixed value of the property, with interest up to the time of the rendition of the verdict.[225] So in an action against a sheriff for wrongful seizure and sale of property.[226] Damages are to be ascertained at the place where it is detained when the action is commenced.[227] But where the value of the goods is fluctuating, the plaintiff may recover the

218 Krause v. Herbert, 16 Or. 429, 18 Pac. 852; Dennis v. Snell, 50 Barb. 98.

219 Riley v. Pearson, 21 Or. 15, 26 Pac. 849.

220 Ramirez v. Main (Ariz.), 89 Pac. 508.

221 Cal. Civ. Code, § 3336.

222 Nicholls v. Mapes, 1 Cal. App. 349, 82 Pac. 265.

223 Lynch v. McGhan, 7 Cal. App. 132, 93 Pac. 1044.

224 Drumm-Flato Commercial Co. v. Edmission, 17 Okla. 344, 87 Pac. 311.

225 Dorsey v. Manlove, 14 Cal. 553; Hamer v. Hathaway, 33 Cal. 117; Phillips v. Sutherland (Cal.) 2 Pac. 32, 1 West Coast Rep. 350. See, also, as to the measure of damages in replevin, Hanselman v. Kegel, 60 Mich. 540, 27 N. W. 678; Lewis v. Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735; Thompson v. Scheid, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801; Coffin v. Taylor, 16 Or. 375, 18 Pac. 638.

226 Pelberg v. Gorham, 23 Cal. 349; Phelps v. Owens, 11 Cal. 22.

227 Hisler v. Carr, 34 Cal. 641.

highest market value at the time of the conversion, or at any time afterwards, the market value to be ascertained at the place of the conversion.[228] And such amount may be recovered upon an allegation of higher value at the time the money was lost, at gambling, demand and conversion occurring later.[229] Interest is allowed as a matter of right from the time when value is estimated.[230] The defendants are not entitled to claim compensation for money or services laid out or expended upon plaintiff's property, in the absence of a request on his part. No request will be presumed when the property of one person is taken under legal process against another.[231] The damage when the property has been delivered is the legal interest on the value thereof during the detention.[232] In an action to recover possession of a mare, and damages for her detention, damages resulting from the mare's losing flesh and the breeding season during such detention, should be specially alleged.[233] The rightful possession being found in favor of the plaintiff, nominal damages may be awarded, without averment of special damages, for the wrongful detention, and without proof of actual injury.[234] The value of the use of the property during the time of detention is recoverable as damages in replevin, and such damages may be estimated down to the day of trial.[235]

§ 4096. **Demand.**—In this form of action a demand must be proved.[236] But proof of demand is unnecessary when the pleadings admit it.[237] And it is only when the original possession is lawful, and the action relies upon the unlawful detention, that a

228 Douglass v. Kraft, 9 Cal. 563; Dorsey v. Manlove, 14 Cal. 555; Hamer v. Hathaway, 33 Cal. 117.

229 Ramirez v. Main (Ariz.), 89 Pac. 508.

230 Douglass v. Kraft, 9 Cal. 563; Hamer v. Hathaway, 33 Pac. 117. But see Cal. Civ. Code, § 3336, as amended 1878.

231 Hisler v. Carr, 34 Cal. 641. See Peters Box etc. Co. v. Lesh, 119 Ind. 98, 12 Am. St. Rep. 367, 20 N. E. 291.

232 Nickerson v. Chatterton, 7 Cal. 568; Douglass v. Kraft, 9 Cal. 562.

233 Stevenson v. Smith, 28 Cal. 102, 87 Am. Dec. 107. As to allegation of special damages, see Ross v. Malone, 97 Ala. 529, 12 South. 182; Bradley v. Borin, 53 Kan. 628, 36 Pac. 977.

234 Hammond v. Solliday, 8 Colo. 610, 9 Pac. 781.

235 Coffin v. Taylor, 16 Or. 375, 18 Pac. 638.

236 Powers v. Bassford, 19 How. Pr. 309; Fuller v. Lewis, 3 Abb. Pr. 384 See Gurney v. Kenney, 2 E. D. Smith, 132; Storm v. Livingston, 6 Johns. 44.

237 Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637.

demand is required.[238] Where the taking is by an officer upon proper legal authority, a demand is necessary in order to make him liable in damages.[239]

§ 4097. **Execution creditor joined.**—If the levy was made by the direction of the execution creditor, he also may be joined.[240]

§ 4098. **Fixtures, when personal property.**—By the wrongful severance from the premises, the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains a sheriff's deed.[241]

§ 4099. **Liabilities of third persons.**—Where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention.[242] A third person who acquires possession of the goods from a wrongdoer is liable when notice has been given.[243] And against such no demand is necessary.[244]

§ 4100. **Property taken for tax.**—In New York, under a statute providing that replevin shall not lie for goods taken for a tax pursuant to statute, it was held that property taken from the owner for a tax assessed on him under a statute of the United States cannot be replevied by him.[245] Yet the rightful possessor of goods unlawfully seized under a warrant against another for non-payment of taxes, may prosecute an action to recover possession of such goods, and take proceedings of claim and deliv-

238 Paige v. O'Neal, 12 Cal. 483; Bacon v. Robson, 53 Cal. 399; Stone v. O'Brien, 7 Colo. 458, 4 Pac. 792; Harris v. McCasland, 29 Ill. App. 430; Surles v. Sweeney, 11 Or. 21, 4 Pac. 469; Moorhouse v. Donaca, 14 Or. 430, 13 Pac. 112; Chandler v. Colcord, 1 Okla. 260, 32 Pac. 330; Smith v. Jensen, 13 Colo. 213, 22 Pac. 434; Hopkins v. Bishop, 91 Mich. 328, 30 Am. St. Rep. 480, 51 N. W. 902.

239 Daumiel v. Gorham, 6 Cal. 43; Killey v. Scannell, 12 Cal. 73.

240 Allen v. Crary, 10 Wend. 349, 25 Am. Dec. 566; Acker v. Campbell, 23 Wend. 372; Marsh v. Backus, 16 Barb. 483.

241 Sands v. Pfeiffer, 10 Cal. 258.

242 Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Dunham v. Troy Union R. R. Co., 3 Keyes, 543.

243 Olmsted v. Hotailing, 1 Hill, 317, and cases there cited. See Ely v. Ehle, 3 N. Y. 506.

244 Pringle v. Phillips, 5 Sandf. 157.

245 O'Reilly v. Good, 42 Barb. 521, 18 Abb. Pr. 106.

ery of such goods.[246] In such cases the court cannot inquire into the regularity of the proceedings upon which the warrant issued.[247]

§ 4101. **Relief.**—If there are several defendants, the court may adjudge a return of the property in favor of such of the defendants as appear to be entitled to a return, and refuse it as to such of them as are not.[248] The judgment must be in the alternative, and not in any case absolutely, for the value of the property.[249]

§ 4102. **Right of possession.**—Replevin lies for goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession.[250] A bill of sale of a given number of cattle, part of a herd running on the seller's ranch, giving the purchaser the right to select the number sold, and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller.[251] The plaintiff, by virtue of his prior actual possession of the land, will be entitled to recover, unless the defendants prove they entered in good faith, with the intention to pre-empt the land, on which hay was cut, and had actual possession of it at the time.[252] The ownership requisite to maintain an action for the recovery of personal property need not be absolute. A right to the possession and dominion over it for the time is all that is essential.[253] And a complaint in such action which

246 Stockwell v. Vietch, 18 Abb. Pr. 412. See Daniels v. Nelson, 41 Vt. 161, 98 Am. Dec. 577.

247 People v. Albany, 7 Wend. 485.

248 Woodburn v. Chamberlin, 17 Barb. 446.

249 Fitzhugh v. Wiman, 9 N. Y. 559; Dwight v. Enos, 9 N. Y. 470; Cooke v. Aguirre, 86 Cal. 479, 25 Pac. 5; Phipps v. Taylor, 15 Or. 484, 16 Pac. 171. Thus it is otherwise in Arkansas, see Swantz v. Pillow, 50 Ark. 300, 7 Am. St. Rep. 98, 7 S. W. 167.

250 Lazard v. Wheeler, 22 Cal. 139; Pangburn v. Partridge, 7 Johns. 140, 5 Am. Dec. 250, and cases there cited; Cresson v. Stout, 17 Johns. 116, 8 Am. Dec. 373.

251 McLaughlin v. Piatti, 27 Cal. 464.

252 Page v. Fowler, 37 Cal. 112.

253 Lewis v. Birdsey, 19 Or. 164, 26 Pac. 623; Stevens v. Chase, 61 N. H. 340.

states the particular facts entitling the plaintiff to the immediate and exclusive possession of the property claimed sufficiently pleads his title thereto, although it contains no general allegation that he is the owner and entitled to the possession of the property.[254] But in order to sustain the action the plaintiff must have the right to the immediate and exclusive possession of the property at the time the action is commenced. And a complaint averring that on a day two days prior to the commencement of the action the plaintiff was the owner and entitled to the immediate possession of the property, and that defendants refused to deliver the property upon demand made on the day of the commencement of the action, and unlawfully withhold possession, etc., does not state a cause of action.[255] And a complaint which only avers ownership and right of possession in the plaintiff at a time more than four years before the commencement of the suit is clearly bad.[256] In replevin, the plaintiff is not required to plead specially the source of his title, or the particular facts which entitle him to the possession of the property. He may allege generally that he is the owner and entitled to the immediate possession, and, under it, prove any right of property, general or special, that entitles him to possession; as, for example, a chattel mortgage and a breach of its conditions, which, by the terms of the instrument, entitles the mortgagee to possession.[257] But in some jurisdictions a plaintiff in replevin must set forth in his complaint or petition the facts which constitute his special interest or ownership in the property.[258] In an action of claim and delivery, when the complaint alleges ownership and right of possession in the plaintiff, and wrongful detention by the defendant, a general verdict for the plaintiff finds all these issues for the plaintiff. Such verdict determines that he is owner and entitled to possession.[259] And where, in such action, the evidence shows that the ownership of the property was the only issue, an allegation in the com-

254 Visher v. Smith, 91 Cal. 260, 27 Pac. 650.

255 Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750.

256 Affierbach v. McGovern, 79 Cal. 268, 21 Pac. 837.

257 Miller v. Adamson, 45 Minn. 99, 47 N. W. 452; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31.

258 Ream v. McElhone, 50 Kan. 409, 31 Pac. 1075; Kennett v. Peters, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999; Musser v. King, 40 Neb. 892, 42 Am. St. Rep. 700, 59 N. W. 744.

259 Gaines v. White, 1 S. Dak. 434, 47 N. W. 524.

plaint that the plaintiff was the owner of and entitled to the property at the time of the commencement of the suit is sufficient after verdict.[260]

§ 4103. **Non-payment.**—In replevin by a chattel mortgagee against an attaching creditor of the mortgagor, an allegation in the complaint of the non-payment of the mortgage note, the same not being due, is unnecessary.[261]

§ 4104. **Allegation of value.**—In an action for claim and delivery of a stated number of hogs, of which the aggregate value is alleged in the complaint, a finding that each hog was of the value of four dollars is proper, and will be well supported by the evidence, when the only evidence of their value is that they were worth four or five dollars a head.[262]

§ 4105. **When replevin lies.**—Replevin lies by the owner of chattels against one who has merely directed the sheriff to levy on them.[263] Replevin lies wherever trespass would lie.[264] This does not mean that the remedies are always concurrent, but that wherever trespass would lie, and the defendant was in possession of the goods, replevin would lie.[265] Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a preemption right, entered when he cut the hay.[266] The action for replevin would not lie for emblements cut and taken by a person who was at the time of the taking in possession of the land.[267] A safe in the possession of McC., belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant,

260 Pierce v. Langdon, 3 Idaho, 141, 28 Pac. 401.

261 Stevenson v. Lord, 15 Colo. 131, 25 Pac. 313.

262 Black v. Black, 74 Cal. 520, 16 Pac. 311.

263 Knapp v. Smith, 27 N. Y. 277.

264 Pangburn v. Partridge, 7 Johns. 140, 5 Am. Dec. 250; Marshall v. Davis, 1 Wend. 109, 19 Am. Dec. 463.

265 Roberts v. Randel, 3 Sandf. 707; further qualified as meaning that it would lie where trespass might be brought. Thompson v. Button, 14 Johns. 84; Clark v. Skinner, 20 Johns. 465, 11 Am. Dec. 302.

266 Page v. Fowler, 28 Cal. 606; affirmed in Page v. Fowler, 39 Cal. 416; Hutton v. Frisbie, 37 Cal. 490.

267 Rich v. Baker, 3 Denio, 79; De Mott v. Hagerman, 8 Cow. 220, 18 Am. Dec. 443. See Gossett v. Drydale, 48 Mo. App. 431.

as sheriff, under a writ against McC., seized eighteen hundred dollars of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting. It was held that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff.[268] Money is not the subject of an action of replevin, unless it is marked or designated in some manner so as to become specific as regards the power of identification, such as being in a bag or package.[269] Where one person is in possession of personal property, exercising dominion over it, and another takes and carries it away without his consent, the former may maintain an action against the latter to recover the possession of the property, although in fact it belongs to a third person, unless the latter can justify his taking of the property by showing such a privity existing between him and the owner as would entitle him to represent the owner's interest in it.[270] Where tenants in common of chattels agree that one shall have exclusive possession of the chattels, the tenant so entitled may maintain replevin against his cotenant.[271] Where a husband, without his wife's authority, sells or incumbers her personal property, she may recover its value in an action of replevin.[272] In an action by a married woman to recover the possession of personal property, it is not necessary for her to deraign her title to the property.[273]

§ 4106. When action will not lie.—If an officer, by his misconduct, induces a sale of property for less than it would otherwise have brought, the remedy must be by an action for damages for the loss resulting from his acts, and not an action to recover the property or its value.[274]

§ 4107. Wrongful detention.—This action is based upon a wrongful detention of the property; and such wrongful deten-

268 Griffith v. Bogardus, 14 Cal. 410.

269 Hamilton v. Clark, 25 Mo. App. 428.

270 Lewis v. Birdsey, 19 Or. 164, 26 Pac. 623.

271 Morgan v. Hedges, 4 Colo. 526. See Fines v. Bolin, 36 Neb. 621, 54 N. W. 990. Compare Robinson v. Dickey, 143 Ind. 205, 52 Am. St. Rep. 417, 42 N. E. 679.

272 Ashby v. Greenslate, 30 Neb. 253, 46 N. W. 427.

273 Freeburger v. Caldwell, 5 Wash. 769, 32 Pac. 732.

274 Foster v. Coronel, Oct. T., 1867.

tion must exist at the commencement of the suit.[275] But facts must be shown; as the averments in a complaint of "wrongful" and "unlawful" may be stricken out as surplusage.[276] It is held, however, not to be absolutely necessary to state in the complaint the facts which show that the detention is unlawful, and that they may be given in evidence on the trial.[277] An averment in the complaint that the defendant "unlawfully holds" the property is equivalent to an averment that it is "unlawfully detained."[278]

In South Dakota, the action to recover personal property takes the place of, and is a substitute for, both the former actions of replevin and detinue, and the unlawful detention is the gist of the action. It is immaterial how the defendant acquired the possession; but he must have either the actual or constructive possession of the property at the time the action for its recovery is instituted.[279] Under the Oregon statute,[279a] the action of replevin is local. A complaint in such action which only alleges a wrongful taking within the county in which the action is brought is bad on demurrer; but in the absence of such objection is sufficient to support evidence of the *situs* of the property at the time the action was commenced.[280]

§ 4108. **Wrongful taking.**—Alleging that the defendant took the plaintiff's property, and unjustly detains the same, sufficiently imports a wrongful taking.[281] The plaintiffs may declare generally, claiming the property as theirs, and give in evidence special facts to establish the fraud by which the defendant obtained possession of the goods.[282]

275 Savage v. Perkins, 11 How. Pr. 17; Gardner v. Brown, 22 Nev. 156, 37 Pac. 240.

276 Halleck v. Mixer, 16 Cal. 574.

277 Everett v. Buchanan, 2 Dak. 249, 6 N. W. 432, 8 N. W. 31. That it is otherwise in New York, see Barry v. Calder, 48 Conn. 449, 1 N. Y. Supp. 583.

278 Gould v. O'Neal, 1 Ind. App. 144, 27 N. E. 307.

279 Willis v. De Witt, 3 S. Dak. 281, 52 N. W. 1090. See Gildas v. Crosby, 61 Mich. 413, 28 N. W. 153; McHugh v. Robinson, 71 Wis. 565, 37 N. W. 426; Howe v. Shaw, 56 Me. 291; Turpie v. Fagg, 124 Ind. 476, 22 N. E. 743; Ross v. Menefee, 125 Ind. 432, 25 N. E. 545.

279a Or. B. & C. Codes, § 442.

280 Moorhouse v. Donaca, 14 Or. 430, 13 Pac. 112.

281 Childs v. Hart, 7 Barb. 370. Compare Reynolds v. Lounsbury, 6 Hill, 534.

282 Benesch v. Waggner, 12 Colo. 534, 13 Am. St. Rep. 254, 21 Pac. 706; Bliss v. Cottle, 32 Barb. 323; Nudd v. Thompson, 34 Cal. 39. See McKinney v. First Nat. Bank, 36 Neb. 629, 54 N. W. 963, where a petition stating a good cause of action in

§ 4109. **Complaint by assignee of insolvent.**—A complaint by the assignee of an insolvent debtor, which alleges that certain personal property belonged to the insolvent; that the same was wrongfully withheld from the schedule of assets; that the defendant wrongfully and without the consent of the plaintiff came into possession of and retained the same, claiming to be the owner thereof, and had no title to or right to the possession of said property, but that the same was the property of the insolvent, and that the plaintiff, as his assignee, was the owner and entitled to the possession of the same; and that a demand had been made of the property, but the defendant had refused to give possession of the same, states a cause of action which does not depend upon the ground of fraud, and is sufficient without any allegation of fraud, general or special.[283]

§ 4110. **Property of decedent.**—In an action by an administrator against a person claiming to hold the decedent's property by virtue of a gift or transfer from the decedent, if the defendant in his answer denies that the plaintiff's intestate, at the time of his death, owned or was in possession of the property, he may on the trial claim or establish a title to the property by gift from the intestate, especially after the plaintiff has himself proved that the defendant had claimed the property as such.[284] In Oregon, a person converting to his own use property of a decedent is made liable for double damages;[285] but in suing such person the administrator must demand double damages, or the action will be deemed to be for actual damages only.[286] Whatever may be the allegation of a complaint, if it shows that defendant received possession it is issuable.[287]

§ 4111. **Warehouseman.**—A person who is not engaged in warehousing as a business has no lien for his compensation for the chattels kept by him on storage.[288]

§ 4112. **Former recovery.**—A plea of former recovery in an action based on a wrongful sale of property must show that

replevin is set out in full. See, also, Daniels v. Cole, 21 Neb. 156, 31 N. W. 491.

283 Cady v. Leonard, 81 Cal. 622, 22 Pac. 694. See Fitzgerald v. Neustadt, 91 Cal. 600, 27 Pac. 936.

284 Woodruff v. Cook, 25 Barb. 505.

285 B. & C. Codes, § 1152.

286 Springer v. Jenkins, 47 Or. 502, 84 Pac. 479.

287 Elton v. Markham, 20 Barb. 343.

288 Rivard v. Ghio, 3 E. D. Smith, 267; Alt v. Weidenberg, 6 Bosw. 176.

the cause of action in the former suit was identical with the sale.[289] Where an action was brought by an agent in his own name for a trespass in converting coin, in which the jury found that the coin belonged to the principal, such action was no bar to an action by the principal for the coin.[290] Where an agent sues in his own name, the defendant may avail himself of all defenses which would be good as against either the principal or agent.[291] Plaintiff brought an action of replevin to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought an action in trover to recover the value. Defendants pleaded the former recovery as a bar to the action of trover, the judgment in replevin not being satisfied. It was held that the judgment in replevin did not constitute a bar to the action in trover.[292]

§ 4113. **General denial.**—Under the New York code, it has been held, in a suit for conversion of property, a denial of each and every allegation of the complaint puts in issue the conversion and plaintiff's title.[293]

§ 4114. **Justification of officer.**—When an officer justifies under an execution issued by a justice, his pleading must show that the justice had jurisdiction of the cause.[294] Upon issue joined upon plea of justification by an officer, it is incumbent upon him to establish his official capacity.[295] An officer having made a proper levy cannot be sued in trover by the debtor, for a part of the goods which was not sold, without proving a demand that he redeliver them, and a refusal.[296]

289 Hopkinson v. Shelton, 37 Ala. 306.

290 Pico v. Webster, 12 Cal. 140.

291 Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1029.

292 Nickerson v. California Stage Co., 10 Cal. 520.

293 Robinson v. Frost, 14 Barb. 536. But see Ely v. Ehle, 3 N. Y. 510; Jacobs v. Remson, 12 Abb. Pr. 390; Beaty v. Swarthout, 32 Barb. 293; Davis v. Hoppock, 6 Duer, 256; Heine v. Anderson, 2 Duer, 318; Gorham v. Cary, 1 Abb. Pr. 285. See, also, Young v. Glasscock, 79 Mo. 577; Thomas v. Ramsey, 47 Mo. App. 84; Johnson v. Oswald, 38 Minn. 550, 8 Am. St. Rep. 698, 38 N. W. 630.

294 Cleveland v. Rogers, 6 Wend. 438.

295 Greig v. Clement, 20 Colo. 167, 37 Pac. 960.

296 Seaman v. Luce, 23 Barb. 240

§ 4115. **Plaintiff regaining possession.**—The fact that the plaintiff has regained possession before suit brought is no defense to an action for the conversion.[297] It only goes to the mitigation of damages.[298]

§ 4116. **Title in another.**—Where, in an action for conversion, the issue under the pleadings is whether the plaintiff at the time of the conversion owned the property, and as owner was entitled to immediate possession, according to the allegation of his complaint, the defendant has a right to prove that the legal title was at the time vested in a third person, and that the plaintiff was not in possession, the above allegation not being a mere conclusion of law from facts previously stated, but the affirmation of a fact.[299] A sheriff may justify in this form of action by showing want of title in the plaintiff.[300] In an action of trover against the sheriff, who has seized personal property at the suit of a creditor of a grantor of the plaintiff, where there is no indication in the complaint that the plaintiff claims title by sale from the defendant in the execution, the sheriff is not bound in his answer to anticipate such title, and is not bound to plead any fraud, actual or constructive, in the sale.[301] In an action for wrongfully taking personal property, the answer alleged that the defendant took the property as constable, under an execution against a third party, in whose possession it was, but did not rebut the allegation that it was the property of the plaintiff. The answer was properly stricken out.[302]

§ 4117. **Counterclaim.**—In an action for the conversion of personal property of the plaintiff by an alleged sale thereof without his consent, the defendant may plead an agreement between the plaintiff and the defendant by which the property was turned over to such defendant as security for the payment by such defendant of all the debts of the plaintiff, which such defendant agreed to pay, and that the proceeds of the property were applied to the payment of such debts, and such defendant may

297 Murray v. Burling, 10 Johns. 172; Kerr v. Mount, 28 N. Y. 659.

298 Reynolds v. Shuler, 5 Cow. 323; Connah v. Hale, 23 Wend. 462.

299 Davis v. Hoppock, 6 Duer, 254.

300 Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324, 26 How. Pr. 75; Hall v. Stryker, 27 N. Y. 596.

301 Howe v. Johnson, 107 Cal. 67, 40 Pac. 42.

302 Barley v. Cannon, 17 Mo. 595.

plead by way of counterclaim the amount of all the plaintiff's debts paid under the agreement, and obtain judgment for the residue after deducting therefrom the value of the property sold.[303]

§ 4118. **Value.**—In an action in the nature of trover, the usual averment in the complaint of the value of the property converted is not traversable matter. The defendant cannot take issue upon it; and his omission to answer it does not admit its truth. Hence, where the answer does not deny the averment of value, the plaintiff must notwithstanding prove the amount of his damages.[304] In trover, trespass, or replevin, it is not necessary to deny the value or the damages alleged in the complaint. So held in Wisconsin.[305] It is held in California, that where an unverified complaint alleges the value of property converted, and the answer is a general denial, the value is put in issue.[306] In an action for the conversion of chattels, alleged by the plaintiff to be of a certain value, defendant denied that they were of such value, or of any greater value than a certain less sum named. It was held to be an admission that they were worth the less sum named.[307]

§ 4119. **Another action pending.**—In an action against a constable to recover possession of personal property taken under attachment, the pendency of another suit for the same goods by the plaintiff's vendor is no defense.[308] A pleading by a defendant in an action of replevin which admits the taking complained of, but justifies under legal process, and prays judgment, restitution of the property replevied, or for its value, contains only matter of confession and avoidance, and is deemed controverted by plaintiff.[309]

§ 4120. **Limitation of action.**—An action for taking, detaining, or injuring goods or chattels, or for the specific recovery

303 Story etc. Co. v. Story, 100 Cal. 30, 34 Pac. 671.

304 Connoss v. Meir, 2 E. D. Smith, 314.

305 Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675.

306 Paden v. Goldbaum (Cal.), 37 Pac. 759.

307 Carlyon v. Lannan, 4 Nev. 156. For the measure of damages in California, see Civ. Code, § 3336. See, also, Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Hisler v. Carr, 34 Cal. 641; Atherton v Fowler, 46 Cal. 323. For instance of erroneous judgment, see Cummings v. Stewart, 42 Cal. 230.

308 O'Connor v. Blake, 29 Cal. 312.

309 Stringer v. Davis, 35 Cal. 25.

of personal property, must be commenced within three years;[310] and this includes conversion of corporate stocks, even though it be joined with an application for an accounting.[311] The statute runs not from the date of taking, but from the date of demand and refusal.[312]

§ 4121. **Delivery to third person.**—If, during the pendency of an action to recover the possession of personal property, and before the trial thereof, the defendant has been required to deliver, and has delivered the property to another person entitled to its possession, as against both plaintiff and defendant, that fact may be set up in the answer, or in a supplemental answer, for the purpose of defeating a recovery of the possession or of the value of the property.[313]

§ 4122. **Demand.**—If the defendant does not object to the sufficiency of a demand, and refuses to deliver up the property for improper reasons, a further demand will be unnecessary.[314] If the complaint shows that the property came rightfully to the possession of the defendant, and does not aver a demand and failure to deliver, it is fatally defective.[315]

§ 4123. **Fraudulent transfer.**—In an action against a sheriff to recover the possession of personal property, it is a good defense for the sheriff to show that the defendant in the attachment, when insolvent, sold the property to the plaintiff, to defraud his creditors, with the knowledge of plaintiff, and that said defendant has since been declared a bankrupt, and the sheriff has, on demand of the assignee in bankruptcy, delivered him the goods.[316]

§ 4124. **General denial—Insufficient denials.**—In an action for claim and delivery of personal property, the denial by the defendant of the averment in the complaint of the plaintiff's title and right of possession, and of the wrongful detention, is sufficient, without a denial of an averment of the particu-

310 Cal. Code Civ. Proc., § 338.

311 Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889.

312 Austin v. Van Loon, 36 Colo. 196, 85 Pac. 183.

313 Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162.

314 King v. Fitch, 1 Keyes, 432.

315 Campbell v. Jones, 38 Cal. 507.

316 Bolander v. Gentry, 36 Cal. 105, 95 Am. Dec. 162.

lar facts upon which his title and right of possession are claimed.[317] Evidence of a levy under an execution prior to that stated in the answer was not admissible under the general denial. If defendant had made a prior levy, and was thereby entitled to possession of the goods, it was matter to be specially pleaded.[318] In an action to recover the possession of personal property, the defendant may set up a general denial, and also a justification.[319] Where the complaint in replevin averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was one thousand dollars; and the answer denied that on the day specified "the plaintiff was the owner and lawfully in possession," and, as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth one thousand dollars, it was held that the answer is insufficient because it raises an immaterial issue as to time; and as to the possession of the property, that it amounts merely to a conclusion of law.[320] Where the complaint is in replevin, a denial in the answer in the conjunctive that defendant took "and" carried away the goods is not a denial that he took the goods, or a denial that he carried them away, and is bad as implying an affirmative of the allegation intended to be denied.[321]

§ 4125. **Justification.**—An officer, to justify the seizure of property in possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint.[322] He may plead the property to have been in possession of the defendant in the suit. In such case it is not necessary that the defendant should specially plead want of notice and demand in order to make such a defense.[323] In an action of replevin against a sheriff, he must justify not only with the execution, but with the judgment itself, whenever he takes property which is in the possession of a stranger to the writ.[324] It does not state facts constituting a defense if it fails to allege that the defendant in the attachment suit was the owner of the property.[325] In an

317 Nudd v. Thompson, 34 Cal. 39.

318 Graham v. Harrower, 18 How. Pr. 144.

319 Hackley v. Ogmun, 10 How. Pr. 44.

320 Kuhland v. Sedgwick, 17 Cal. 123.

321 Bach etc. Co. v. Montana etc. Co., 15 Mont. 345, 39 Pac. 291.

322 Glazer v. Clift, 10 Cal. 303.

323 Killey v. Scannell, 12 Cal. 73.

324 Knox v. Marshall, 19 Cal. 617.

325 Richardson v. Smith, 29 Cal. 529.

action against a sheriff for taking goods, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which states the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, is held to be sufficient.[326]

§ 4126. **Non cepit.**—A plea of *non cepit* in replevin puts in issue the question of general property only, and not of special property, at least in a suit between a principal and his agent. On such a plea the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another; for a wrongful detainer after a lawful taking is not equivalent to a wrongful original taking.[327]

§ 4127. **Subsequent proceedings.**—If it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification.[328]

§ 4128. **Denial of plaintiff's title.**—The defendant, whether he plead property in himself or in a stranger, is required to traverse property in the plaintiff.[329] In claim and delivery, the denial of the particular facts upon which the plaintiff claims title and right of possession is sufficient.[330] If the complaint in an action to recover the possession of personal property avers "that the plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property."[331] A complaint in an action to recover personal property averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and, in addition, averred affirma-

326 Towdy v. Ellis, 22 Cal. 650. As to plea of justification, see Barnhart v. Fulkerth, 90 Cal. 157, 27 Pac. 71; Poole v. Wilber, 95 Cal. 343, 30 Pac. 548.

327 Meany v. Head, 1 Mason, 319, Fed. Cas. No. 9379.

328 Walker v. Woods, 15 Cal. 66.

329 Rogers v. Arnold, 12 Wend. 30; Prosser v. Woodward, 21 Wend. 205; Curtis v. Jones, 1 How. App. Cas. 137; Curtis v. Jones, 3 Denio, 590; Pringle v. Phillips, 1 Sandf. 292.

330 Nudd v. Thompson, 34 Cal. 39.

331 Richardson v. Smith, 29 Cal. 529.

tively that the property was at that time owned and possessed by a third person. It was held that this averment was but another form of denial, and not new matter, which under the system of replication formerly in force was admitted by failure to reply.[332] In an action of claim and delivery, a defendant who has wrongfully taken possession of the property cannot set up as a defense that other persons who are not defendants have a lien on the property which entitles them to its possession.[333] But if plaintiff has no right to the property, that is a good defense, even though defendant does not have the right.[334]

§ 4129. Prayer.—In an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments.[335] If the plaintiff takes the property, the defendant must claim its return in his answer to enable the court to give the judgment in the alternative form.[336] An answer praying for the return of the property, or the value thereof in case a return cannot be had, and for damages and costs, seeks affirmative relief, and a judgment of dismissal by the plaintiff, entered by the clerk after such answer is filed, is void, although an order of dismissal had been entered upon the register of actions before the filing of the answer.[337]

§ 4130. Property in defendant.—Property is a good plea in replevin,[338] but must be specially pleaded.[339] An answer which denies the ownership of the plaintiff is not obnoxious on a general demurrer, although other irrelevant matters are set up therein

332 Woodworth v. Knowlton, 22 Cal. 164.

333 Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330.

334 Herman v. Northern Pacific Ry. Co., 43 Wash. 624, 86 Pac. 1068.

335 Gould v. Scannell, 13 Cal. 430.

336 Id.; Pico v. Pico, 56 Cal. 459; Banning v. Marleau, 101 Cal. 238, 35 Pac. 772.

337 Acock v. Halsey, 90 Cal. 215, 27 Pac. 193.

338 Dermott v. Wallach, 1 Black, 96, 17 L. Ed. 50.

339 Dickson v. Mathers, Hempst. 65, Fed. Cas. No. 3898a.

as a defense.[340] A plea in replevin that the property was not in the plaintiff is informal, but sufficient, and admits proof of property in the defendant or a stranger.[341] The omission of a *similiter* is immaterial;[342] but the defendant cannot allege that the plaintiff has taken from him other property than that mentioned in the complaint, and ask or obtain judgment for its return.[343]

FORMS IN CONVERSION.

§ 4131. Complaint for conversion—Common form.

Form No. 1107.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff was lawfully possessed of [briefly describe the goods], his property, of the value of . . . dollars.

II. That on said day, at . . ., the defendant unlawfully took and carried away said goods and converted and disposed of the same to his own use, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4132. Complaint for conversion—Another form.

Form No. 1108.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., he was the owner of [describe the property], of the value of . . . dollars, and was then entitled to the immediate possession of the same.

II. That on said . . . day of . . ., 19.., at . . ., the defendant then being in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

340 Laughlin v. Thompson, 76 Cal. 287, 18 Pac. 330.

341 Dermott v. Wallach, 1 Black, 96, 17 L. Ed. 50. See, also, Rogers v. Arnold, 12 Wend. 30, 34, 35; Siedenbach v. Riley, 111 N. Y. 560, 19 N. E. 275.

342 Rogers v. Arnold, 12 Wend. 30.

343 Lovensohn v. Ward, 45 Cal. 8.

§ 4133. Complaint by seller against buyer, under contract for sale.

Form No. 1109.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the said plaintiff delivered to the said defendant two thousand sheep [or other personal property], under a contract in writing, by the terms of which the defendant agreed to furnish range, pasturage, and care for said sheep, and to pay the plaintiff the sum of . . ., as the purchase price thereof, within two years thereafter, and the plaintiff agreed to sell said sheep to the defendant upon such payment being made.

II. That the defendant has made the following payments on account of said sheep, and none other, to-wit: [State payments.]

III. That it was provided in said contract that the title to said sheep should remain in the plaintiff until full payment should be made of the said purchase price therein mentioned.

IV. That on or about the . . . day of . . ., 19. . , the defendant wrongfully took said sheep, and without the consent of plaintiff, sold the same, and converted the same to his own use, to the plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4134. Complaint by seller against fraudulent buyer of goods for conversion.

Form No. 1110.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., defendant represented to the plaintiff that one A. B. was solvent and in good credit, and worth . . . dollars over all his liabilities.

II. That the plaintiff was thereby induced to sell to the said A. B. [dry goods] to the value of . . . dollars.

III. That said representations were false, and known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff.

IV. That the defendant, having so obtained from the plaintiff the possession of said goods, converted and disposed of them to

his own use, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4135. Allegations against fraudulent buyer and his transferee.

Form No. 1111.

That the said [buyer] afterwards transferred said goods to the defendant A. B., who wrongfully detains them from the plaintiff. That on the . . . day of . . . , 19.. , at . . . , the plaintiff demanded of said A. B. that he deliver the same to him, but the said A. B. refused to do so, to his damage in the sum of . . . dollars.

§ 4136. Complaint for goods wrongfully taken from possession of plaintiff's assignor.

Form No. 1112.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, one A. B. owned and was lawfully possessed of [describe the property], of the value of . . . dollars.

II. That on the . . . day of . . . , 19.. , the defendant wrongfully took said goods from the possession of said A. B., and ever since has detained the same.

III. That on the . . . day of . . . , 19.. , said A. B. assigned and set over to the plaintiff said goods, and also his claim to damages for said taking and detention, and plaintiff is now the owner thereof.

IV. By reason of the premises, the plaintiff has sustained damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4137. Complaint for goods wrongfully taken from possession of bailee.

Form No. 1113.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the plaintiff was, and still is, the owner of [describe the goods], which goods

were then in the possession of A. B., with whom the plaintiff had left the same for safe-keeping [or otherwise].

II. That on the . . . day of . . . , 19.. , the defendant wrongfully took said goods from the possession of said A. B. and still detains the same from the plaintiff without his consent, to the damage of the plaintiff in the sum of . . . dollars.

III. That before this action, to-wit, on the . . . day of . . . , 19.. , the time which said A. B. was safely to keep said goods had expired, and thereupon the plaintiff became entitled to the immediate and exclusive possession of said goods.

[DEMAND OF JUDGMENT.]

§ 4133. Complaint for conversion of promissory note.

Form No. 1114.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff made his promissory note, of which the following is a copy: [insert copy], which note was made and delivered by the plaintiff to A. B., without consideration, and for his accommodation, and with the special purpose and agreement between the plaintiff and said A. B., that [state intended appropriation of the note as the fact was].

II. That said note was thereafter offered by said A. B. to the bank of . . . , which refused to discount the same, and returned it to said A. B., whereupon the plaintiff became entitled to the possession thereof. [Or, state facts as they occurred.]

III. That thereafter, but before the maturity of the note, the defendant C. D., without the knowledge or consent of the plaintiff or of A. B., unlawfully took the said note from the possession of A. B. and delivered it to the defendant E. F.; and that the defendants thereupon converted and disposed of it to their own use, whereby the plaintiff was compelled to pay it, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4139. Complaint by assignee after conversion.

Form No. 1115.

[TITLE.]

The plaintiff complains, and alleges:

I. That before, and until the time hereinafter mentioned, one A. B. owned and was lawfully possessed of [designate the goods],

or was entitled to the immediate possession of [describe the goods].

II. That on the . . . day of . . ., 19.., the defendant converted the same to his own use, to the damage of the plaintiff in the sum of . . . dollars.

III. That on the . . . day of . . ., 19.., said A. B. assigned to the plaintiff his claim against the defendant for damages for said conversion.

[DEMAND OF JUDGMENT.]

§ 4140. Complaint against one in possession innocently.

Form No. 1116.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege ownership.]

II. That on the . . . day of . . ., 19.., at . . ., one A. B. wrongfully took said goods and chattels from the possession of the plaintiff, and unjustly detained the same.

III. That thereafter the same came into the possession of the defendant, who refused to deliver them to the plaintiff, although, before this action, to-wit, on the . . . day of . . ., 19.., the plaintiff duly demanded of the defendant possession of the same.

IV. That the defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4141. Complaint by administrator, after conversion.

Form No. 1117.

[TITLE.]

The plaintiff complains, and alleges:

I. That before and until the time hereinafter mentioned, one A. B. was lawfully possessed of [or, was entitled to the immediate possession of—describe goods], the property of the said A. B., of the value of . . . dollars.

II. That on the . . . day of . . ., 19.., the same came into the possession of the defendant, who from that day until the commencement of this action has detained the same.

III. That before the commencement of this action, to-wit, on the . . . day of . . ., 19.., the said A. B. [or, the plaintiff] demanded the same from the defendant, but he refused to deliver them.

IV. That thereafter and before this action, said A. B. died intestate, and on the . . . day of . . ., 19.., letters of administration upon the estate of said A. B., deceased, were duly issued and granted to the plaintiff by the probate court of the county of . . ., of this state, appointing the plaintiff administrator of all the goods, chattels, and credits which were of said deceased, and that the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office, and is now such administrator.

[DEMAND OF JUDGMENT.]

§ 4142. Complaint for conversion of bond.

Form No. 1118.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., one A. B. was the owner of a bond, a copy of which is annexed as a part of this complaint, and marked "Exhibit A," and by his agent, at the request of the defendant, deposited it with the defendant for the purpose of [here briefly state the purpose for which it was deposited].

II. That after a reasonable time for [state purpose] and on the . . . day of . . ., 19.., at . . ., said A. B. demanded from the defendant the said bond, or the value thereof; but the defendant refused either to return it or to pay its value to the said A. B.

III. That on the . . . day of . . ., 19.., at . . ., the said A. B. duly assigned to the plaintiff the said bond, together with all his right of action against the defendant and all other persons, to recover its value, or its possession, or damages.

IV. That the value of said bond at the date of said demand was the sum of . . . dollars.

[If the plaintiff is entitled to recover special damages, allege the facts which show it.]

[DEMAND OF JUDGMENT.]

§ 4143. Complaint for claim and delivery.

Form No. 1119.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff was the owner [or otherwise] of the following goods and chattels [of the value of . . . dollars], to-wit: [Describe goods.]

II. That the defendant on the . . . day of . . ., 19.., at the city and county of . . ., without the plaintiff's consent, and wrongfully, took said goods and chattels from the possession of the plaintiff.

III. That before the commencement of this action, to-wit, on the . . . day of . . ., 19.., the plaintiff demanded of the defendant possession of said goods and chattels.

IV. That said defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of . . . dollars.

Wherefore the plaintiff demands judgment against the defendant.

1. For the recovery of possession of said goods and chattels, or for the sum of . . . dollars, the value thereof [in case a delivery cannot be had].

2. For . . . dollars damage, and for costs of suit.

§ 4144. Answer—Denial of plaintiff's ownership.

Form No. 1120.

[TITLE.]

The defendant answers to the complaint, and denies, that at the time of the alleged conversion, the plaintiff was the owner, or entitled to the possession of the goods, wares, and merchandise mentioned in the complaint, or any of them.

§ 4145. Answer—Denial of bailment.

Form No. 1121.

[TITLE.]

The defendant answers to the complaint, that the defendant never received the plaintiff's goods mentioned in the complaint, as bailee, as alleged, or at all.

§ 4146. Answer—Lien upon goods detained.

Form No. 1122.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff deposited the goods mentioned in the complaint with the defendant for storage, agreeing to pay for the same [one dollar] per [ton] per [month].

II. That the defendant has always been, and still is, ready and willing to deliver the said goods to the plaintiff, upon the payment of the storage money due.

III. That the plaintiff has not paid or tendered to the defendant the storage money due.

§ 4147. Answer—Lien for services.

Form No. 1123.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That said goods were manufactured by the defendant, as tailor, and that he detained them by virtue of his lien as a mechanic, and the manufacturer thereof, as security for the payment of . . . dollars, which is the amount due him from the plaintiff for work and labor in manufacturing them.

II. That defendant has always been and still is ready and willing to deliver the said goods to the plaintiff upon receiving the said amount.

III. That the plaintiff has not paid or tendered to the defendant the said amount of . . . dollars due thereon.

§ 4148. Answer—Claim and delivery.

Form No. 1124.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That the plaintiff, at the time stated in the complaint, or ever, or at all, was in possession, or entitled to the possession, of the goods described in the complaint, or any of them.

II. That said goods, or any of them, are or ever were the property of the plaintiff.

III. That said goods are or were, at the time alleged, or at any time since, of the value of . . . dollars or any amount greater than . . . dollars.

§ 4149. Answer—Title in another than plaintiff.

Form No. 1125.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the property described in the complaint was, at the time stated therein, and still is, the property of . . ., and not the property of the plaintiff.

§ 4150. Answer—Defendant part owner.

Form No. 1126.

[TITLE.]

The defendant answers to the complaint, and alleges:

That, at the several times mentioned in the complaint, the defendant was, and still is, the owner of an undivided half of said goods, wares, and merchandise; and defendant was then, and still is, in the possession of the whole of said goods.

§ 4151. Justification of taking by defendant as sheriff.

Form No. 1127.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the . . . day of . . ., 19.., one John Doe was, and from thence until the . . . day of . . ., 19.., remained, the sole owner of all the property described in said complaint.

II. That on the . . . day of . . ., 19.., an action was duly commenced by one . . . against the said John Doe, in the superior court of the county of . . ., state of California, to recover the sum of . . . dollars, alleged to be due for [state object of action].

III. That on the said date a summons in due form was issued in said last-named action, and on said date was duly served upon said John Doe by the defendant, as the sheriff of the county of . . ., by delivering to him personally a true copy thereof, attached to a copy of the complaint therein, at the [state place].

IV. That on said date a writ of attachment was duly issued in due form in said last-named action, after the issuance of the summons therein, and placed in the hands of the defendant, as sheriff

as aforesaid; and that on said date said sheriff delivered a true copy of said writ of attachment to . . ., in whose possession the property described in said complaint then was, together with a written notice signed by said sheriff, indorsed on said copy of said writ of attachment, and directed to said . . ., notifying him that all the moneys, goods, credits, effects, debts due or owing, or any other personal property in his possession or under his control, belonging to said John Doe, were attached by virtue of said writ of attachment, and not to pay over or transfer the same to any one but him, the said sheriff.

V. That thereafter, and on the . . . day of . . ., 19.., judgment was duly made, rendered, and entered in said last-named action, in said superior court, against said John Doe, and in favor of said . . ., for the sum of . . . dollars.

VI. That on the . . . day of . . ., 19.., an execution was duly issued in due form in said superior court, under and by virtue of said judgment, which execution was on said last-mentioned date placed in the hands of the defendant as sheriff, for service.

VII. That said sheriff executed the same by delivering to said . . . personally, on the . . . day of . . ., 19.., at . . ., a true copy of said execution, and a notice in writing, notifying said . . . that all moneys, goods, credits, effects, debts due or owing, or any property in his possession or under his control, belonging to the said John Doe, were levied upon by virtue of said writ of execution, and not to pay over or transfer the same to any one but him, the said sheriff, and by delivering to the said John Doe personally, on the . . . day of . . ., 19.., at . . ., a true copy of said writ of execution and notice, together with a description of the property levied upon.

VIII. That said sheriff, by virtue of said writ of execution, duly levied upon, on the . . . day of . . ., 19.., all the right, title, and interest of said John Doe in and to the property described in the complaint, the same then being in the possession of said . . ., and being the sole property of said John Doe, by taking all of said property into his possession, and by delivering to said . . . on the . . . day of . . ., 19.., a true copy of said writ of execution, together with a description of all of said property, and a written notice that said property, and all the right, title, and interest of said John Doe therein, was levied upon, and by delivering to said John Doe personally on the . . . day of . . .,

19.., at . . ., a true copy of said writ of execution, description, and notice.

IX. That said sheriff, on the . . . day of . . ., 19.., duly advertised all of said property in accordance with law by posting three notices of sale, particularly describing said property, in three public places in . . . , advertising said property to be sold at public auction in view thereof, at [state place of sale], on . . ., between the hours of . . ., and that on said day all of said described property was by said sheriff, at the hour of . . ., and at the place aforesaid, exposed for sale at public auction, and was sold in separate lots or parcels to the highest and best bidders for cash, the whole thereof being sold for the sum of . . ., which said sum, less the sum of . . ., sheriff's costs, was on the . . . day of . . ., 19.., credited on said execution and judgment.

X. [Denies that plaintiff was the owner or in possession of said property.]

§ 4152. Defense of attorney's lien for services.

Form No. 1128.

[Title.]

The defendant alleges:

I. That he is and was at all times hereinafter mentioned an attorney at law, duly admitted and practicing as such at . . ., and that the plaintiff, on or about the . . . day of . . ., 19.., retained the defendant as such attorney to prosecute a certain action against one E. F. [Or otherwise, state the character of the business.]

II. That at the time of such retainer, and in pursuance thereof, the plaintiff deposited with the defendant, as such attorney, the said deeds [or other papers] mentioned in the complaint, and that thereafter the defendant performed legal services in the prosecution of said action for the plaintiff, which were reasonably worth the sum of . . . dollars, and necessarily advanced and expended for traveling expenses, officers' fees, and other necessary expenses, at plaintiff's request, the sum of . . . dollars, no part of which sums have been paid to the defendant [except the sum of . . . dollars], though often demanded.

III. That the defendant now holds and retains said papers by virtue of his lien thereon for the said services and disbursements, amounting to . . . dollars, and not otherwise.

§ 4153. Answer—Goods seized under attachment, and plaintiff a fraudulent purchaser.

Form No. 1129.

[TITLE.]

The defendant answers, and alleges:

I. That one M. N., on the . . . day of . . ., 19. . , was indebted to the defendant in the sum of . . . dollars, over and above all legal set-offs, and departed out of the state, or kept concealed within it, with intent to defraud his creditors of their just demands, or to avoid being arrested by the ordinary process of law. [Or otherwise, according to the statute of the particular state.]

II. That the defendant applied [stating the proceedings to obtain an attachment against M. N. pursuant to the law of the state]; and that a warrant of attachment was duly issued by the said judge to the sheriff of the county of . . ., commanding him to attach all the property of the said M. N., which warrant was delivered to one O. P., a deputy sheriff of said county, to be executed in due form of law.

III. That the plaintiff, on the . . . day of . . ., 19. . , was possessed of the said nine horses, by virtue of a conveyance thereof, made to him by the said M. N., with the intent to defraud the creditors of the said M. N. of their just debts. [Here state facts showing fraudulent intent.]

IV. That the deputy sheriff, by virtue of the said warrant, and the defendant, in aid and by the command of the said deputy sheriff, did attach, and for the space of two days did safely keep, the said horses as and for the proper goods and chattels of the said M. N., which is the same trespass complained of by the plaintiff.

CHAPTER CXI.

PERSONAL INJURY CAUSED BY NEGLIGENCE.

§ 4154. Carrier's contract.—Passenger-carriers bind themselves to carry safely those whom they take into their coaches or cars, as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons.[1] It is contrary to public policy to permit carriers to contract for exemption from effects of their negligence.[2] The words "care, diligence, and foresight" imply a relation to future events.[3] Carriers of passengers must use the utmost, the highest degree of care,[4] and are liable for the slightest negligence;[5] but are not insurers of the personal safety of the passengers.[6] The carrier need not do everything, but need exercise only the highest degree of care consistent with the practical conduct of its business.[7] That other carriers have done the same thing customarily is no defense.[8]

§ 4155. Special damages—Pleading.—Increased injury to plaintiff by reason of her diseased condition at the time of the accident does not constitute special damages which must be pleaded in order to be recovered.[9] Nor is it necessary to plead special damages where they are such as would necessarily result from the act complained of.[10] The petition must show that the injuries were the natural and probable consequences of the negli-

1 Story on Bailments, § 601. See Dodge v. Boston etc. S. S. Co., 148 Mass. 207, 12 Am. St. Rep. 541, 19 N. E. 373, 2 L. R. A. 83; Treadwell v. Whittier, 80 Cal. 575, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498.

2 Pierce v. Southern Pacific Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Ogdensburg v. Pratt, 89 U. S. (22 Wall.) 123, 22 L. Ed. 827.

3 Wheaton v. North Beach etc. R. R. Co., 36 Cal. 590. See Cal. Civ. Code, §§ 2100-2104, inclusive.

4 Cal. Civ. Code, § 2100; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169; Williams v. Spokane Falls etc. Ry. Co., 39 Wash. 77, 80 Pac. 1100.

5 Sambuck v. Southern Pacific Co., 138 Cal. xix., 71 Pac. 174.

6 Taillon v. Mears, 29 Mont. 161, 74 Pac. 421; Foster v. Seattle El. Co., 35 Wash. 177, 76 Pac. 995.

7 Johnson v. Seattle El. Co., 35 Wash. 382, 77 Pac. 677; Denham v. Washington Water Co., 38 Wash. 354, 80 Pac. 546.

8 Williams v. Spokane Falls etc. Ry. Co., 39 Wash. 77, 80 Pac. 1100.

9 Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624.

10 Bussard & Robson v. Hibler, 42 Or. 500, 71 Pac. 642.

gent act of defendant, and that defendant should have foreseen such an injury.[11] Medical expenses must be specially pleaded, but need not be itemized.[12] It is proper to allow funeral expenses and cost of transportation of the body to the home of deceased in another state.[13] Costs of medical treatment should not be allowed to a plaintiff who has not paid such costs and is not liable therefor.[14]

§ 4156. Damages.—If by the negligent driving of defendant's servant his vehicle runs into another which is driven with due care, and causes the horse of the latter to take fright and run away, and said horse runs into the plaintiff's vehicle and injures him when he is using due care, the damage is not too remote to be recovered.[15] In a case of simple negligence in which the elements of fraud, malice, or oppression do not enter, only actual damages can be recovered.[16] In actions of this character, all the circumstances in the case may be taken into consideration in making up the estimate of damages, and the jury are not confined to the actual damages sustained, and where the stage at the time was driven by the servant or agent the principal is liable only for simple negligence, and exemplary damages cannot be imposed.[17] There is no fixed rule for the measure of damages for personal injuries, especially for mental anguish apart from physical suffering, and much must be left to the jury.[18] The only damages which can be recovered in such actions are such as are commensurate with the injury alleged to have been sustained, or actual damages.[19]

11 Mayme v. Chicago etc. Ry. Co., 12 Okla. 10, 69 Pac. 933.

12 Turney v. Southern Pacific Co., 44 Or. 280, 75 Pac. 144, 76 Pac. 1080.

13 Dean v. Oregon R. R. etc. Co., 44 Wash. 564, 87 Pac. 824; Philby v. Northern Pacific Ry. Co., 46 Wash. 173, 123 Am. St. Rep. 921, 89 Pac. 468, 9 L. R. A. (N. S.) 1193.

14 Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733.

15 McDonald v. Snelling, 96 Mass. 290, 92 Am. Dec. 768. See Gonzales v. City of Galveston, 84 Tex. 3, 31 Am. St. Rep. 17, 19 S. W. 284.

16 Moody v. McDonald, 4 Cal. 297; Sedgwick on Measure of Damages, 39; Keene v. Lizardi, 8 La. (O. S.) 26; Mason v. Hawes, 52 Conn. 12, 52 Am. Rep. 552; Hurt v. St. Louis etc. R. R. Co., 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1.

17 The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456; Wardrobe v. California Stage Co., 7 Cal. 120, 68 Am. Dec. 231.

18 Powell v. Nevada etc. Ry., 28 Nev. 40, 78 Pac. 978.

19 City of Pueblo v. Timbers, 31 Colo. 215, 72 Pac. 1059; Greenleaf on Evidence, § 253; Whittemore v. Cutter, 1 Gall. 478, Fed. Cas. No. 17601; Bateman v. Goodyear, 12 Conn. 580; Dain v. Wycoff, 7 N. Y. 193.

§ 4157. Defect of vehicle.—A carrier of passengers for hire does not warrant that the carriage in which the passenger travels is roadworthy. He is bound to use all vigilance to insure safety, but is not liable for a defect which could not be detected, and which arises from no fault of the manufacturer.[20]

§ 4158. Injury to children.—If a child under four years of age is injured by the negligence of third persons in the street of a city traversed constantly by cars and other vehicles, his father cannot recover for loss of service if he has knowingly suffered such child to be in the street unattended.[21] Otherwise of an action by the child itself, although the negligence of a volunteer undertaking to interfere for the child's benefit contributed to the injury.[22] One who sells gunpowder to a child eight years old, knowing that he is unfit to be trusted with it, is liable, if the child, using the care of which he is capable, explodes it, and is burned by the same; and a license to sell gunpowder is no defense.[23]

§ 4159. Master and servant—General doctrine.—The general doctrine is maintained that the master or employer is responsible for the act or omission of the servant or employee within the scope of his employment or authority,[24] and is so even where the acts were not within the scope of the servant's employment, if

20 Readhead v. Midland R. R. Co., L. R., 4 Q. B. 379, 2 Q. B. 412; Du Laurans v. St. Paul etc. R. R. Co., 15 Minn. 49, 2 Am. Rep. 107. See Breen v. New York etc. R. R. Co., 109 N. Y. 297, 4 Am. St. Rep. 450, 16 N. E. 60; St. Louis etc. R. R. Co. v. Valirius, 56 Ind. 511.

21 Glassey v. Hestonville R. R. Co., 57 Pa. St. 172; Westbrook v. Mobile & Ohio R. R. Co., 66 Miss. 560, 14 Am. St. Rep. 587, 6 South. 321.

22 North Pennsylvania R. R. Co. v. Mahoney, 57 Pa. St. 187; St. Clair etc. Ry. Co. v. Eadie, 43 Ohio St. 91, 54 Am. Rep. 803, 1 N. E. 519; Winters v. Kansas etc. R. R. Co., 99 Mo. 509, 17 Am. St. Rep. 591, 12 S. W. 652, 6 L. R. A. 536; Huff v. Ames, 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623.

23 Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682.

24 New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30; Chapman v. New York Cent. R. R. Co., 33 N. Y. 369, 88 Am. Dec. 392; Drew v. Sixth Avenue R. R. Co., 26 N. Y. 49; Lannen v. Albany Gas Light Co., 46 Barb. 264; Carman v. Mayor of New York, 14 Abb. Pr. 301; Annett v. Foster, 1 Daly, 502; Meyer v. Second Ave. R. R. Co., 8 Bosw. 305; Merrick v. Brainard, 38 Barb. 574. When not affected by partial reversal, see Merrick v. Van Santvoord, 34 N. Y. 208; International etc. R. R. Co. v. Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. 1039; Palmer v. Manhattan Ry. Co., 133 N. Y. 261, 28 Am. St. Rep. 632, 30 N. E. 1001, 16 L. R. A. 136; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400.

the defendant, as principal, is acting as a carrier of passengers.[25] One whose servant negligently throws a keg out of a window and injures a person passing through a passageway below is liable, although such person was there only by license.[26] But the employer is not responsible for a willful injury committed by an employee not within the scope of his employment.[27] For injury by negligence, both employer and employee may be sued together.[28] A municipal corporation is not liable for negligence of members of its paid fire department.[29]

§ 4160. Essential averments.—It is only necessary to prove the overturn and the injuries sustained. The presumption of law is that the overturn occurred through the negligence of the defendant.[30] In an action on the case for an injury sustained by the upsetting of a stage-coach, the declaration alleged that the plaintiff, at the special instance and request of the defendants, became a passenger in a certain coach, to be carried safely, and for certain rewards to the defendants; and that thereupon it was their duty to use due and proper care that the plaintiff should be safely conveyed. The breach was well assigned, showing the neglect and consequent injury sustained; and it was held that the defect, if any, was cured by section 32 of the judiciary act, which provides that no litigant shall lose his right in law for want of form.[31] In an action for an injury sustained by the upsetting of defendant's stage-coach, the plaintiff alleged that he paid for his passage the sum of ten dollars; this was held to be a material allegation.[32]

A complaint which alleges that defendant's servant, while driving along the street in the performance of his master's business, so negligently managed the horse and wagon that by reason thereof the wagon struck plaintiff while riding on her bicycle, causing bodily injuries, is a sufficient statement of the facts, as against a motion requiring plaintiff to state in what the negli-

25 Taillon v. Mears, 29 Mont. 161, 74 Pac. 421.

26 Corrigan v. Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685.

27 Garvey v. Dung, 30 How. Pr. 315; Stephenson v. Southern Pacific Co., 93 Cal. 558, 27 Am. St. Rep. 223, 29 Pac. 234, 15 L. R. A. 475; Mott v. Consumers' Ice Co., 73 N. Y. 543.

28 Phelps v. Wait, 30 N. Y. 78.

29 Howard v. San Francisco, 51 Cal. 52.

30 Boyce v. California Stage Co., 25 Cal. 460.

31 Stockton v. Bishop, 4 How. 155, 11 L. Ed. 918. See, also, Washington v. Ogden, 1 Black, 450, 17 L. Ed. 203.

32 Harris v. Rayner, 8 Pick. 541.

gence consisted, and in what manner the horse and wagon were negligently driven.[33]

§ 4161. **Overturning plaintiff's carriage.**—In a case for personal injuries caused by plaintiff's horse being frightened by two loud, sudden, and sharp whistles from defendant's engine, and upsetting his carriage, it was held that whether or not the above was a proper signal, in the use of ordinary care, was for the jury. A verdict for the plaintiff was upheld.[34]

§ 4162. **Paid fare.**—Carriers cannot protect themselves from liability for gross negligence by contract.[35] It is otherwise when the passenger is carried free.[36]

§ 4163. **Railroad company.**—An action lies against a city railroad company for the negligence of their driver in respect to stopping the car and assisting young and infirm persons on.[37]

§ 4164. **Stock running at large.**—Plaintiff was driving in the highway, using due care, when defendant's hog, running at large, contrary to the statute, frightened plaintiff's horse, and his minor daughter was injured in consequence. It was held that defendant was liable, although he did not know that the hog was at large.[38]

§ 4165. **Who liable.**—Where one owning a carriage hires horses and a driver of B., for an injury resulting from the carelessness of the driver B. alone is liable.[39] A municipal corporation is liable for injuries ensuing from neglect of its employees

33 Adams Express Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6; Mills' Annot. Code, § 49.

34 Hill v. Portland R. R. Co., 55 Me. 438, 92 Am. Dec. 601.

35 Illinois Cent. R. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85. See Adams Express Co. v. Haynes, 42 Ill. 89, 93.

36 Kinney v. Cent. R. R. Co., 32 N. J. L. 407, 90 Am. Dec. 675. But see Pennsylvania R. R. Co. v. Butler, 57 Pa. St. 335.

37 Drew v. Sixth Ave. R. R. Co., 3 Keyes, 429. See Anderson v. Minneapolis etc. Ry. Co., 42 Minn. 490, 18 Am. St. Rep. 525, 44 N. W. 518; Birmingham etc. Ry. Co. v. Smith, 90 Ala. 60, 24 Am. St. Rep. 761, 8 South. 86.

38 Jewett v. Gage, 55 Me. 538, 92 Am. Dec. 615.

39 Quarman v. Burnett, 6 Mee. & W. 497; Rapson v. Cubitt, 9 Mee. & W. 709; Hobbitt v. N. W. R. R. Co., 4 Welsb., Hurlst. & Gord. 254; Allen v. Hayward, 7 Adol. & E. (N. S.) 960.

or officers.[40] The fact that the driver of the carriage and horses was their owner was conclusive in establishing that the relation of master and servant did not exist; and so far as the defendant's liability rested upon the existence of such relation, he was not responsible for the injury which the plaintiff received through the negligence of the driver.[41] If defendant owns the vehicle, receives the profits from its use, and the driver lives with him and is employed at other duties, a finding of the jury that he was employed by defendant at the time of the accident will not be disturbed.[42]

§ 4166. **Degrees of negligence.**—Degrees of negligence are matters of proof, and not of averment; and a general allegation of negligence, want of care and skill, etc., is sufficient in an action for injuries caused by such negligence, whether the defendant is liable for ordinary or gross negligence.[43] And an averment of malice does not vitiate the pleading.[44] The doctrine of different degrees of slight, ordinary, and gross negligence is not followed in Colorado.[45]

§ 4167. **Diligence.**—The same diligence is not required from a railroad company towards a stranger as towards a passenger. The care required is that which experience has found reasonable and necessary to prevent injury to others in like cases.[46] A railroad company is not liable for injuries received by a passenger while voluntarily and unnecessarily standing on the platform of a car in motion, although by the express permission of the conductor and brakeman.[47]

40 Lloyd v. Mayor of New York, 5 N. Y. 369, 55 Am. Dec. 347. Contra, Howard v. San Francisco, 51 Cal. 52. Compare Orlando v. Pragg, 31 Fla. 111, 34 Am. St. Rep. 17, 12 South. 368, 19 L. R. A. 196; Caspary v. City of Portland, 19 Or. 500, 20 Am. St. Rep. 842, 24 Pac. 1036; City of Denver v. Dean, 10 Colo. 375, 3 Am. St. Rep. 594, 16 Pac. 30.

41 Boniface v. Relyea, 5 Abb. Pr. (N. S.) 259.

42 Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202.

43 Nolton v. Western R. R. Co., 15 N. Y. 444, 69 Am. Dec. 623.

44 Winterson v. Eighth Ave. R. R. Co., 2 Hilt. 389; Robinson v. Wheeler, 25 N. Y. 252.

45 Denver etc. Ry. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76, 69 Pac. 578.

46 Baltimore etc. R. R. Co. v. Breinig, 25 Md. 378, 90 Am. Dec. 49. See Philadelphia etc. R. R. Co. v. Kerr, 25 Md. 521.

47 Hickey v. Boston etc. R. R. Co., 96 Mass. 429.

§ 4168. **General averment of negligence.**—Ordinarily, a general averment of negligence is sufficient to admit proof of the special circumstances constituting it. Thus, in an action against a railroad company for running over a child, evidence is admissible under such a general averment that there were no suitable brakes or guards in front of the car where the driver was stationed.[48] When the law imposes and defines a duty, a complaint for negligent breach thereof need not specifically plead it.[49] Specifying the particular act, together with a general allegation that such act was negligently done, makes a sufficient statement of a case.[50]

§ 4169. **Negligence generally, and also specific acts.**—Under a complaint alleging negligence generally, and also specifying particular acts of negligence, evidence of any other kinds of negligence is admissible; the general allegation being sufficient, the particular charges, being surplusage, should not affect the reception of evidence.[51] Negligence is a question of fact, or of mixed law and fact; and in pleading it is only necessary to aver negligence generally, not the specific facts constituting the negligence.[52] As a rule, negligence may be pleaded generally. It is an ultimate fact, and not a conclusion of law.[53]

But it is held by the Oregon court that a general allegation of negligence does not charge any fact.[54] And although negligence may be charged in general terms, yet it must appear from the facts averred that the negligence caused or contributed to the injury, and it is not sufficient merely to aver that the injury was caused by reason of the negligence averred, if no fact is stated which shows how the injury was caused.[55] It is sufficient if the acts which caused the injury are alleged to have been negligently or carelessly done, without stating the specific facts

48 Oldfield v. New York etc. R. R. Co. 14 N. Y. 310; McGehee v. Schiffman, 4 Cal. App. 50, 87 Pac. 290.

49 Adams Express Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6.

50 Chaperon v. Portland Gen. El. Co., 41 Or. 39, 67 Pac. 928.

51 Edgerton v. New York etc. R. R. Co., 35 Barb. 389; affirmed, 39 N. Y. 227; Cunningham v. Union Pacific R. R. Co., 4 Utah, 206, 7 Pac. 795.

52 McCauley v. Davidson, 10 Minn. 418.

53 McGonigle v. Kane, 20 Colo. 292, 38 Pac. 367; House v. Meyer, 100 Cal. 592, 35 Pac. 308.

54 Woodward v. Oregon etc. Nav. Co., 18 Or. 289, 22 Pac. 1076; McPherson v. Pacific Bridge Co., 20 Or. 486, 26 Pac. 560.

55 Smith v. Buttner, 90 Cal. 95, 27 Pac. 29.

constituting the negligence.[56] The particular act alleged to have been negligently done must be specified.[57]

§ 4170. Particular facts.—The complaint in an action against a railroad company for running over a person with an engine need not show the particular facts constituting negligence on the part of the defendant, if it charges such negligence in a general way. Such complaint, in some states, must show that there was no fault on the part of the person run over.[58]

§ 4171. Several acts of negligence.—If the plaintiff would rely on several acts of negligence as the cause of one injury, he may allege all the acts of negligence in one count, and aver that they were the cause; and if he prove upon the trial that any one of them was the cause, his complaint is sustained.[59]

§ 4172. Sufficient averment of negligence.—In an action against a railroad company for injuries caused by a collision with its cars, a complaint which alleges that the defendant, with carelessness and with gross negligence, caused one of its engines to run upon the track, etc., sufficiently charges negligence.[60] An allegation that an act was wanton, reckless, or grossly negligent is not equivalent to an allegation that the act is willful and intentional.[61] That defendant extracted seven of plaintiff's teeth, and removed all of them except one, which, by defendant's carelessness and unskillfulness, was permitted to drop and pass into plaintiff's right lung, without any negligence on plaintiff's part, is not demurrable for failure to allege that

56 Board of Commissioners v. Huffman, 134 Ind. 1, 31 N. E. 570; Walsh v. Western R. R. Co., 34 Fla. 1, 15 South. 686; Wills v. Cape Girardeau etc. R. R. Co., 44 Mo. App. 51; Jackman v. Lord, 56 Hun, 192, 9 N. Y. Supp. 200; Conley v. Richmond etc. R. R. Co., 109 N. C. 692, 14 S. E. 303; Parker v. Providence etc. S. S. Co., 17 R. I. 376, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414; Poling v. Ohio River R. R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; Gulf etc. R. R. Co. v. Washington, 49 Fed. 347, 1 C. C. A. 286.

57 Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 Pac. 618, 36 Pac. 407.

58 Indianapolis etc. R. R. Co. v. Keeley's Admr., 23 Ind. 133; St. Louis etc. Ry. Co. v. Mathias, 50 Ind. 65.

59 Dickens v. New York Cent. R. R. Co., 13 How. Pr. 228; Louisville etc. R. R. Co. v. Mothershed, 97 Ala. 261, 12 South. 714.

60 Ohio etc. R. R. Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477. See Denver etc. R. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261; Lavis v. Wisconsin etc. R. R. Co., 54 Ill. App. 636.

61 Denver etc. Ry. v. Buffehr, 30 Colo. 27, 69 Pac. 582.

defendant's negligence was the proximate cause.[62] But it is held to be an established rule, that if the plaintiff specifically plead the act or acts constituting the defendant's negligence, he cannot prove other and different act or acts for the purpose of substantiating his complaint.[63] Thus where the plaintiff alleges that the personal injuries for which he seeks to recover were caused by a defective piledriver, he cannot recover for injuries received on account of an unmanageable team of horses used in operating it.[64] And where it was alleged that the defendant's omission to give any signal of an approaching engine was the cause of the plaintiff's injuries, no recovery can be had on the ground that the whistle was sounded, frightening the plaintiff's horse.[65]

§ 4173. **Averment of no contributory negligence.**—Freedom from contributory negligence need not be alleged in the complaint, in most states, that being a matter of defense,[66] unless the complaint shows that plaintiff's own act was a proximate cause of the injury.[67]

§ 4174. **Negligence of children.**—In an action against a railroad company for the death of an eleven-year-old child, while on the right of way, attracted there by an overturned car, which fell over onto the child, plaintiff must allege and prove that the child was too young to appreciate the danger; that the death was caused by a dangerous thing attractive to children; that the railroad company knew, or, in the exercise of ordinary care, ought to have known, that children would be attracted by the car.[68]

§ 4175. **Imputed contributory negligence.**—The neglect of an employee in not protecting the property from fire is neglect of the owner.[69] One riding in a buggy with another is not chargeable with the contributory negligence of such party, but must

62 McGehee v. Schiffman, 4 Cal. App. 50, 87 Pac. 290.

63 Batterson v. Chicago etc. Ry. Co., 49 Mich. 184, 13 N. W. 508; Cherokee etc. Min. Co. v. Wilson, 47 Kan. 460, 28 Pac. 178.

64 Santa Fe etc. Ry. Co. v. Hurley, 4 Ariz. 258, 36 Pac. 217.

65 Barron v. Chicago etc. R. R. Co., 89 Wis. 79, 61 N. W. 303.

66 Pryor v. City of Walkerville, 31 Mont. 618, 79 Pac. 240; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871.

67 Cummings v. Helena etc. Co., 26 Mont. 434, 68 Pac. 852.

68 Gates v. Northern Pacific Ry. Co., 37 Mont. 103, 94 Pac. 751.

69 Hawley v. Sumpter Valley Ry. Co., 49 Or. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526.

exercise ordinary care himself.[70] The negligence of the parent of an infant of tender years cannot be imputed to the child in an action by the child for an injury due to the railroad's negligence.[71]

§ 4176. Without the bounds of the state.—An action cannot be maintained under the statute for a wrongful act causing death, where such act occurred without the bounds of the state,[72] except upon proof of the laws of the other state.[73] The law of the place where the injury occurred governs.[74]

§ 4177. Omission of duty.—The facts which are relied on as raising a duty must be alleged where the negligence consists in the omission of a duty.[75] An existing duty or obligation is an essential and necessary prerequisite or predicate of an affirmation of neglect or failure to perform.[76] Neglect to ring the bell for the entire distance required by law does not necessarily make the company liable, if the bell was rung or whistle sounded for such a distance from the crossing as to give the deceased timely and sufficient warning of the approaching train to prevent him from trying to cross the track.[77]

§ 4178. Condition of boiler.—The certificate of an inspector does not discharge the liability of the owner of a boiler to the

70 Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059.

71 Atchison etc. Ry. v. Calhoun, 18 Okla. 75, 89 Pac. 207; Colorado Springs El. Co. v. Soper, 38 Colo. 126, 88 Pac. 161.

72 Mahler v. Norwich etc. Transp. Co., 45 Barb. 226. Compare Leonard v. Columbia etc. R. R. Co., 84 N. Y. 48, 38 Am. Rep. 491; Knight v. West Jersey R. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200; Vawter v. Missouri Pacific R. R. Co., 84 Mo. 679, 54 Am. Rep. 105.

73 Leonard v. Columbia etc. Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Wooden v. Railway Co., 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050, 13 L. R. A. 458.

74 Sartin v. Oregon Short Line, 27 Utah, 447, 76 Pac. 219.

75 City of Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550; affirming 14 Barb. 101; Taylor v. Atlantic Mut. Ins. Co., 2 Bosw. 106; Congreve v. Morgan, 4 Duer, 439; Seymour v. Maddox, 16 Q. B. 326, 71 Eng. Com. L. 326. See McGinity v. Mayor etc., 5 Duer. 674; Rockford City R. R. Co. v. Matthews, 50 Ill. App. 267; Funk v. Piper, 50 Ill. App. 163; Falk v. New York etc. R. R. Co., 56 N. J. L. 380, 29 Atl. 157.

76 Eustace v. Jahns, 38 Cal. 3; O'Brien v. Capwell, 59 Barb. 497.

77 Cook v. New York Cent. R. R. Co., 5 Lans. 401. But see Robinson v. Western Pacific R. R. Co., 48 Cal. 410. As to duty of railway company to give proper signals at crossings, see Murray v. Missouri etc. R. R. Co., 101 Mo. 236, 20 Am. St. Rep. 601, 13 S. W. 817; Chicago etc. R. R. Co.

party injured by its bursting.[78] The owner of an engine and boiler is not absolved from liability for injury to a servant, caused by the bursting of the boiler while in use, merely because he had procured an independent contractor to repair it.[79]

§ 4179. **Master and servant.**—The owner of a water-craft is not liable for the injury willfully committed by the master or pilot running her.[80]

§ 4180. **Company, when not liable.**—The fact that a railroad company's servant was of a higher grade than another servant of said company, injured through his negligence, does not make the company liable.[81]

§ 4181. **Employer, when liable.**—If injury to the employee results from fault or negligence on the part of the employer, the employer is liable.[82] But if such injury results from defects in machinery, etc., notice of such defect must be brought home to the employer.[83] An allegation that defendant "negligently provided" such machinery, is held a sufficient averment of knowledge.[84]

§ 4182. **Joinder of parties.**—Master and servant may be joined as defendants in an action to recover for the negligence of the servant.[85]

§ 4183. **Mutual negligence.**—The rule that the plaintiff cannot recover if his own wrong as well as that of the defendant conduced to the injury is confined to cases where his wrong or negligence has immediately or approximately contributed to the result.[86] A slight want of care on the part of the plaintiff will

v. Dillon, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181.

78 Swarthout v. New Jersey Steamboat Co., 46 Barb. 222.

79 Shea v. Pacific Power Co., 145 Cal. 680, 79 Pac. 373.

80 Richmond Turnpike Co. v. Vanderbilt, 1 Hill, 480.

81 Shauck v. Northern Cent. R. R. Co., 25 Md. 462; Cumberland Coal etc. Co. v. Scally, 27 Md. 589; McLean v. Blue Point Gravel Min. Co., 51 Cal. 255.

82 Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315; Connolly v. Poillon, 41 Barb. 366.

83 Kunz v. Stuart, 1 Daly, 431; Loonam v. Brockway, 28 How. Pr. 472.

84 Knaresborough v. Belcher S. Min. Co., 3 Sawy. 446, Fed. Cas. No. 7874.

85 Montfort v. Hughes, 3 E. D. Smith, 591.

86 Kline v. Central Pacific R. R. Co., 37 Cal. 400, 99 Am. Dec. 282;

not excuse gross negligence by the defendant.[87] Contributory negligence is any negligence on the part of the person injured which proximately or naturally contributed to the injury.[88]

§ 4184. Want of ordinary care.—In Indiana, in an action against a railroad company by one of its servants to recover for injuries received through the negligence of another servant, the complaint must allege, either expressly or by stating facts from which it clearly appears, that the plaintiff did not by his own fault or negligence contribute to the injury.[89] Generally, however, it is not necessary for the plaintiff to allege in his complaint that the injury happened without any want of ordinary care on his part, except where the facts alleged are such as to raise a presumption of such fault in him.[90]

Ordinary care implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as under all the circumstances of the particular service a careful, prudent man or officer of a corporation would exercise under the same or similar circumstances.[91]

citing Needham v. San Francisco & San Jose Railroad Co., 37 Cal. 409.

87 Bequette v. People's Trans. Co., 2 Or. 200; Hurt v. St. Louis etc. R. R. Co., 94 Mo. 255, 4 Am. St. Rep. 374, 7 S. W. 1; Hays v. Gainesville etc. Ry. Co., 70 Tex. 602, 8 Am. St. Rep. 624, 8 S. W. 491; Romick v. Chicago etc. R. R. Co., 62 Iowa, 167, 17 N. W. 458.

88 McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74.

89 Evansville R. R. Co. v. Dexter, 24 Ind. 411; Indiana etc. R. R. Co. v. Greene, 106 Ind. 279, 55 Am. Rep. 736, 6 N. E. 603; Brannen v. Kokomo etc. Gravel Road Co., 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; Evansville etc. R. R. Co. v. Malott, 13 Ind. App. 289, 41 N. E. 549. See, also, Messenger v. Pate, 42 Iowa, 443; Gregory v. Woodworth, 93 Iowa, 246, 61 N. W. 962.

90 Johnson v. Hudson River R. R. Co., 5 Duer, 21, 20 N. Y. 65, 75 Am. Dec. 375; Wolfe v. Supervisors of Richmond, 11 Abb. Pr. 270, 19 How. Pr. 370; Burdick v. Worrall, 4 Barb. 596; Holt v. Whatley, 51 Ala. 569; Higley v. Gilmer, 3 Mont. 97, 35 Am. Rep. 450; Nelson v. City of Helena, 16 Mont. 21, 39 Pac. 905; Texas Ry. Co. v. Murphy, 46 Tex. 356, 26 Am. Rep. 272; Robinson v. Western Pacific R. R. Co., 48 Cal. 409; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Melhado v. Poughkeepsie Transp. Co., 27 Hun, 99; Wilson v. Northern Pacific R. R. Co., 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. 333; Gram v. Northern Pacific R. R. Co., 1 N. Dak. 252, 46 N. W. 972; Coughtry v. Willamette etc. R. R. Co., 21 Or. 245, 27 Pac. 1031; Johnston v. Oregon etc. R. R. Co., 23 Or. 94, 31 Pac. 283; Lee v. Troy Citizens' Gas Light Co., 98 N. Y. 115; Hickman v. Kansas City etc. R. R. Co., 66 Miss. 154, 5 South. 225. Contra. Louisville etc. R. R. Co. v. Boland, 53 Ind. 398. See, also Chicago etc. R. R. Co. v. Coss, 73 Ill. 394.

91 Downey v. Gemini Min. Co., 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 414.

§ 4185. **Company liable for acts of servants.**—It has been held in a case where men are in the employ of a manufacturing company, that where an injury is suffered through the gross carelessness of the agent of the company, the company is not liable in damages, where both the injured party and the agent through whose neglect the injury was caused were engaged in their respective duties.[92] Injury received by an employee while doing work at the direction of the foreman, which work is dangerous and has no connection with his ordinary duties, is recoverable of the employee.[93] It has been the opinion in a large number of cases very similar to those referred to, that the inquiry should be made, Did the accident happen through the fault of the company or the fault of its servants?—and if through the fault of the servants, and without any fault on the part of the company, then it would not be liable. In a New York case,[93a] it was held that the defendant was liable, on the ground that the neglect was that of the corporation, and not of its servants, and so did not come within the principle established in an earlier case of that state.[93b] The locomotive, in this case, had been reported as insufficient by the engineers, but the corporation continued to use it; hence it was the fault of the corporation, and not of its servants. Where the injury was alleged to have been caused by the negligence of an engineer, who was employed by a superintendent who had full authority and control of the work, and employed and discharged the workmen, the complaint must also allege that the defendants were negligent in the selection of their superintendent, or it does not state a cause of action against them.[94]

§ 4186. **Liability of master.**—A master is bound to use reasonable care and diligence to prevent accident or injury to his servant in the course of his employment, and is responsible in damages for failure to do so.[95] He is responsible for injuries

92 Albro v. Agawam Canal Co., 6 Cush. 75; Wilson v. Northern Pac., 31 Wash. 67, 71 Pac. 713.

93 Daubert v. Western Meat Co., 135 Cal. 144, 67 Pac. 133; Grijalva v. Southern Pacific Co., 137 Cal. 569, 70 Pac. 622.

93a Keegan v. Western R. R. Corp., 8 N. Y. 175, 59 Am. Dec. 476.

93b Coon v. Syracuse & U. R. R. Co., 5 N. Y. 492.

94 Collier v. Steinhart, 51 Cal. 116.

95 Hallower v. Henley, 6 Cal. 209; Riley v. West Virginia etc. R. R. Co., 27 W. Va. 145; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Meier v. Morgan, 82 Wis. 289, 33 Am. St. Rep. 39, 52 N. W. 174.

caused through the use of unusual methods of doing the work.[96] A common employer is not responsible for the injury to one servant, occasioned by the negligence of another in the course of their common employment, unless he himself was in fault.[97] The negligence of a fellow-servant can only be invoked when it is set up as an affirmative defense to a right of recovery.[98] A railroad company having employed competent persons to supervise and inspect its roadbed and bridges, is not liable for an injury to one of its servants caused by the falling of a bridge in consequence of a latent defect.[99]

§ 4187. Risk of employee.—In a California case, it is held that "if an employee works with or near machinery which is unsafe, and from which he is liable to sustain injury, with a knowledge or means of knowing its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained arising out of accident, resulting from such defective condition of the machinery."[100] The rule that it is the master's duty to furnish a reasonably safe place to work in applies to places permanent in character only,[101] and does not apply where the servant makes his own place to work in.[102] The negligence of an inspector, or one hired by the master to provide a safe place to work, is the negligence of the master himself.[103]

96 Johnson v. Union Pacific Coal Co., 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506.

97 Wright v. New York Cent. R. R. Co., 25 N. Y. 562; Treadwell v. Mayor of New York, 1 Daly, 123; Kunz v. Stuart, 1 Daly, 431; Mathews v. Case, 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513; Blake v. Maine Central R. R. Co., 70 Me. 60, 35 Am. Rep. 297.

98 Layng v. Mt. Shasta etc. Co., 135 Cal. 143, 67 Pac. 48.

99 Warner v. Erie Ry. Co., 39 N. Y. 468. See Cal. Civ. Code, §§ 1969-1971, inclusive.

100 McGlynn v. Brodie, 31 Cal. 376. See McGatrick v. Wason, 4 Ohio St. 569; Hayden v. Smithville Mfg. Co., 29 Conn. 548; William v. Clough, 3 Hurlst. & N. 258; Griffiths v. Gidlow, 3 Hurlst. & N. 648; Dynen v. Leach, 40 Eng. L. & E. 491; Skipp v. Eastern Counties Ry. Co., 9 Exch. 223; Story on Agency, 6th ed., § 453, and notes; Hallower v. Henley, 6 Cal. 209; Daniel v. Chesapeake etc. Ry. Co., 53 W. Va. 397, 32 Am. St. Rep. 870, 15 S. E. 162, 16 L. R. A. 383; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464.

101 Roche v. Denver etc. Ry., 19 Colo. App. 204, 73 Pac. 880.

102 City of Greeley v. Foster, 32 Colo. 292, 75 Pac. 351.

103 Shea v. Pacific Power Co., 145 Cal. 680, 79 Pac. 373; Neeley v. Southwestern Cotton Seed Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145; Metzler v. McKenzie, 34 Wash. 470, 76 Pac. 114; Wood v. Rio Grande

§ 4188. **Conflict of laws.**—An administrator appointed in one state cannot maintain an action there, on the statute of another state, which gives to the personal representatives of a person killed by wrongful act, neglect, or default a right to maintain an action for damages in respect thereof, notwithstanding the death, for the benefit of the widow or next of kin, against the party that would have been liable if death had not ensued.[104] Statutes giving a right of action for the death of a person wrongfully caused by another, though having no extraterritorial effect, will be recognized by comity, and an action may be maintained in one state, although the wrongful act causing the death was committed in another state, upon proof of the laws of the latter state authorizing the action.[105]

§ 4189. **Damages.**—Damages ensuing from bodily pain need not be alleged specially in the complaint.[106] But funeral expenses, and expenses of medical care, nursing, and medicine, are not recoverable, except as special damages, and must be specially pleaded,[107] but need not be itemized.[108] It is held that no compensation can be given for wounded feelings, nor for the pain and suffering of the deceased.[109] The recovery is for the injuries inflicted upon the plaintiffs, and not for the injuries inflicted upon the deceased.[110]

§ 4190. **Liability for causing death.**—In California, when the death of a person, not being a minor, is caused by the wrongful

etc. Ry. Co., 28 Utah, 351, 79 Pac. 182; Hough v. Grant's Pass Power Co., 41 Or. 531, 69 Pac. 655.

104 Richardson v. New York Cent. R. R. Co., 98 Mass. 85.

105 Bruce v. Cincinnati R. R. Co., 83 Ky. 174; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Knight v. West Jersey R. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200; Wooden v. Western etc. R. R. Co., 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050, 13 L. R. A. 458; Stone v. Groton etc. Mfg. Co., 77 Hun, 99, 28 N. Y. Supp. 446.

106 Curtiss v. Rochester etc. R. R. Co., 20 Barb. 282; affirmed, 18 N. Y. 534, 75 Am. Dec. 258.

107 Gay v. Winter, 34 Cal. 153. See Petrie v. Columbia etc. R. R. Co., 29 S. C. 303, 7 S. E. 515; Murphy v. New York Cent. R. R. Co., 88 N. Y. 445. As to measure of damages in case of the death of a woman having children, see Tilley v. Hudson River R. R. Co., 29 N. Y. 252, 86 Am. Dec. 297, 24 N. Y. 471; McIntyre v. New York Cent. R. R. Co., 43 Barb. 532.

108 Turney v. Southern Pacific, 44 Or. 280, 75 Pac. 144, 76 Pac. 1080.

109 Hutchins v. St. Paul etc. R. R. Co., 44 Minn. 5, 46 N. W. 79; Morgan v. South. Pacific Co., 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71.

110 Redfield v. Oakland etc. Ry. Co., 110 Cal. 277, 42 Pac. 822. As to the damages recoverable in this action, see, also, Pepper v. Southern Pacific Co., 105 Cal. 389, 38 Pac. 974;

act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under sections 376 and 377 of the code, such damages may be given as, under all the circumstances of the case, may be just.[111] The action may be brought either by the heirs of the deceased or by his personal representatives; but when one action is brought that is the only action which the statute permits.[112] The word "heirs" in the statute is used in its common-law sense, and denotes those who are capable of inheriting from the deceased person generally, without reference to the distribution of community property.[113] In the case of a minor, the father, or, where he is dead or has deserted his family, the mother, or the guardian of a ward, may bring the action.[114]

§ 4191. **Limitation of action.**—In California, every action for the death of a person by wrongful act shall be commenced within one year after the death of such deceased person.[115]

§ 4192. **Negligence.**—Where the complaint alleged that a car of the defendants, in charge of their servant and agent, was wrongfully driven over a child, whereby, etc., and that the defendants, by negligence of themselves and their agents, ran over the child and caused her death, it was held that evidence was admissible of any facts of negligence on the part of the defendants in the construction of the cars which would have aided in causing such injury.[116]

§ 4193. **Parties plaintiff.**—A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child; and so may a guardian for the injury or death of his ward.[117] And if the wife secures a divorce upon the grounds of cruelty it is considered a desertion under this

Lee v. Southern Pacific Co., 101 Cal. 118, 35 Pac. 572; Sloane v. Southern California Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

111 Cal. Code Civ. Proc., § 377.

112 Munro v. Pacific Coast Dredging Co., 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

113 Redfield v. Oakland etc. Ry. Co., 110 Cal. 277, 42 Pac. 822.

114 Cal. Code Civ. Proc., § 376.

115 Cal. Code Civ. Proc., § 340, subd. 3.

116 Oldfield v. New York etc. R. R. Co., 3 E. D. Smith, 103.

117 Cal. Code Civ. Proc., § 376.

rule.[118] A parent may recover the expenses of nursing and healing a minor child, even though the child be so young that there is no loss of service.[119] An action may be maintained by a father as administrator of an unmarried infant son; and it is not indispensable that deceased should leave a widow and next of kin.[120] The old common-law rule that no damages can be recovered by action for injuries resulting in immediate death applies to actions brought by a husband for injury to his wife. The loss of society and assistance does not alter the case; and the New York statute of 1847 has not extended the remedy to such an injury.[121] An action in Pennsylvania against a railroad company for negligence in causing the death of a father, is properly brought in the name of all the children. The recovery is for the benefit of all, the amount to be distributed as in case of intestacy.[122]

§ 4194. **Parties defendant.**—In New York, a passenger in a vehicle or railroad-car injured by its collision with another vehicle or car, resulting from the concurrent negligence of the owners of such vehicles or cars, or their employees, may maintain a joint action against both;[123] but no presumption of negligence arises from the fact of injury as against the proprietor of the vehicle not occupied by plaintiff.[124] For injury from the concurring negligence of two, either is liable,[125] and may be sued jointly or separately.[126]

§ 4195. **Personal representatives.**—In California, an action for the death of a person, not a minor, caused by negligence of

118 Delatour v. Mackay, 139 Cal. 621, 73 Pac. 454.

119 Sykes v. Lawler, 49 Cal. 236.

120 McMahon v. Mayor of New York, 33 N. Y. 642.

121 Green v. Hudson River R. R. Co., 2 Keyes, 294; affirming 28 Barb. 9. See Wooden v. Western etc. R. R. Co., 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. 1050, 13 L. R. A. 458.

122 North Pennsylvania R. R. Co. v. Robinson, 44 Pa. St. 175.

123 Chapman v. New Haven R. R. Co., 19 N. Y. 341, 75 Am. Dec. 344; Colegrove v. New York etc. R. R. Co., 20 N. Y. 492, 75 Am. Dec. 418; Webster v. Hudson River R. R. Co., 38 N. Y. 260. See dictum, contra, in Brown v. New York Cent. R. R. Co., 32 N. Y. 597, 88 Am. Dec. 353; Mooney v. Hudson River R. R. Co., 5 Rob. 548. See, also, in support of the text, Quill v. Railroad Co., 16 Daly, 313; Gulf etc. R. R. Co. v. McWhirter, 77 Tex. 357, 19 Am. St. Rep. 755, 14 S. W. 26; Jacksonville etc. R. R. Co. v. Peninsular Land Co., 27 Fla. 1, 157, 9 South. 661, 17 L. R. A. 33.

124 Tompkins v. Clay St. Ry. Co., 66 Cal. 163, 4 Pac. 1165; Osgood v. Los Angeles Trac. Co., 137 Cal. 280, 92 Am. St. Rep. 171, 70 Pac. 169; Cal. Code Civ. Proc., § 1963, subd. 4.

125 Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

126 Grundel v. Union Iron Works,

another, may be brought by decedent's heirs or personal representatives.[127] The administrator is expressly authorized by this section to bring such action.[128] And in case of the death of the wife, the right of action does not accrue to the entire benefit of the widower, as if it were community property.[129] Every action for the death of a person, caused by the wrongful act, neglect, or default of a person or corporation, shall be brought by and in the names of the personal representatives of such deceased person. The provision of the Louisiana statute, that the cause of action for the wrongful death of a person shall survive to the personal representatives for the space of one year from the death, is a legal subrogation in favor of the persons designated to the right of action of the deceased; and in case of a suit under that subrogation, the plaintiff should allege that his cause of action was derived from deceased under the statute, and a neglect to do this will be fatal.[130] And the administrator can sue only where there are heirs, as the right of action is for their benefit.[131] No action lies in favor of the legal representatives where the code section specifies the parents, the minor children, or spouse as the ones who may sue;[132] but otherwise, if the section permits it.[133]

§ 4196. Special damage.—In an action for death by the wrongful act of a person, it is not necessary to allege or prove special damage.[134] In an action under the New York statute[134a] for the negligent killing of a person, it is not necessary to allege actual damages. Damages are implied from an allegation of the wrongful act, and no other allegation that damages have been sustained by those beneficially interested in the action is necessary.[135] The loss of the comfort, society, support, and

127 Cal. 438, 78 Am. St. Rep. 75, 59 Pac. 826, 47 L. R. A. 467.

127 Cal. Code Civ. Proc., § 377.

128 Burk v. Arcata etc. Co., 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1065.

129 Redfield v. Oakland Cons. St. Ry., 110 Cal. 277, 42 Pac. 822.

130 Earhart v. New Orleans etc. R. R. Co., 17 La. Ann. 243; Bonthron v. Phœnix Light etc Co., 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563.

131 Webster v. Norwegian Min. Co., 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276.

132 Romero v. Atchison etc. Ry., 11 N. Mex. 679, 72 Pac. 37.

133 Schleiger v. Northern Terminal Co., 43 Or. 4, 72 Pac. 324.

134 Keller v. New York Cent. R. R. Co., 24 How. Pr. 172; McIntyre v. New York Cent. R. R. Co., 43 Barb. 532.

134a Code Civ. Proc., §§ 1902-1904.

135 Kenney v. New York Cent. Ry. Co., 2 N. Y. Supp. 512, 49 Hun, 535; 15 Civ. Proc. Rep. 347.

protection of the deceased may be considered by the jury for the purpose of estimating the pecuniary loss.[136]

§ 4197. What must be shown.—To maintain an action for causing by wrongful acts the death of or injury to a person two things must be shown: 1. An obstruction in the road by the fault of the defendant; 2. No want of ordinary care on the part of the plaintiff or party injured. The gravamen of the action is the negligence of the defendant, and plaintiff cannot recover where it appears that the negligence of the deceased or person injured contributed in any degree to the death or injury sustained. But in cases where the negligence of the defendants is affirmatively shown, and there is no proof of the conduct of the deceased or person injured, the jury are at liberty to infer ordinary care and diligence on his part, taking into consideration his character and habits as proved, and the natural instinct of self-preservation. In such actions, if the plaintiff makes a case which does not charge the deceased or the person injured with negligence, the case should be permitted to go to the jury, under appropriate instructions.[137]

§ 4198. What must be shown—Sufficiency of the complaint.—Usually the duty due from the defendant to the plaintiff and its breach must be set forth, or no negligence will appear. But in cases of collision it is often impossible to aver more than that the plaintiff, while on the highway and exercising due care, was run into by the defendant. In an action for personal injuries resulting in death, caused by a collision on a highway,—namely, the public waters of the state,—the declaration sufficiently states a cause of action by charging that the defendant's servants so negligently and carelessly managed and navigated its steamer that it ran upon and sunk the vessel of the plaintiff's testator, without stating particularly in what the negligence consisted.[138] A complaint by an administratrix in an action to recover dam-

136 Munro v. Pacific Coast Dredging Co., 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; Morgan v. Southern Pacific Co., 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71; Hyde v. Union Pacific R. R. Co., 7 Utah, 356, 26 Pac. 979.

137 Gay v. Winter, 34 Cal. 153.

138 Parker v. Providence etc. Steamboat Co., 17 R. I. 376, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414. See Chase v. American Steamboat Co., 10 R. I. 79; Steamboat Co. v. Chase, 16 Wall. 522, 21 L. Ed. 369.

ages for a death caused by negligence, which alleges in substance that the defendant negligently left unprotected an open hatchway on its vessel, through which the deceased, who was lawfully employed on the vessel, was precipitated and killed, owing to his being struck by a barrel of lime, by and through the carelessness and negligence of the defendant, and its servants and employees, in and about the loading of the vessel, states a cause of action, and shows a breach of duty on the part of the owner of the vessel.[139] It is not necessary in an action for causing death by negligence for the defendant to allege that the wrong was committed in another state, but it is for the plaintiff to allege that the cause of action arose within the jurisdiction.[140] A complaint or petition in such action is fatally defective which fails to show that the person or persons for whose benefit the action is brought have sustained pecuniary injury by the death of the deceased.[141] And such defective complaint or petition will not support even a judgment for nominal damages.[142]

§ 4199. Widow and next of kin.—It was held in the superior court of New York that a complaint of this kind must expressly allege that there is a widow or next of kin, giving their names, and alleging that they had sustained pecuniary injury.[143] But the doctrine of this case is entirely inconsistent with later cases.[144]

139 Davies v. Oceanic S. S. Co., 89 Cal. 280, 26 Pac. 827.

140 Debevoise v. New York etc. R. R. Co., 98 N. Y. 377, 50 Am. Rep. 683.

141 Webster v. Norwegian Min. Co., 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; Orgall v. Chicago etc. R. R. Co., 46 Neb. 4, 64 N. W. 450; Anderson v. Chicago etc. R. R. Co., 35 Neb. 95, 52 N. W. 840; Coops v. Lake Shore etc. R. R. Co., 66 Mich. 448, 33 N. W. 541; Charlebois v. Gogebic etc. R. R. Co., 91 Mich. 59, 51 N. W. 812; Topping v. Town of St. Lawrence, 86 Wis. 526, 57 N. W. 365.

142 Orgall v. Chicago etc. R. R. Co., 46 Neb. 4, 64 N. W. 450; Hurst v. Detroit City R. R. Co., 84 Mich. 539, 48 N. W. 44. See, also, as to insufficient allegations in complaint or petition in this action, Henry v. Brackenridge Lumber Co., 48 La. Ann. 950, 20 South. 221; Miller v. Coffin, 19 R. I. 164, 36 Atl. Rep. 6.

143 Safford v. Drew, 3 Duer, 627. See section 4198, ante.

144 Chapman v. Rothwell, El. B. & E. 168; Quin v. Moore, 15 N. Y. 436; Oldfield v. New York etc. R. R. Co., 14 N. Y. 316; Dickens v. New York Cent. R. R. Co., 28 Barb. 41; Keller v. New York Cent. R. R. Co., 17 How. Pr. 102. The first of these cases expressly decides that no allegation of damages to the next of kin is necessary; and though the whole doctrine of Safford v. Drew, 3 Duer, 627, is not overruled in terms, yet it is in effect, and that nominal damages at least may be recovered on the above complaint, with liberty to prove actual damage. In California, however, that the statute especially provides for this class of actions, see Code Civ. Proc., §§ 376, 377. For

§ 4200. **Cause of death.**—The responsibility in cases of a personal injury from falling through a defective sidewalk is upon him who has the control and management of the work.[145]

§ 4201. **Corporation, liability of.**—A city having the power and duty of lighting its streets is liable for injuries or death caused by a party's falling off a bridge, opened for the passage of a vessel, in consequence of its being insufficiently lighted.[146] It is not liable for negligence of a member of a paid fire department.[147]

§ 4202. **Defect in highways.**—Where plaintiff was injured owing to a defect in a highway, but would not have been if the horse had not been vicious,—he had never driven the horse before, and did not know of its viciousness,—it was held that plaintiff could recover substantial damages.[148]

§ 4203. **Drover, liability of.**—The law governing the liability of persons in driving cattle through the streets of a city for damages caused by injuring a person lawfully in the street, without any fault on his part, is the same as that by which the carriers of passengers are governed.[149]

§ 4204. **Dug, opened, and made.**—In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "dug, opened, and made" the area is sustained by proof that he formed it partially by excavation and partially by raising walls.[150]

§ 4205. **Liability of deceased.**—The foundation of this action is the personal tort of the defendant, and not of his testators. The defect in the street from which the injury resulted to plain-

provisions in New York, see Code Civ. Proc., §§ 1902-1904. See section 4198, ante, and cases there cited.

145 Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345; Fanjoy v. Seales, 29 Cal. 243; followed in Du Pratt v. Lick, 38 Cal. 691. See, also, Eustace v. Jahns, 38 Cal. 3.

146 Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418. As to sidewalks, see City of Bloomington v. Bay, 42 Ill. 503. As to the liability of corporations for neglect to have proper precautions taken for the safety of the public, see Grant v. City of Brooklyn, 41 Barb. 381; Davenport v. Ruckman, 10 Bosw. 20.

147 Howard v. San Francisco, 51 Cal. 52.

148 Daniels v. Town of Saybrook, 34 Conn. 377.

149 Ficken v. Jones, 28 Cal. 618.

150 Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427.

tiff is not alleged to have existed anterior to the death of such testator; hence no obligation was incurred by the testator in his lifetime in respect thereto which could serve as a basis for a valid claim against his estate, or a right of action against the administrator of his estate as such.[151]

§ 4206. **Non-repair of premises.**—A complaint against the owner of premises leased to a third person, to recover damages sustained by plaintiff by the falling of a part of the building through want of repairs, is bad on demurrer, unless it states facts from which the court can say that the owner was bound to keep the premises in repair. A mere general allegation that defendant was bound to keep the premises in repair is insufficient.[152] A railroad company, having a station at a given point, invites persons to enter upon the premises for business, and it is its duty to be reasonably sure that it is not inviting them into danger.[153] The station-grounds, so far as passengers would naturally resort to them, should be properly lighted for a reasonable time next prior to and after the arrival of a passenger-train and this security is extended to passengers who leave the train during its stop at the station to transact private business.[154] If injury occurs at a union depot, suit may be brought against the company whose passenger the plaintiff is.[155]

§ 4207. **Respondeat superior.**—The responsibility in cases of personal injuries is upon him who has the control and management of the work, and the relation of *respondeat superior* has no application where the relation of master and servant does not exist.[156] Where there is no power of selection or direction, there can be no superior, and where a man is employed to do the work with his own means and by his own servant, he has the power of selection and direction, and he, and not the person for whom the work is principally done, is the superior.[157]

151 Eustace v. Jahns, 38 Cal. 3.

152 Casey v. Mann, 5 Abb. Pr. 91, sub nom. Corey v. Mann, 14 How. Pr. 162. See Brown v. Harmon, 21 Barb. 508.

153 Mayne v. Chicago etc. Ry., 12 Okla. 10, 69 Pac. 933.

154 Abbott v. Oregon R. Co., 46 Or. 549, 114 Am. St. Rep. 885, 80 Pac. 1012, 1 L. R. A. (N. S.) 851.

155 Herrman v. Great Northern Ry. Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390.

156 Fanjoy v. Seales, 29 Cal. 243. The doctrine approved in Du Pratt v. Lick, 38 Cal. 691. See Lancaster v. Connecticut etc. Ins. Co., 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23.

157 Fanjoy v. Seales, 29 Cal. 243; cited and followed in Du Pratt v.

§ 4208. **Street contractor—Liabilities.**—The responsibility in cases of repairs in public streets made by a contractor rests upon the contractor.[158] The law does not impose upon the owner of a lot fronting on a street of an incorporated city the duty to repair a defect in the portion of the public street upon which his lot abuts or fronts.[159] The only duty imposed upon him is the payment of the assessment which shall be lawfully imposed upon his lots or lands. So the owner of property is not liable for the torts of servants employed by the contractor,[160] nor for omission or negligence of the contractor so employed.[161] But the principal contractor is liable for negligence of subcontractors and their servants.[162] So of a party obtaining authority to do work in a public street.[163] But public officers are not within the rule of employer and employee, and are not responsible for persons employed under them.[164] Where a party was injured by falling at night into an excavation made in grading the street of a city, under a city contract, given out in obedience to the law, owing to the failure to put lights or guards about the place, the contractor, and not the city, is liable.[165]

§ 4209. **Mutual negligence.**—Where a child was killed by the fall of a counter on which he was climbing, and which had been left in the street of a city for two or three weeks, the child being six years old, and at the time of his death playing unattended six blocks from home, it was held that the city was no more negligent than the parents of the child, and was not liable.[166]

Lick, 38 Cal. 691. See, also, Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Dane v. Cochrane Chemical Co., 164 Mass. 453, 41 N. E. 678.

158 Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345. The doctrine recognized in Fanjoy v. Seales, 29 Cal. 243, and followed in the cases of Du Pratt v. Lick, 38 Cal. 691; O'Hale v. Sacramento, 48 Cal. 212; and Krause v. Sacramento, 48 Cal. 221. See Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; Spence v. Schultz, 103 Cal. 208, 37 Pac. 220.

159 Eustace v. Jahns, 38 Cal. 3.

160 Van Wert v. City of Brooklyn, 28 How. Pr. 451; O'Rourke v. Hart, 7 Bosw. 511; Schular v. Hudson River R. R. Co., 38 Barb. 653.

161 Fish v. Dodge, 38 Barb. 163; Benedict v. Martin, 36 Barb. 288; Engel v. Eureka Club, 137 N. Y. 100, 33 Am. Rep. 692, 32 N. E. 1052; Fink v. Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376; Powell v. Virginia Construction Co., 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

162 Creed v. Hartmann, 29 N. Y. 591, 86 Am. Dec. 341.

163 McCamus v. Citizens' Gas Light Co., 40 Barb. 380.

164 Murphy v. Commissioners of Immigration, 27 How. Pr. 41.

165 James v. City of San Francisco, 6 Cal. 528, 65 Am. Dec. 526.

166 Chicago v. Starr, 42 Ill. 174, 89 Am. Dec. 422.

When the injured one is a girl thirteen years old, the ordinary caution and care required should be explicit to apply to children of her age.[167]

§ 4210. **Mischievous animals.**—The gist of an action for keeping a mischievous animal, at common law, is the keeping of the animal after knowledge of its mischievous propensities. And a declaration is sufficient which alleges the ferocity of the animal, and the knowledge of the defendant, without any negligence or want of care.[168] It is unnecessary to allege and prove *scienter*, where it is alleged that the injury was done while the animal was negligently permitted by the defendant to trespass upon the plaintiff's premises.[169] A complaint in an action to recover damages alleged to have been suffered by the plaintiff from the bite of a vicious dog owned and kept by the defendant, in consequence of the negligent manner in which the defendant kept the dog, need not negative contributory negligence on the part of the plaintiff.[170] In an action for injuries inflicted by a vicious dog, such damages as are the direct and obvious results of the injuries received by the plaintiff, including physical pain and mental anguish, need not be specially alleged in order to recover compensation therefor.[171]

§ 4211. **Averments essential.**—The averment that a dog was of a mischievous or ferocious nature is simply an averment that he would bite men, that he was accustomed to bite, and this is best evidenced by the fact that he did bite plaintiff. There are three necessary averments: 1. That the dog would bite mankind; 2. That the owner or keeper knew it; and 3. That he did bite plaintiff. When all this is proved, it matters not how carefully the dog was kept; the owner or keeper has no right to keep such a dog at all.[172] Chitty advises counts averring that

167 Quill v. Southern Pacific Co., 140 Cal. 268, 73 Pac. 991.

168 Popplewell v. Pierce, 10 Cush. 509, and cases there cited. See Finney v. Curtis, 78 Cal. 498, 21 Pac. 120.

169 Mosier v. Beale, 43 Fed. 358; Shipley v. Colclough, 81 Mich. 624, 21 Am. St. Rep. 546, 45 N. W. 1106; Malone v. Knowlton, 15 N. Y. Supp. 506.

170 Boyd v. Oddous, 97 Cal. 510, 32 Pac. 569. Contra, Gregory v. Woodworth, 93 Iowa, 246, 61 N. W. 962.

171 Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752.

172 Kippen v. Ollasson, 136 Cal. 640, 69 Pac. 293; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002; M'Caskill v. Elliott, 5 Strobh. 196, 53 Am. Dec.

the dog was of a ferocious and mischievous nature, and also for not keeping the dog properly secured or fed, as the facts may be.[173]

§ 4212. **Ownership.**—It is not necessary, in an action for damages sustained by the bite of a dog, for the plaintiff to prove that the defendant owned the dog. It is sufficient on this point for the plaintiff to prove that the defendant kept the dog.[174]

§ 4213. **Scienter.**—The *scienter* must be alleged and proved.[175]

§ 4214. **Vicious horse.**—Defendant negligently let his horse go loose and unattended in the street of a city, where the horse kicked the plaintiff. It was held that defendant was liable, without proof that the horse was vicious.[176] If the owner of an animal has notice that its disposition is such that it would be likely to commit an injury similar to the one complained of, it is not necessary that the notice be of injury actually committed. And a servant's knowledge of the animal's viciousness is imputable to the master.[177]

§ 4215. **Implied promise of physician.**—The employment of a physician in this country raises an implied promise to pay for his services. The plaintiff in an action for malpractice may allege that defendant was a physician, and as such was called on by the plaintiff, and undertook as such to administer medicines, etc. This is sufficient to raise a duty of skill and

706. But the cases of Jones v. Perry, 2 Esp. 482, and Cockerham v. Nixon, 11 Ired. (33 N. C.) 269, seem to make a distinction. See Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123; Fake v. Addicks, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450; Woodbridge v. Marks, 5 App. Div. 604, 40 N. Y. Supp. 728.

173 2 Chit. Pl. 597.

174 Wilkinson v. Parrott, 32 Cal. 102. See Ficken v. Jones, 28 Cal. 618; Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 455, 15 N. E. 695; Manger v. Shipman, 30 Neb. 352, 46 N. W. 527; Mitchell v. Chase, 87 Me. 172, 32 Atl. 867; Lunt v. Moore, 38 N. Y. Supp. 1095.

175 1 Mau. & Sel. 238; Smith v. Pelah, 2 Stra. 1264; Vrooman v. Lawyer, 13 Johns. 339; Jones v. Perry, 2 Esp. 482; Beck v. Dyson, 4 Camp. 198; Judge v. Cox, 1 Stark. 285; Blackman v. Simmons, 3 Car. & P. 138; Marsh v. Jones, 21 Vt. 378, 52 Am. Dec. 67; Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 346.

176 Dickson v. McCoy, 39 N. Y. 400. See, also, Norris v. Kohler, 41 Cal. 42.

177 Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695.

care on his part.[178] Evidence of reputed skill is held to be material.[179]

Where a physician or surgeon takes the charge of a patient, he assumes an implied obligation to treat the case with reasonable diligence, carefulness, and skill.[180] A physician is liable for damages for loss of child, pain, and mental anguish, upon his abandoning a patient at the time of her confinement.[181] In an action against a physician for malpractice, the plaintiff may elect to sue on contract, and thus waive the tort.[182] A complaint alleging that the plaintiff, having injured his right shoulder and arm, "the defendant, being then a practicing physician and surgeon, as such undertook faithfully, skillfully, and diligently to treat and set, and endeavor to cure and heal, said arm and shoulder," followed by proper averments as to his lack of skill, negligence, etc., sets out an action in tort, and not on contract.[183] Partners in the practice of medicine are all liable for an injury to a patient resulting from the negligence, either of omission or commission, of any one of the partners within the scope of their partnership business. But for an injury resulting from the act of one partner outside of the common business, the offending partner is alone responsible.[184]

§ 4216. Defense—General denial.—In an action for damages for negligence, it is not necessary that the answer should aver that the plaintiff's negligence contributed to the injury in order to enable defendant to offer evidence of that fact. It may be shown, under a general denial of the plaintiff's charge, that the injury was caused by defendant's negligence.[185] An act of God is a defense which must be pleaded;[186] as also is contributory negligence,[187]

178 Peck v. Martin, 17 Ind. 115.

179 Carpenter v. Blake, 50 N. Y. 696.

180 Potter v. Warner, 91 Pa. St. 362, 36 Am. Rep. 668; Ely v. Wilbur, 49 N. J. L. 685, 60 Am. Rep. 668, 10 Atl. 358, 441.

181 Lathrope v. Flood, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215.

182 Lane v. Boicourt, 128 Ind. 420, 25 Am. St. Rep. 442, 27 N. E. 1111.

183 De Hart v. Haun, 126 Ind. 378, 26 N. E. 61.

184 Hyrne v. Erwin, 23 S. C. 226, 55 Am. Rep. 15. See Hess v. Lowrey, 122 Ind. 225, 17 Am. St. Rep. 355, 23 N. E. 156, 7 L. R. A. 90.

185 MacDonnell v. Buffum, 31 How. Pr. 154. See Magee v. Northern Pacific R. R. Co., 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114; Johnson v. Oregon etc. R. R. Co., 23 Or. 94, 31 Pac. 283.

186 Orient Ins. Co. v. Northern Pacific Ry. Co., 31 Mont. 502, 78 Pac. 1036.

187 Meisner v. City of Dillon, 29 Mont. 116, 74 Pac. 130; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734.

unless it is shown by plaintiff's testimony.[188] In an action for keeping a ferocious dog, which bit the plaintiff, defendant may on general denial avail himself of want of proof that the dog was accustomed to bite.[189]

§ 4217. **Defense—Concurrent negligence.**—If, in an action brought by a laborer against his employer to recover damages for an injury sustained by the employer's carelessness, the employer relies for a defense upon the fact that such injuries were caused by the negligence or improper conduct of a fellow-servant, an averment to that effect should be made in the answer. An averment that the plaintiff's injury was caused by his own negligence does not raise the issue.[190] *Quære,* whether in an action against a carrier for injuries resulting in the death of a passenger, owing to the concurrent negligence of the carrier and a third party, the defense of concurrent negligence in the agencies producing death, if a defense at all, can be heard without being specially pleaded.[191]

§ 4218. **Replication or reply.**—Failure to reply in a personal injury case does not admit the allegations of contributory negligence.[192]

§ 4219. **Former recovery.**—In Utah, a recovery by the administrator for wrongful death is a bar to any subsequent action by the personal representatives and heirs of decedent.[193] Also, recovery by a widow for the wrongful death of the husband is a bar to a subsequent action brought by a child who at the time of the first action was yet unborn.[194]

188 Holland v. Oregon Short Line, 26 Utah, 209, 72 Pac. 940.

189 Hogan v. Sharpe, 7 Car. & P. 755.

190 Conlin v. San Francisco etc. R. R. Co., 36 Cal. 404; Bjorman v. Ft. Bragg Redwood Co., 104 Cal. 626; Gibson v. Sterling Furniture Co., 113 Cal. 1, 45 Pac. 694; Layng v. Mt. Shasta etc. Co., 135 Cal. 143, 67 Pac. 48.

191 Lockhart v. Lichtenthaler, 46 Pa. St. 151.

192 Mont. Rev. Codes, § 6562; Coleman v. Perry, 28 Mont. 1, 72 Pac. 42.

193 Fritz v. Western Union Tel. Co., 25 Utah, 263, 71 Pac. 209; Cal. Code. Civ. Proc., § 377.

194 Daubert v. Western Meat Co., 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. 297, 73 Pac. 244.

FORMS IN ACTIONS FOR PERSONAL INJURY.

§ 4220. Complaint for injuries resulting from lack of guard or railing on culvert.

Form No. 1130.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation of town and existence of highway.]

II. That on and prior to the . . . day of . . ., 19.., the said highway was insufficient and in want of repair in this, that at a point [designate point with certainty] there was a wooden culvert or bridge in said highway, . . . feet in width from east to west, and . . . feet in length from north to south, and that at the south end of said culvert or bridge there was an abrupt descent to the ditch below of . . . feet, with no guard or railing of any kind to prevent teams or wagons from running off the said culvert into the said ditch.

[Allege knowledge on the part of town officers, and notice and claim.]

[DEMAND OF JUDGMENT.]

§ 4221. Complaint for injuries on a sidewalk resulting from accumulation of snow and ice.

Form No. 1131.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned the defendant was, and still is, a duly organized town in the county of . . ., state of . . ., containing within its limits an unincorporated village of more than one thousand people, known as the village of . . .

II. That at the time of the injury hereinafter set forth, and for a long time prior thereto, there was in the said village a certain highway, known as . . . street, which was one of public highways of the defendant town, and was largely used by the public generally for travel, by teams and on foot, the center thereof being used for travel by teams and a portion on the south side thereof being so used by foot-travelers.

III. That on the . . . day of . . . . 19... that portion of said . . . street over which foot-travelers usually and commonly pass as aforesaid was in a dangerous and unsafe condition for foot-

travel, by reason of snow and ice having been negligently left for a long period, to-wit, for more than three weeks, to accumulate along the said southerly side of said street, and especially at a point [name the point of the accident], which said accumulation of snow and ice became so uneven and rounded in form as to make travel along and over the said highway unsafe and dangerous; and that said accumulation existed in said unsafe and dangerous condition continuously for more than three weeks prior to the happening of the accident hereinafter described.

IV. That notwithstanding it was the duty of the defendant town to keep said street at said point in a reasonably safe condition for travel by the public, and notwithstanding said town and its officers had notice of the said defective and unsafe condition of said street at the point aforesaid for a long time prior to the said . . . day of . . ., 19.., the said defendant and its officers neglected and failed to put said street in a safe condition for public travel.

V. That on the . . . day of . . ., 19.., at the hour of . . . o'clock in the evening of said day, the plaintiff was lawfully traveling along the said south side of said street on foot in a careful manner, when at a point [describe the point with certainty], owing to the aforesaid slippery and uneven condition of said street at that point, this plaintiff slipped and fell in such manner that one of his legs was broken. [State other injuries received, and the damage resulting.]

[Allege the giving of notice and demand.]

[DEMAND OF JUDGMENT.]

§ 4222. Complaint against municipal corporation, for injuries caused by leaving street in insecure state.

Form No. 1132.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a municipal corporation, duly organized under the laws of this state.

II. That, among other things, it is, by its charter, made its duty to keep the streets in said city in good order, and at all times properly to protect any excavations made in said streets, by placing lights and signals thereat to indicate danger.

III. That a certain street in said city, known as . . ., was and is a common thoroughfare, and used by the citizens thereof

and others; and that the duty of said defendant as to said street was, and became at the time hereinafter mentioned, a matter of public and general concern.

IV. That on or about the . . . day of . . ., 19.., a deep and dangerous excavation [hole or trench] was dug in said street [or, an obstruction was placed in said street, and negligently left therein], and suffered by the defendant, during a night, on or about said day, to remain open, exposed, and without proper protection, and without any light or signal to indicate danger.

V. That the plaintiff on the night aforesaid was lawfully traveling on said street, and was wholly unaware of danger, and was accidentally, and without fault or negligence on his part, precipitated into said excavation [hole or trench], whereby he received great bodily injury, and was made sick and sore, and was thereby kept to his bed, and detained from business for . . . days, and was in consequence thereof compelled to expend . . . dollars for medical attendance and nursing, and has been made permanently lame, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4223. Complaint for injuries caused by rubbish in street, whereby plaintiff was thrown from his carriage.

Form No. 1133.

[Title.]

The plaintiff complains, and alleges:

I. That the defendant, on or about the . . . day of . . ., 19.., wrongfully placed large quantities of lumber and bricks in the public highway [known as . . . street], in . . ., and negligently left the same therein, obstructing the highway during the night-time, and without proper protection or notice to citizens and travelers against accidents.

II. That by reason of said negligence and improper conduct of the defendant, in the night-time of that day, the carriage of the plaintiff, with the plaintiff therein, then passing through said street, was accidentally driven against the said lumber and earth, and was thereby overturned; by means whereof the plaintiff was bruised and wounded, and was for . . . days prevented from attending to his business, and was compelled to expend, and did expend . . . dollars for medical attendance and nursing, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4224. Complaint for injuries caused by leaving hatchway open.

Form No. 1134.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was the occupant of the [store No. .. street], and had possession and control of the hatchway hereinafter mentioned.

II. That on the said day the plaintiff was in the said [store or building], by permission of the defendant, for the purpose of transacting business with him [or in the discharge of his duties as—state what].

III. That the hatchway on the [second] story of the said building was then, by the negligence of the defendant, left open, and not in any manner protected.

IV. That in consequence thereof the plaintiff fell through the said hatchway, and was much injured [state special damage, if any, as], and was confined to his bed and detained from business for . . . days, was compelled to expend . . . dollars for medical attendance and nursing, and has been made permanently lame, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4225. The same—Another form.

Form No. 1135.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant was the owner, and had possession and control of a certain building and premises [describe them], with the appurtenances thereto belonging, which building was then occupied by him as [designate the uses of the building, if a public resort].

II. That said building was negligently and carelessly built, inasmuch as there was in the public hall in the third story of the same, at the time of its erection and leasing by the defendant, as well as at the time hereinbefore mentioned, an unguarded hatchway, opening into the second story.

III. That the defendant, well knowing the premises, and while the owner and occupant [or, while the occupant] of said building did, on the day and year aforesaid, negligently leave the same open and unprotected, by means whereof the plaintiff, who was

then lawfully in said building, and in pursuit of his business [or otherwise, show for what purpose, and by what right, the plaintiff was there], then and there necessarily and carefully passing along said hall, fell through said hatchway.

IV. That in consequence thereof the plaintiff was greatly injured, and became sick and lame, and so remained for a long time [or, so still remains], and was during the space of . . ., prevented from attending to his business as . . ., and was compelled to expend . . . dollars for medical attendance, [or otherwise, state injuries to plaintiff], to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4226. Complaint against one who has placed attractive and dangerous nuisance in street, injuring child playing thereon.

Form No. 1136.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., and for a long time prior thereto, defendant was engaged in the lumber business in the city of . . ., and maintained a lumber-yard in said city adjoining the north side of . . . street, in said city, which street is a main traveled thoroughfare, and used by both pedestrians and vehicles at all times of the day and night.

II. That several days prior to the said . . . day of . . ., 19.., the defendant caused a large number of timbers to be piled within the limits of said . . . street adjoining said lumber-yard, said pile extending lengthwise of said street, and being about four feet high; that defendant negligently and carelessly placed a large timber, about fourteen feet long and twelve or fourteen inches square, upon the top of said pile of said timbers, in such position that upon the slightest application of force said timber was liable to lose its position and fall over the edge of said pile; and that the defendant negligently and carelessly allowed said timber to remain and be in such position until the time of the injury hereinafter described, knowing the position of said timber to be unsafe and dangerous.

III. That there were at all times many families living in the vicinity of said lumber yard, and that the children of said families were accustomed to pass and repass on the north side of

. . . street, and along said lumber yard, and were accustomed to play about the same, to the knowledge of the defendant.

IV. That on the said . . . day of . . ., 19.., while the plaintiff and other children were standing and playing upon the said pile of lumber, the said timber upon the top of said pile became loosened and lost its equilibrium, and fell upon the plaintiff, causing great injuries to her arm, and [state injuries and damage].

[DEMAND OF JUDGMENT.]

§ 4227. Complaint for negligently leaving dangerous structure in street.

Form No. 1137.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege the incorporation of the defendant city and the existence of the street in question.]

II. That the said street was at the times hereinafter mentioned, and still is, largely used by the citizens of the said city for public travel.

III. That on the . . . day of . . ., 19.., and for some years prior thereto, the defendant city owned, used, and controlled a large iron and wooden roller, weighing several tons, and about six feet high and ten feet wide, used by the said defendant for the purpose of pressing and making more compact the various streets of said city, which said roller was, and is, an ungainly and unsightly object, and naturally calculated to frighten horses.

IV. That on the . . . day of . . ., 19.., and for some weeks prior thereto, the said roller was left by the said city and its officers at a point on the . . . side of said . . . street in said city, about . . . feet from the intersection of said street with Main Street, and about . . . feet from the north side of the sidewalk on the south side of said . . . street, one wheel of said roller being within the south road track of said street; and the said roller thus unlawfully occupied and obstructed about one third of said street, making the same dangerous and unsafe for travel; and that the defendant had knowledge of the situation of said roller for several weeks prior to the accident hereinafter mentioned.

V. That on the . . . day of . . ., 19.., at about . . . o'clock in the evening of said day, the plaintiff was driving a single

horse and carriage west upon said . . . street, with due care, and when he came to the point where said roller was situated as aforesaid, his horse became frightened and unmanageable at said roller, and escaped from the plaintiff's control, and ran away, partially overturning the carriage and throwing the plaintiff upon the ground with great violence, thereby seriously injuring him [state injuries], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4228. Complaint against railway company for collision at crossing.

Form No. 1138.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and was at the times hereinafter named, a railroad corporation duly organized under the laws of the state of . . ., and operating a commercial railroad between the city of . . . and the city of . . ., in said state, carrying passengers and freight thereon for hire.

II. That on the . . . day of . . ., 19.., the plaintiff was traveling with due care, in a wagon drawn by two horses, along a public highway in the town of . . ., in said county, which highway crosses said railroad about . . . miles north of the city of . . . [or otherwise, describe and locate the crossing with certainty]; and as plaintiff reached said public crossing defendant ran one of its locomotives, with a train of cars attached, across said highway at said crossing at a great and negligent rate of speed, and without warning of any kind, so that by reason of the said negligent operation of said locomotive and train the said locomotive struck the horses which the plaintiff was driving, and killed them and destroyed the harness and wagon, and threw plaintiff out upon the ground with such force as to break his leg. [Or otherwise, state injuries.]

III. That plaintiff was the owner of said horses, harness, and wagon, and that the same were worth . . . dollars.

IV. That plaintiff necessarily spent . . . dollars for medical attendance and medicines in an endeavor to cure himself of said injuries, and for a period of . . . months was unable to attend to his business as . . . in consequence of said injuries, and is permanently injured so that he will never be able again to carry

on said business as efficiently as before, and was otherwise greatly injured, all to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4229. **Complaint by brakeman against corporation operating logging-railroad, alleging defective equipment and track.**

Form No. 1139.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the state of . . ., and was operating a logging railroad in the county of . . ., in said state, running from . . . to . . .

II. That on and prior to the . . . day of . . ., 19.., the plaintiff was an employee of said defendant, as a brakeman on defendant's trains on said logging railroad, and on said last-named day was riding upon one of the logging trains of said defendant, drawn by a locomotive engine over said logging railroad, engaged in the performance of his duties as brakeman aforesaid.

III. That the said defendant, on and prior to the date aforesaid, negligently failed to provide a safe and suitable roadbed for the track of said logging railroad, in that the same was very rough and uneven, and allowed so to remain, and negligently failed to provide any suitable or safe place upon its logging cars for the plaintiff to perform his duties as brakeman, and failed to provide suitable and safe appliances for fastening the logs upon its cars, and did not provide chains of sufficient strength for such purpose, but did provide certain weak, broken, and patched chains totally insufficient and unsuitable for such purpose; and that for about ten days before said date the defendant negligently allowed several large logs to remain on said roadbed parallel with said track, and so close thereto as to be an obstruction to cars loaded with logs thereon.

IV. That on said . . . day of . . ., 19.., said defendant was operating said railroad by its servants and agents, and transporting over the same said train composed of a number of cars, drawn by said locomotive engine, and that said cars were heavily loaded with logs, and that each load was negligently and carelessly fastened upon the car upon which it rested by means of one of said weak, small, improper, and unsuitable chains; that this plaintiff, acting as the agent and servant of said defendant,

and in the lawful and proper performance of his duty, was riding upon said train, and was standing at one of the brakes upon said cars; that while so riding as such agent and servant, and while so lawfully performing his said duty, and when said train was running over said railroad, and at a point about a mile and a half distant from the village of . . ., in said . . . county, one of said loaded cars in front of the car upon which this plaintiff was so lawfully standing came in contact with one of the said logs so negligently allowed to remain alongside said railroad track as aforesaid, the chain which bound the logs upon said car gave way and broke, and the said logs which were bound by said chain to said car fell, or partly fell, from the said car upon which they were loaded, and some of them falling with their front ends to the ground, or against said logs so negligently allowed to remain alongside said track, caused the logs upon the car upon which this plaintiff was standing to be thrown back upon him, so that this plaintiff was caught between two of said carloads of logs, and by reason of the negligence of said defendant in so failing to provide suitable and proper chains to bind the logs upon said cars, and in so failing to keep its said roadbed in proper condition and free from obstruction, and with no want of care on his part, this plaintiff sustained the injuries hereinafter mentioned.

V. [State injuries and damages.]

[Demand of Judgment.]

§ 4230. Complaint by passenger for forcible ejection from train.

Form No. 1140.

[Title.]

The plaintiff complains, and alleges:

I. That the defendant is, and was at the times hereinafter named, a railroad corporation duly organized under the laws of the state of . . ., and operating a commercial railroad between the city of . . . and the city of . . ., in said state, carrying passengers and freight thereon for hire.

II. That on the . . . day of . . ., 19.., the plaintiff purchased from the defendant a ticket entitling him to safe transportation on defendant's said railroad from . . . to . . . , and thereupon boarded one of defendant's trains, and was received as a passenger thereon.

III. That the defendant, by its officers and servants in charge of said train, at a point on the line of its said railroad about . . . miles east from the station of . . ., [the same not being a usual stopping-place or near any dwelling-house], unlawfully, and with force and violence, ejected the plaintiff from said train, and refused to permit him to ride further thereon.

IV. That by reason of said ejection, and the violence so used by defendant's servants, the plaintiff was severely bruised about the face and body, and suffered great pain of body and humiliation, and was delayed in his business; all to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4231. Complaint by employee against employer for injuries suffered by reason of employment of incompetent fellow-servant.

Form No. 1141.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [Allege business of defendant and employment of plaintiff.]

III. That it was the duty of defendant to employ skillful and competent fellow-servants for plaintiff in said factory, but that defendant negligently employed one L. M. as engineer to operate the steam-engine and boilers in said factory, who was incompetent in this, that [state particulars of incompetency]; and that defendant well knew the incompetency and unfitness of said L. M. when he employed him, but that plaintiff was at all times wholly ignorant thereof.

IV. That on or about the . . . day of . . ., 19.., while plaintiff was performing his duties in said factory, said L. M. so negligently and unskillfully operated said engine and boilers, by reason of his said incompetence and unfitness, that the boiler exploded, and plaintiff was thereby thrown to the floor and [state the injuries received and damage].

[DEMAND OF JUDGMENT.]

§ 4232. Complaint by husband for injuries to wife while passenger.

Form No. 1142.

[After alleging that plaintiff is the husband of the injured person, allege incorporation of defendant, its business as a car-

rier, the purchase of a ticket, the transportation of the injured person, the negligence of the company, and the resulting injuries, with necessary changes of verbiage to show that the plaintiff's wife was the injured person, and continue:]

V. That by reason of the premises the plaintiff has been put to great expense, and will continue to be subjected to great expense, in procuring necessary medical and surgical attendance, care, and suitable nursing for his said wife, and has been, and will be hereafter, put to great loss and expense in money by the loss of her services, by reason of her permanent injuries and physical disabilities caused by such injuries, and has lost the comfort of the society and health of his said wife, in all to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4233. Complaint by infant for injuries from being negligently run over by street-car.

Form No. 1143.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is an infant under the age of twenty-one years, to-wit, of the age of . . . years, and that on the . . . day of . . ., 19.., on the application duly made, A. B. was, by order of J. K., judge of the . . . court of . . . county, duly appointed the guardian *ad litem* of this plaintiff, for the purposes of this action.

II. [Allege incorporation and business of defendant.]

III. That on the . . . day of . . ., 19.., a certain car of the defendant, propelled by electricity, was, by its servants, being driven upon . . . street in said city in a southerly direction, when the said infant plaintiff was lawfully passing said . . . street in a westerly direction, at a point [locate the point]; that the defendant, by its said servants, so negligently and carelessly propelled and conducted said street-car that the same was driven with great force against and over said infant plaintiff, cutting off his left arm, and otherwise seriously and permanently injuring him.

IV. That, in addition to the negligence hereinbefore mentioned, the defendant carelessly and negligently permitted said street-car to become and remain out of repair, in that the brakes thereon had become weakened and unserviceable, so that they would not

stop said car with reasonable certainty or celerity, or within a reasonable distance, yet that the defendant carelessly and negligently operated the same while said brakes were so defective and unserviceable, and its said servants so negligently conducted and operated said unsafe and unserviceable car, by reason whereof the same was driven against said infant plaintiff as aforesaid, causing the loss of his said arm, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4234. Complaint by conductor of freight-train for injuries from cattle-chute dangerously near track.

Form No. 1144.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and was at the times hereinafter named, a railroad corporation duly organized under the laws of the state of . . ., and operating a commercial railroad between the city of . . . and the city of . . ., in said state, carrying passengers and freight thereon for hire.

II. That prior to the time hereinafter mentioned the defendant made and constructed a stockyard near its track, in the town of . . ., in said county, and, to facilitate the loading of live-stock from the said yard into and upon its cars, a chute or passageway was constructed by the defendant from the said yard to the track of said railroad, so that said live-stock could be driven from said yard across said chute and upon the cars of the defendant standing upon the said railroad in front of the said passageway; and the plaintiff alleges that the said chute or passageway was negligently and improperly built so as to project so near to the track of the said railroad as to greatly endanger the lives and persons of the servants and employees of the said defendant operating the freight-trains over said railroad at the place where said chute or passageway was located.

III. That on the . . . day of . . ., 19.., the plaintiff was in the employment of defendant in the capacity of conductor of a freight-train then passing over and along said railroad, and that at a point a few rods north of the said stockyard a sidetrack branched from the main line and ran past the said chute or passageway to the depot in said town of . . .; that in the course of the plaintiff's duty it was necessary for him to transfer a

number of said cars from the said main line to the said sidetrack, and to assist in the uncoupling of said cars; and that while in the act of thus assisting, and in the exercise of due care and caution, the plaintiff, in necessarily ascending to the top of one of said cars by means of the ladder on the side thereof, was carried by said car against said chute or passageway, and pressed between the same and said car, by means whereof he was greatly bruised and wounded in his person, and one of his legs crushed and broken. [Allege other injuries, if any, and the damage suffered.]

[DEMAND OF JUDGMENT.]

§ 4235. Complaint for injuries caused by collision of vehicle driven by servant.

Form No. 1145.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff was driving along the public highway of the city of . . ., in a carriage drawn by one horse.

II. That the defendant was then the owner of a wagon and two horses, which were then being driven along said highway, in the possession of defendant [or, of defendant's servant].

III. That the defendant [or, that said servant] so carelessly drove and managed said horses and wagon, that by reason of his negligence said wagon struck the plaintiff's carriage and overthrew the same, and threw the plaintiff out of his carriage upon the ground [or describe the accident], whereby the plaintiff was bruised and wounded, and was for . . . days prevented from attending to his business, and was compelled to expend . . . dollars for medical attendance and nursing, and . . . dollars for the repair of his said carriage, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4236. Complaint against common carriers for injuries caused by overturning stage-coach.

Form No. 1146.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a

common carrier of passengers for hire by stage-coach between . . . and . . .

II. That on that day, as such carrier, he received the plaintiff upon his coach, to be carried from . . . to . . ., for the sum of . . . dollars, which was then and there paid by the plaintiff to the defendant.

III. That while he was such passenger at . . . [or, near . . . ; or, between . . . and . . .], the said coach was, by and through the carelessness and negligence of the said defendant, overturned and thrown down, with the plaintiff therein, as aforesaid, by means whereof the said plaintiff was greatly injured, and one of the legs of said plaintiff was broken, fractured, and bruised, and the said plaintiff was otherwise greatly injured, wounded, and cut, insomuch that the said plaintiff then became sick, lame, and sore, and so continued for the space of . . . months thence next ensuing, and was during all that time prevented from attending to his business and carrying on the same; and the said plaintiff was forced to expend, and did expend, the sum of . . . dollars for medical attendance and nursing, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4237. Complaint against railroad for injuries by collision.

Form No. 1147.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a corporation duly incorporated under the laws of this state, and was the owner of a certain railroad, known as the . . . railroad, together with the track, rolling-stock, and other appurtenances thereto belonging; and was a common carrier of passengers thereupon for hire, between . . . and . . ., in the state of . . .

II. That on that day the defendant, in consideration of the sum of . . . dollars, then paid to it by the plaintiff therefor, undertook and agreed, as such common carrier, to transport and convey the plaintiff from . . . to . . ., as a passenger, and the plaintiff thereupon entered one of the cars of the defendant to be so conveyed as aforesaid from . . . to . . . aforesaid.

III. That while he was such passenger, at . . . [or, near the station of . . . ; or, between the stations of . . . and . . .], a

collision occurred on the said railroad caused by the negligence of the defendant and its servants, whereby the plaintiff was much injured. [State the injury according to fact, and the special damage, if any.]

[Or, III. That the defendant and his servants, in managing said cars in which plaintiff was a passenger, were so careless and negligent that it was unsafe for him to remain in one of them; and that in order to free himself from the danger, he was obliged to leap from the car, and in doing so was injured.] [State injury according to the fact.]

IV. By means whereof the plaintiff hath been damaged in the sum of . . . dollars.

[Demand of Judgment.]

§ 4238. Complaint against railroad for injuries by car running off track.

Form No. 1148.

[Title.]

The plaintiff complains, and alleges:

I. [Same as in form No. 1147.]

II. That on that day the defendant received the plaintiff as a passenger in one of the carriages of the defendant on said road, to be transported from . . . to . . .

III. That while he was such passenger, at . . ., the said defendant, not regarding its duty in that behalf, did, by its servants and agents, so carelessly, negligently, and unskillfully, conduct the running of said cars and railroad, that, on the day and year aforesaid, by the carelessness, negligence, and default of its said agents and servants, and for want of due care and attention to its duty in that behalf, the said car was run off the track of said railroad, and thrown down the embankment thereof, whereby the said plaintiff was greatly cut, bruised, and wounded, so that he, the said plaintiff, became and was sick, lame, and unable to walk, and was wholly unable to attend to the transaction and performance of his usual and necessary business, and so continued from thence hitherto; and said plaintiff has been put to great expense, to-wit, to the amount of . . . dollars, in endeavoring to cure his said wounds, bruises, and fractures, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4239. Complaint against railroad for injuries by negligently starting cars without giving passenger opportunity to get off.

Form No. 1149.

[TITLE.]

The plaintiff complains, and alleges:

I, II. [Same as in form No. 1147.]

III. That while plaintiff was such passenger, and at the . . . station of said railroad, when in the act of getting out of and off from said car, and being still thereon, to-wit, on the platform thereof, the said car was, through the neglect of the servant of said defendant, suddenly started and put in motion, without allowing said plaintiff sufficient time to safely get off, and in consequence thereof, and in consequence of the defect and insufficiency of said company's said platform, and of the couplings connecting said car with the other cars of the same train, and of the defective and insufficient guards around said platform, and across the passageway leading therefrom to the next adjacent car, and in further consequence of the insufficient and imperfect means provided for giving the alarm, preparatory to starting said train, and of the negligence and carelessness of the servants of said defendant in the running and conducting of said train, the said plaintiff was violently thrown on the track between the cars of said defendant, and sustained great injury, to-wit, one of his feet was crushed by a wheel of one of said cars passing over it, so that its immediate amputation became necessary, and it was accordingly amputated.

IV. That in the act of getting off from said car, as aforesaid, the plaintiff exercised and observed all due and proper care and precaution.

V. [Allegation of any special damages.]

[DEMAND OF JUDGMENT.]

§ 4240. Complaint for injuries caused by negligence on a railroad in omitting to give signal.

Form No. 1150.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a corporation duly incorporated under and pursuant to the laws of this state, and was the owner of a certain railroad, known as

. . . railroad, together iwth the track, rolling-stock, and other appurtenances thereto belonging.

II. That on that day the plaintiff was traveling in a carriage along the public highway, from . . . to . . ., which public highway crosses the railroad aforesaid, at . . ., and as the plaintiff had reached said crossing, the defendant carelessly and negligently caused one of its locomotives [with a train of cars attached thereto] to approach said crossing, and then and there to pass rapidly over the track of said railroad, and negligently and carelessly omitted its duty while approaching said crossing, to give any signal by ringing the bell or sounding the steam-whistle, by reason whereof the plaintiff was unaware of its approach.

III. That, in consequence thereof, the locomotive struck the plaintiff's horse, and overset the plaintiff's carriage, and plaintiff was thrown out upon the ground with such force as to fracture his left arm [or other injuries].

IV. That thereby the plaintiff was put to great pain, and was, and still is, prevented from going on with his business as . . ., and is, as he believes, permanently injured, and was otherwise greatly injured, and was compelled to expend . . . dollars for medical attendance and nursing, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4241. Complaint for injuries by steamboat explosion.

Form No. 1151.

[Title.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendants were common carriers of passengers for hire, between . . . and . . ., and were the proprietors of a steamboat, named the . . ., employed by them in carrying passengers and merchandise on the . . . river, from . . . to . . ., for hire.

II. That on the . . . day of . . ., 19.., the defendants received the plaintiff and his wife and daughter into said boat for the purpose of safely conveying them therein as passengers, from . . . to . . ., for . . . dollars, paid to them by the plaintiff therefor.

III. That the defendants so negligently and unskillfully conducted themselves, and so misbehaved in the management of said

boat, that, through the negligence and unskillfulness of themselves and their servants, the steam escaped from the boiler and engine, and burned or scalded [otherwise, state injury, according to the facts], the plaintiff and his wife and daughter.

IV. That in consequence thereof, the plaintiff and his said wife and daughter became, and for a long time remained ill; the plaintiff was deprived, and for a long time to come will be deprived, of the assistance and services of his wife and daughter, and was compelled to, and did, expend . . . dollars in attempting to cure himself and his wife and daughter, and was for . . . months prevented from pursuing his business, and was otherwise greatly injured, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4242. Complaint for injuries to engineer of railroad company, caused by collision.

Form No. 1152.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a corporation, duly incorporated under and pursuant to the laws of the state of California, and was owner of a certain railroad known as . . . railroad, together with the track, cars, and locomotives thereto belonging.

II. That one of said locomotives, and the train thereto attached, ran from . . . to . . ., and back again, each day; and another thereof ran from . . . to said . . ., and back again, each day; which said locomotives, with their respective trains, were used and accustomed to meet and safely pass each other at . . .

III. That the said plaintiff was employed by the said defendant as an engineer upon one of said locomotives, at and for a certain hire and reward agreed upon by the parties in that behalf, and was accustomed to stop the said last-mentioned locomotive at . . . aforesaid, under the instruction by him received from the said defendant, and there to pass the said other locomotive as aforesaid.

IV. That by reason of the premises it became the duty of the said defendant to give the said plaintiff due notice of any change in the place of meeting and passing of the said locomotives and their respective trains, yet the said defendant, not regarding its said duty, did, on the . . . day of . . ., 19.., change the place

of meeting and passing of said locomotives, with their respective trains, from said . . . to said . . ., and did direct said change to be carried into effect on the . . . day of . . ., 19..

V. That the said defendant wholly neglected and failed to give the said plaintiff notice of said change in the place for the passing of said locomotives with their respective trains, and whilst the said plaintiff was proceeding, in his capacity as engineer as aforesaid, on one of said locomotives, with the train thereto belonging, according to the directions before that time given to the said plaintiff by the said defendant, between . . . and . . . aforesaid, the other locomotive with its train, coming from . . . to . . ., ran against it, and violently crushed the same.

VI. That by reason thereof the plaintiff was severely scalded, bruised, burnt, and wounded, and became sick, sore, lame, and disordered, and so remained for the space of . . . months, and was compelled to expend the sum of . . . dollars for medical attendance; and was prevented from attending to his ordinary business, and lost all the wages he otherwise would have earned, to-wit, the sum of . . . dollars, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4243. Complaint for injuries to engineer of railroad company—Said company having used a condemned locomotive.

Form No. 1153.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a corporation, duly incorporated under and pursuant to the laws of the state of . . ., and was the owner of a certain railroad, and of a locomotive propelled by steam on said railroad, and by said defendant used and employed in carrying and conveying passengers and goods [or, hauling trains of cars containing passengers and goods], upon and over the said railroad of the said defendant, from . . . to . . .

II. That the said plaintiff, on the day and year aforesaid, at . . . aforesaid, and at the time of the committing of said grievances, was in the employ of the said defendant, as engineer upon said locomotive, so moved and propelled by steam as aforesaid; and that it then and there became and was the duty of the said defendant to procure a good, safe, and secure locomotive, with

good, safe, and secure machinery and apparatus, to move and propel the same as aforesaid.

III. That the said defendant conducted itself so carelessly, negligently, and unskillfully, that, by and through the carelessness, negligence, and default of the said defendant and its servants, it provided, used, and suffered to be used, an unsafe, defective, and insufficient locomotive, of all which it had notice.

IV. That for want of due care and attention to its duty in that behalf, on the said . . . day of . . ., 19.., at . . ., aforesaid, and whilst the said locomotive was in the use and service of said defendant, upon said railroad, and whilst the said plaintiff was on the same, in the capacity aforesaid, for the said defendant, the boiler connected with the engine of the said locomotive, by reason of the unsafeness, defectiveness, and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom, and fell upon the said plaintiff, by which he was greatly scalded, burnt, and wounded, and became sick, sore, and disordered, and so remained for the space of . . . months, and was compelled to expend the sum of . . . dollars for medical attendance, and was prevented from attending to his ordinary business, and lost all the wages he otherwise would have earned, to-wit, the sum of . . . dollars, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4244. Complaint by executor or administrator against railroad company for injuries causing death.

Form No. 1154.

[Title.]

The plaintiff, as the executor [or, administrator] of the estate of A. B., deceased, complains and alleges:

I. That on the . . . day of . . ., 19.., the defendant was a corporation duly organized by [or, under] the laws of this state, and was a common carrier of passengers for hire, by railroad, between . . . and . . .

II. That on that day said defendant received one A. B. into its cars, for the purpose of conveying him therein as a passenger from . . . to . . . [for . . . dollars paid to them by said A. B.].

III. That while he was such passenger, at . . ., a station on the line of the said railroad, by and through the carelessness of the defendant and its servants, a collision occurred by which

[the cars of said railroad were thrown from the track, and the car in which the said A. B. then was was precipitated down an embankment, and the said A. B. was thereby killed; or as the case may be].

IV. That on the . . . day of . . ., 19.., letters of administration upon the estate of the said A. B. were duly issued by the probate court of the county of . . . to the plaintiff, by which he was appointed administrator of all the goods and credits belonging to the said A. B. at the time of his death, and he thereupon was qualified and entered upon his duties of such administration.

V. That by reason of the premises the plaintiff, as such executor [or, administrator], hath sustained damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4245. Complaint by heirs against railroad for injuries to employee causing death, resulting from defective machinery.

Form No. 1155.

[TITLE.]

The plaintiffs complain, and allege:

I. That the plaintiff Mary Doe is the widow of John Doe, deceased; that said plaintiff and said deceased intermarried on the . . . day of . . ., 19..

II. That the plaintiff James Doe is the only child of said John Doe, deceased; that the plaintiff James Doe is an infant, less than . . . years of age; that before the commencement of this action said Mary Doe, his mother, was by an order of the superior court of . . . county, duly made and given, appointed guardian *ad litem* of said infant, for the purpose of appearing for him in this action.

III. [Allege defendant's corporate existence and business, as in form No. 1153.]

IV. That on or about the . . . day of . . ., 19.., said defendant was the owner of, and engaged in running and operating, a railroad and train of cars in the county of . . ., state of . . .

V. That on said day, and at the time of the injuries hereinafter mentioned, said John Doe, deceased, was employed and hired by the defendant as a brakeman on said train, and was then and there acting as and discharging the duties of such brakeman.

VI. That at the time aforesaid one of the brake-wheels and the brake machinery on said train, which said John Doe, as such brakeman, was required to operate, was imperfectly constructed, defective, and unsafe; that said imperfection, defectiveness, inadequacy, and unsafeness could have been by said defendant discovered and known by the use and exercise by it of ordinary care and diligence, and were at the time aforesaid known to said defendant; but the same were unknown to the said John Doe.

VII. That at the time aforesaid, and while said John Doe was employed and engaged in the duties and occupation of brakeman as aforesaid, said brake-wheel and brake machinery, by reason of the imperfection, defectiveness, inadequacy, and unsafeness thereof, broke and gave way, without any negligence or fault of said John Doe, by reason whereof said John Doe was cast upon the ground, and there crushed and killed by said train.

VIII. That said plaintiffs were wholly dependent upon said John Doe for subsistence and support, and by reason of his death are left utterly helpless and destitute, and are damaged in the sum of . . . dollars.

[Demand of Judgment.]

§ 4246. Complaint by employee against employer for injuries by obvious defects in machinery which defendant had promised to repair.

Form No. 1156.

[Title.]

The plaintiff complains, and alleges:

I. [Allege incorporation and business of defendant.]

II. That on or about the . . . day of . . ., 19.., the plaintiff was employed by the defendant as a workman in defendant's factory at said . . ., and was required to operate a certain dangerous machine in said factory, with rapidly revolving and unguarded gearing, called a planer [or otherwise, describe machinery], and that plaintiff thereupon commenced to operate said machine, and continued to do so until he received the injuries hereinafter described.

III. That in operating said machine it was necessary for plaintiff frequently to pass and repass along a certain passageway on the east side thereof, of the width of but . . . inches, projecting into which passageway was a certain rapidly revolving, uncovered

and unguarded shingle-saw propelled by steam; that the presence of said unguarded saw, and the narrowness of said passageway, as well as the slippery condition of the floor thereof, by reason of accumulations of sawdust and bark, caused the use of said passageway to be unsafe and dangerous, all of which was well known to the defendant.

IV. That on the . . . day of . . ., 19.., the plaintiff informed the defendant of the dangerous condition of said saw and passageway, and requested that the same be repaired and made safe, and the defendant then and there promised to cover said saw and make said passageway safe, and that plaintiff, relying on said promise, as he lawfully might, remained in the defendant's employment, and continued to operate said machine and use said dangerous passageway, for the space of . . . hours; that defendant negligently failed to cover said saw or make safe said passageway, and in consequence of such failure and neglect by defendant, and while the plaintiff was still performing his duties in reliance upon said promise, and without fault on his part, he fell against said exposed saw, and [state injuries received and damage].

[Demand of Judgment.]

§ 4247. Complaint by employee against employer for injuries from defective scaffold.

Form No. 1157.

[Title.]

The plaintiff complains, and alleges:

I. That at the times hereinafter named the defendant was, and still is, [a corporation organized and existing under the laws of the state of . . ., and was] engaged in the business of manufacturing [or otherwise, state the business] at . . ., in said county of . . .

II. That on or about the . . . day of . . ., 19.., the plaintiff was employed by defendant as a riveter in the defendant's said factory, and that on the . . . day of . . ., 19.., it became the duty of plaintiff, in the course of his said employment, to go upon, and he did go upon, an elevated scaffold or platform adjoining a certain steel barge, then being constructed by the defendant for the purpose of riveting bolts upon said barge.

III. That it was defendant's duty to furnish to plaintiff a safe and secure platform, or scaffold, for the performance of his said work, but that the defendant, on the contrary, ordered and per-

mitted two certain persons, who were incompetent and unfit, to construct such a scaffold, and known to be so incompetent by the defendant, to erect and put said scaffold in position, and that the said defendant and its employees carelessly and negligently constructed and erected an unsafe, defective, and dangerous scaffold, of all of which facts the plaintiff was ignorant.

IV. That the defendant failed to warn the plaintiff of the unsafe condition of said scaffold, and that solely by reason of the said dangerous and defective condition thereof the same tipped and fell while the plaintiff was upon the same in the performance of his said duties, on the . . . day of . . ., 19.., and the plaintiff was precipitated twenty feet to the earth, breaking his leg. [State injuries and damage.]

[DEMAND OF JUDGMENT.]

§ 4248. Complaint by servant against employer for negligent exposure to infectious disease.

Form No. 1158.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., the plaintiff was employed by the defendant to render assistance in and about the defendant's house, and in the care of defendant's minor daughter, whom the defendant represented to the plaintiff to be ill with nervous prostration.

II. That in truth and in fact the said daughter had been for some time ill with typhoid fever, a dangerous and infectious disease, which fact was unknown to the plaintiff, but well known to the defendant at the time aforesaid, and the defendant negligently and falsely represented and stated to the plaintiff that his daughter's illness was nervous prostration for the purpose of inducing the plaintiff to enter his service.

III. That at the time of entering said service the plaintiff was ignorant as to the appearance and effects of diseases, and particularly as to the appearance and effect of typhoid fever, and was unable to discern for herself the true nature of the illness of defendant's daughter, all of which was then well known to the defendant, and that the plaintiff, by reason of her said ignorance, relied upon defendant's representations as to the character of her said daughter's disease, and, so relying, entered the service of the defendant as aforesaid.

IV. That while the plaintiff was in such service, without negligence upon her part, and on or about the . . . day of . . ., 19.., she, the plaintiff, contracted the said disease of typhoid fever from the defendant's said daughter, and became seriously and dangerously ill, and was confined to her bed for . . . weeks, and suffered great bodily pain and mental anguish. [Allege injuries and damage.]

[DEMAND OF JUDGMENT.]

§ 4249. Complaint by tenant against landlord for leasing infected dwelling.

Form No. 1159.

[TITLE.]

The plaintiff complains, and alleges:

I. That on and prior to the . . . day of . . ., 19.., the defendant was the owner of a certain dwelling-house in the city of . . ., known as No. . . . on . . . street, and that prior to said date a number of cases of smallpox had occurred in said dwelling, and had infected the same, to the knowledge of the defendant.

II. That on the . . . day of . . ., 19.., the defendant leased said dwelling-house to the plaintiff as a residence for himself and family, and the plaintiff with his family thereupon moved into said house; that the plaintiff was wholly ignorant of the infected and dangerous condition of said house at said time, and that the defendant negligently failed to inform the plaintiff that the said house was so infected, and failed to take any precaution against the exposure of the plaintiff to said disease; and that the plaintiff, by reason of residing in said infected house, was made sick with said disease, and was confined to his bed for . . . weeks. [State injuries and damage.]

[DEMAND OF JUDGMENT.]

§ 4250. Complaint by minor servant against employer for injuries received in driving dangerous horse.

Form No. 1160.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege infancy of plaintiff, and appointment of guardian *ad litem*.]

II. That on or about the . . . day of . . ., 19.., the plaintiff being then of the age of . . . years, was employed by the de-

fendant to perform labor upon the defendant's farm as a common farm laborer, and that as a part of said employment the defendant, on the . . . day of . . . , 19.. , negligently required the plaintiff to ride and manage a certain horse belonging to the defendant, attached to a certain dangerous machine known as a corn-stalker and corn-cutter, having as part of its mechanism sharp and dangerous knives.

III. That the said horse of the defendant was vicious and unmanageable, as the defendant well knew, and that the defendant negligently failed and neglected to provide the plaintiff with any proper appliance or apparatus to manage said horse, or for retaining his seat thereon, and also failed and neglected to warn or inform the plaintiff of the vicious character of said horse and dangerous character of said machine, or of the precautions necessary to be used by the plaintiff in said employment, although the plaintiff was wholly ignorant as to the character of said horse, and the dangers attending the use of said machine.

IV. That while the plaintiff was so engaged in said employment, and was riding said horse with due care, the said horse became unmanageable and ran away, and the plaintiff was thrown from said horse in front of the said machine, and was severely injured. [State injuries and damage.]

[DEMAND OF JUDGMENT.]

§ 4251. Complaint for injuries caused by vicious dog.

Form No. 1161.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant was the keeper [or, owner] of a certain vicious dog, which was accustomed to bite mankind.

II. That the said defendant, well knowing the premises, did wrongfully and injuriously keep and harbor the said vicious dog, and wrongfully and negligently suffered such dog to go at large, without being properly guarded or confined.

III. That while so kept as aforesaid the said dog did bite and greatly wound this plaintiff [state the particulars], whereby this plaintiff became sick and sore and lame, and so continued for the space of [six months] thence next following; and was obliged to pay, and did expend, . . . dollars for medical attendance con-

sequent thereon, and was prevented during all said months of sickness from attending to his lawful affairs, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4252. Complaint against physician for malpractice.

Form No. 1162.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and since the . . . day of . . ., 19.., has been, a physician, and that the plaintiff, at . . ., in the month of . . ., 19.., employed the defendant as such, to cure him of a malady from which he then suffered, for compensation to be paid therefor, and for that purpose the defendant undertook, as a physician, to attend and cure the plaintiff.

II. That the defendant entered upon such employment, but did not use due and proper care or skill in endeavoring to cure the plaintiff of the said malady, in this, the defendant did not [here state what defendant failed to do that he should have done, or what he did that he should not have done].

III. That by reason of the several premises the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to, and did, expend the sum of . . . dollars, in endeavoring to be cured of the said sickness, which was prolonged and increased by the said unskillful and improper conduct of the defendant, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4253. Against surgeon, for malpractice.

Form No. 1163.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff by accident broke his leg.

II. That he then employed the defendant, who is a surgeon, as such surgeon, for reasonable reward to be paid therefor, to set and heal the same.

III. That the defendant so negligently and unskillfully conducted himself, in attempting to set said leg of the plaintiff, that

[here state the consequences, as, inflammation ensued, and the plaintiff was compelled to have his leg amputated].

IV. That by reason of said negligence and unskillfulness the plaintiff was made sick and was kept . . . months from attending to his business as [engineer], and was compelled to pay and did pay . . . dollars expense for nursing, and is permanently a cripple; to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4254. Complaint against druggist for negligently putting up poisonous drug.

Form No. 1164.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned the defendant was engaged in the business of selling drugs and filling medical prescriptions in the city of . . ., in said state.

II. That on the . . . day of . . ., 19.., the plaintiff applied to the defendant to put up and sell to him . . . cents' worth of oil of sweet almonds, to be used by plaintiff as a physic, and that the defendant undertook and pretended to fill said order, but carelessly and negligently put up and delivered to the plaintiff, instead of oil of sweet almonds, a certain poisonous drug known as oil of bitter almonds, and negligently failed to mark the bottle or package in any manner so as to indicate its dangerous or poisonous character.

III. That the plaintiff, believing the drug so delivered to be oil of sweet almonds, without fault or negligence on his part, swallowed a part of the same, and was thereby made violently ill. [State injuries and damage.]

[DEMAND OF JUDGMENT.]

§ 4255. Counterclaim against carrier for negligence.

Form No. 1165.

[TITLE.]

The defendant, further answering and by way of counterclaim herein, alleges:

That the transportation of the goods mentioned in the complaint was conducted so badly and negligently, and with so little care, that by the mere carelessness, negligence, and improper

conduct of the said plaintiff and his servants in that behalf, a part of the said goods, of the value of at least . . . dollars, were wholly lost to the defendant; and a part thereof, of the value of . . . dollars, were damaged in the sum of . . . dollars; which said loss and damages, amounting to the sum of . . . dollars, the defendant claims the right to counterclaim and set off against the plaintiff's demand to the extent thereof; and the defendant demands judgment against said plaintiff for the said sum of . . . dollars, or so much thereof as he may be entitled to, over and above the plaintiff's claim.

CHAPTER CXII.

DAMAGES CAUSED BY NEGLIGENCE.

§ 4256. **Ferryman.**—It is the duty of the ferryman to see that the teams are safely driven on board the boat, and, if he thinks proper, he himself may drive, or unharness the team, or unload the wagon to get them safely on board. But if the ferryman permits the party himself to drive, he constitutes him, *quoad hoc,* his agent.[1] A ferryman who receives horses for transportation, in charge of a driver, cannot be held liable for an accident to them, in the absence of negligence on his part.[2]

§ 4257. **Negligence of sheriff.**—The mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff in case a writ last in hand was executed first.[3]

§ 4258. **Pledgee as agent.**—A party by pledging negotiable securities transferable by delivery loses all right to the securities when transferred by the pledgee in good faith to a third party. The pledgee in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises.[4]

§ 4259. **Powers of agent.**—In an action by a principal against his agent charging him with an abuse of his powers, it is necessary to allege that the defendant acted as agent.[5]

§ 4260. **Unauthorized act of agent.**—The ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and, being equivalent to an original authority, an allegation of due authority is sustained by proof of such ratification. If an agent acting in good faith disobey the instructions of his

1 Whitney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 584; May v. Hansen, 5 Cal. 360, 63 Am. Dec. 135.

2 Yerkes v. Sabin, 97 Ind. 141, 49 Am. Rep. 434.

3 Coit v. Humbert, 5 Cal. 260, 63 Am. Dec. 128.

4 Ætna Ins. Co. v. Sabine, 6 McLean, 393, Fed. Cas. No. 97.

5 Hoyt v. Thompson's Exrs., 19 N. Y. 218.

principal, and promptly inform his principal of the fact, the principal should at the earliest opportunity repudiate the act, if he disapprove. Silence is a ratification.[6] A principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, but is not responsible for wanton or malicious damage done by the agent, such as an assault by a hotel waiter,[7] without consent, approval, or subsequent ratification by the principal.[8]

§ 4261. **Subcontractors.**—A subcontractor who furnishes all material and labor to plaster a house is an independent contractor, and not an agent of the original contractor.[9] One employed to take charge of a shingle-mill, furnish all repairs and help, and receive pay according to the number of shingles manufactured, is an independent contractor, and not the agent of the owner.[10]

§ 4262. **Measure of damage.**—The measure of damage to a house the foundation of which is negligently undermined is the difference in value of the house immediately before and after.[11]

§ 4263. **Agent.**—In an action against an agent for not accounting, a request to account and pay over must be alleged in the complaint and proved at the trial.[12] A demand is not required where the agency is denied, or a claim is set up exceeding the amount collected, or the agent's responsibility is disputed in the answer;[13] nor if the evidence shows a wrongful conversion of the money by the agent.[14] But the principal must make demand within a reasonable time if he has notice of the payment of money to his agent or attorney, and if he neglects to do so, the statute of limitations will run.[15] An agent who is authorized to keep a building in repair, and has undertaken the duty,

6 Bray v. Gunn, 53 Ga. 144; Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861. Contra, see Axtell v. Northern Pacific Ry. Co., 9 Idaho, 392, 74 Pac. 1075.

7 Rahmel v. Lehndorff, 142 Cal. 681, 100 Am. St. Rep. 154, 76 Pac. 659, 65 L. R. A. 88.

8 Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657. See, also, George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376.

9 Green v. Soule, 145 Cal. 96, 78 Pac. 337; Louthan v. Hewes, 138 Cal. 116, 70 Pac. 1065.

10 Ziebell v. Eclipse Lumber Co., 33 Wash. 591, 74 Pac. 680.

11 Olson v. Goerig, 45 Wash. 541, 88 Pac. 1017.

12 Bushnell v. McCauley, 7 Cal. 421. As to necessity of alleging a demand, see Claypool v. Gish, 108 Ind. 424, 9 N. E. 382.

13 Wiley v. Logan, 95 N. C. 358.

14 Terrell v. Butterfield, 92 Ind. 1.

15 Whitehead v. Wells, 29 Ark. 99.

and is in complete control of the work, is liable to third persons for injuries due from neglect to so repair and keep such building in order.[16] One who knowingly participates in an agent's breach of trust incurs the same liability to the principal.[17]

§ 4264. **Forwarders are not insurers.**—Forwarders are not insurers, but they are responsible for all injuries to property while in their charge, resulting from negligence or misfeasance of themselves, or of their agents or employees.[18]

§ 4265. **Attorney—Liabilities of.**—An attorney is liable to his client for want of ordinary care, skill, diligence, and integrity.[19] But where in a suit a question has been made and decided by the supreme court, counsel cannot be charged with negligence in acting upon that decision as the law of the case.[20] Nor where he accepts as correct a decision of the supreme court of his own state in advance of any decision by the United States supreme court on the same subject.[21]

An attorney may make a valid purchase of his client's property at execution sale, provided such purchase be made in good faith, and with the client's consent; otherwise, he holds the property as a trustee of his client.[22]

§ 4266. **Attorney—General averment that he was retained.**—In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained. But if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error.[23]

16 Lough v. John Davis Co., 30 Wash. 204, 94 Am. St. Rep. 848, 70 Pac. 491, 59 L. R. A. 802.

17 Guernsey v. Davis, 67 Kan. 378, 73 Pac. 101.

18 Hooper v. Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211.

19 Gambert v. Hart, 44 Cal. 542. See, also, as to negligence, Drais v. Hogan, 50 Cal. 121; Citizens' etc. Assoc. v. Friedley, 123 Ind. 143, 18 Am. St. Rep. 320, 23 N. E. 1075, 7 L. R. A. 669; Isham v. Parker, 3 Wash. 755, 29 Pac. 835. As to the law of Illinois regulating the liabilities of attorneys, see Puterbaugh's Pl. & Pr. 517.

20 Hastings v. Halleck, 13 Cal. 203.

21 Marsh v. Whitmore, 21 Wall. 178, 22 L. Ed. 482.

22 Fisher v. McInerney, 137 Cal. 28, 92 Am. St. Rep. 68, 69 Pac. 622; Carson v. Frogg, 34 Wash. 448, 76 Pac. 112.

23 Cavillaud v. Yale, 3 Cal. 109, 58 Am. Dec. 388.

§ 4267. **Existence of facts.**—To charge an attorney with negligence in failing to set up a defense based upon certain facts communicated to him by his client, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial, by the exercise of proper diligence on the part of the attorney.[24]

§ 4268. **Examining title.**—In an action against an attorney for negligence in examining title, it is not sufficient to allege that the property was incumbered. The declaration must show how the property was incumbered.[25] The law implies that a person engaged in searching records and examining titles possesses the knowledge and skill requisite for the business, and that he will use ordinary care; and for a failure in either of these respects he is liable to the party injured.[26]

§ 4269. **Acceptance.**—After acceptance of the work or construction by the person for whom it was built, the owner becomes liable for subsequent injuries, and the liability of the contractor ceases.[27]

§ 4270. **Action against municipality for damage done by mob.**—At common law an action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty.[28] The liability of a municipal corporation for damages done by a mob is therefore solely the result of statutes;[29] but the fact that such liability is specifically imposed does not indicate a legislative intent to exempt cities from liability for other torts.[30] Under such statutes, in an action against a city or county for damage to property caused by a mob or riot, an averment of the facts and the damage sustained by the plaintiff will be sufficient to sustain the action, and it is

24 Hasting v. Halleck, 13 Cal. 203. See Isham v. Parker, 3 Wash. 755, 29 Pac. 835.

25 Elder v. Bogardus, Hill & D. Supp. 116.

26 Chase v. Heaney, 70 Ill. 268; Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; Dundee Mortgage etc. Co. v. Hughes, 10 Sawy. 144, 20 Fed. 39.

27 Boswell v. Laird, 8 Cal. 469, 68 Am. Dec. 345.

28 Pray v. Mayor of Jersey City, 32 N. J. L. 394.

29 Clear Lake W. Co. v. Lake County, 45 Cal. 90; Cal. Pol. Code, §§ 4452-4457; Mont. Rev. Codes. § 3485.

30 May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759.

not necessary for the plaintiff to negative negligence or carelessness on his own part.[31] But if the plaintiff has knowledge of the impending danger, and neglects to inform the authorities, it may be a valid defense.[32] Nor is it necessary to present a claim for damages to the board of supervisors of the county before an action can be brought thereon.[33] If the plaintiff recover judgment in such action, the judgment must be ordered paid by the supervisors, unless they determine to appeal. If the county treasurer refuses to pay such claim, *mandamus* is the proper remedy to compel him to do so.[34]

§ 4271. **Conflagration.**—The constitutional provision that requires payment for private property taken for public use does not apply in the case of destroying a house to stop a conflagration. This right belongs to the state in virtue of her right of eminent domain.[35] A city is not liable for the destruction of a building to prevent the spread of a fire, whether by private individuals or by order of the city authorities assuming to act officially.[36]

§ 4272. **City's liability.**—A city, even in absence of statute, is liable for acts of its authorized agents in performance of duties for the exclusive benefit of the city; but not in case of duties imposed upon the city as a governmental instrumentality; such as enforcing an ordinance imposing a license tax.[37] The acts of a board of fire commissioners are acts of the city;[38] as are also the wrongful or negligent acts of the city engineer done in the course of his official duties.[39]

31 Wolf v. Supervisors, 19 How. Pr. 370, 11 Abb. Pr. 270.

32 Wing Chung v. Los Angeles, 47 Cal. 531. As to liability of city and county, see Darlington v. Mayor of New York, 28 How. Pr. 352; Moody v. Supervisors, 46 Barb. 659; Schiellein v. Supervisors, 43 Barb. 490; Blodgett v. City of Syracuse, 36 Barb. 526.

33 Clear Lake W. Co. v. Lake County, 45 Cal. 90; Bank of California v. Shaber, 55 Cal. 322. See Lehn v. San Francisco, 66 Cal. 76, 4 Pac. 965; Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091.

34 Bank of California v. Shaber, 55 Cal. 322.

35 Surocco v. Geary, 3 Cal. 69, 58 Am. Dec. 385.

36 McDonald v. City of Red Wing, 13 Minn. 38. See Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; First Nat. Bank v. Sarlls, 129 Ind. 201, 28 Am. St. Rep. 185, 28 N. E. 434, 13 L. R. A. 481.

37 Simpson v. City of Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951, 74 Pac. 577, 63 L. R. A. 815.

38 Wagner v. City of Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300.

39 Normile v. City of Ballard, 33 Wash. 369, 74 Pac. 566.

§ 4273. **Allegation of place.**—A complaint in an action against a railroad company, to recover the value of animals killed on its track, which alleges that at the place and time when said animals were killed by the defendant's locomotive and cars the same was not securely fenced as required by law, sufficiently alleges that the railroad was not securely fenced at the place the cattle entered upon the track.[40] A complaint against a railroad company for stock killed by the machinery of the company is bad, even after verdict, if it fail to aver negligence, or that the road was not fenced.[41]

§ 4274. **Fence on line of road.**—The provision of the law requiring railroad companies to fence along the line of their road may be waived by adjoining owners.[42] A railroad is not bound to maintain a fence on the line of its road against cattle unlawfully in a pasture adjoining.[43] A railroad company was required by statute to maintain "fences suitable for the security of the landowners," on both sides of its road. Plaintiff's sheep having been suffered to go unlawfully on land adjoining said road, got through a defective part of the fence upon the road, and were killed by the train. As it did not appear that the train was negligently managed, it was held that the company was not liable.[44] Otherwise, if the company was grossly negligent.[45] In California, under section 485 of the Civil Code, a railroad corporation is liable for injuries inflicted by it on a horse and the person riding it, when such injuries are occasioned, without negligence on the part of the rider, on a portion of the road which was not inclosed as required by such section. Whether the rider was guilty of contributory negligence is a question for the jury.[46] If an insufficient barway is placed by a railroad company in a fence on the line of its road, at the request of and for the use of the owner of adjoining land, and he uses the same, and does not complain of its insufficiency or notify the company

40 Indianapolis etc. R. R. Co. v. Adkins, 23 Ind. 340.

41 Indianapolis etc. R. R. Co. v. Brucey, 21 Ind. 215.

42 Enright v. San Francisco etc. R. R. Co., 33 Cal. 230.

43 Mayberry v. Concord Railway, 47 N. H. 391.

44 Eames v. Salem etc. R. R. Co., 98 Mass. 560, 96 Am. Dec. 676. See Toledo etc. R. R. Co. v. Furgusson, 42 Ill. 449; Price v. New Jersey R. R. Co., 32 N. J. L. 19.

45 Illinois Cent. R. R. Co. v. Wren, 43 Ill. 77.

46 Hynes v. San Francisco etc. R. R. Co., 65 Cal. 316, 4 Pac. 28.

to alter it, the company is not liable for damages for injuries to his cattle happening in consequence of the barway being too low to turn cattle.[47] Under section 485 of the California Civil Code, construed in connection with section 1248 of the Code of Civil Procedure, the duty of maintaining a fence after its erection is upon the owner, and the expense of doing so is included in the damage allowed for the right of way.[48]

§ 4275. Negligence defined.—Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but always relative to some circumstance of time, place, or person.[49] Negligence is a violation of the obligation which enjoins care and caution in what to do; but this duty is relative, and where it has no existence between particular parties there can be no such thing as negligence in the legal sense of the term.[50]

§ 4276. Negligence, proximate and remote.—When the negligence of the defendant is proximate, and that of the plaintiff remote, the action can be sustained, although the plaintiff is not entirely without fault.[51] So in the case of injury to a domestic animal by an engine and train, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse on the road, the defendants were bound to exercise a reasonable care and diligence in the use of their road and management of their train; and if for the want of that care the injury arose, they are liable.[52] The negligence which disables a plaintiff from recovering must be a negligence which directly or by natural consequence

47 Enright v. San Francisco etc. R. R. Co., 33 Cal. 230.

48 Los Angeles etc. R. R. Co. v. Rumpp, 104 Cal. 20, 37 Pac. 859.

49 Broom's Leg. Max. 329; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681. See Gunn v. Ohio River R. R. Co., 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465.

50 Tonawanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239.

51 Miss. Cent. R. R. Co. v. Mason, 51 Miss. 234.

52 Needham v. San Francisco etc. R. R. Co., 37 Cal. 409; citing Kerwhacker v. Cleveland etc. R. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Cleveland etc. R. R. Co. v. Elliott, 4 Ohio St. 474; Bridge v. Grand Junction Ry. Co., 3 Mee. & W. 246; Davis v. Mann, 10 Mee. & W. 546; Illidge v. Goodwin, 5 Car. & P. 190; Mayor of Colchester v. Brooke, 53 Eng. Com. L. 376. See, also, Kline v. Central Pacific R. R. Co., 37 Cal. 400, 99 Am Dec. 282.

conduced to the injury.[53] Where by the negligence of a railroad company a fire is communicated by the sparks of an engine to the premises of one person, and spreads to those of another, the railroad company is liable for the injury to such second person if the damage is the natural or direct consequence of the original firing.[54]

§ 4277. **Negligence, how alleged.**—Negligence is a question of fact, or mixed law and fact; and in pleading it has been held only necessary to aver negligence generally, not the specific facts constituting negligence.[55] It is always safer, however, to allege the facts constituting the negligence. And where the negligence consists in the omission of a duty, the facts which are relied on must be alleged.[56] A complaint for injury by negligence must show the defendant to be in actual default, or it will not be sustainable.[57] The complaint of a servant in an action against the master for injuries received in his service must charge negligence in reference to the particular matter producing the injury.[58] In Utah, in an action to recover damages for a loss occasioned by the negligence of a railroad company, when the complaint is framed to recover on the common-law liability of the company, the defendant's negligence must be proved. If the plaintiff fails in such proof on the trial, he cannot abandon the action as brought and claim a recovery under a statute which makes the company liable as an insurer against such a loss as the one suffered by him.[59]

§ 4278. **Co-operating negligence.**—It has been held in New York that a railroad company is not liable for negligently running its engine upon and killing domestic animals found upon its road, unless its acts were heedless and wanton.[60] The reason

53 Richmond v. Sacramento Valley R. R. Co., 18 Cal. 351; McQuilken v. Central Pacific R. R. Co., 64 Cal. 463, 2 Pac. 46.

54 Henry v. Southern Pacific R. R. Co., 50 Cal. 176. See, also, Perry v. Southern Pacific R. R. Co., 50 Cal. 578.

55 McCauley v. Davidson, 10 Minn. 418.

56 City of Buffalo v. Holloway, 7 N. Y. 493, 57 Am. Dec. 550; affirming 14 Barb. 101; Taylor v. Atlantic Mut. Ins. Co., 2 Bosw. 106; Congreve v. Morgan, 4 Duer, 439; Seymour v. Maddox, 16 Q. B. 326, 71 Eng. Com. L. 326. See McGinty v. Mayor etc., 5 Duer, 674.

57 Taylor v. Atlantic Mut. Ins. Co., 2 Bosw. 106.

58 Knahtla v. Oregon etc. R. R. Co., 21 Or. 136, 27 Pac. 91.

59 Davis v. Utah S. R. R. Co., 3 Utah, 218, 2 Pac. 521.

60 See Tonawanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239.

of this rule is co-operating negligence of the owner of the animals; and the fact of the trespass of the animals on the property of the defendant constitutes a decisive obstacle to any recovery of damages for injury to them. It is, strictly speaking, *damnum absque injuria.*[61] The general rule upon which the above decisions are founded, that a plaintiff cannot recover for the negligence of a defendant if his own want of care or negligence has in any degree contributed to the result complained of, was approved in a California case,[61a] for the reason that, both parties being at fault, there can be no apportionment of the damages,[62] and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, which would seem to be the true reason in the estimation of the New York courts.[63] In California, a railroad company is responsible for damages done to cattle by running over them on the track, if the accident could have been avoided by ordinary care and prudence on the part of the company, and this though the owner of the cattle permits them to run at large near the line of the railroad. But if they could not by ordinary care and prudence avoid the accident, they are not liable.[64] The New York courts seem to ignore all distinction between cases where the negligence of the plaintiff is proximate and where it is remote; and in not limiting the rule of liability which they announce to the former.[65] The false reasoning of the New York courts upon this question has been ably discussed in a decision by the supreme court of Connecticut,[65a] where it says: "A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated."[66] In an action

61 Tonawanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239. See, also, Wilds v. Hudson River R. R. Co., 24 N. Y. 430.

61a Gay v. Winter, 34 Cal. 153.

62 Trow v. Vermont C. R. R. Co., 24 Vt. 494, 58 Am. Dec. 191.

63 Needham v. San Francisco etc. R. R. Co., 37 Cal. 409.

64 Richmond v. Sacramento Valley R. R. Co., 18 Cal. 351.

65 Needham v. San Francisco etc. R. R. Co., 37 Cal. 409.

65a Isbell v. New York etc. R. R. Co., 27 Conn. 404, 71 Am. Dec. 78.

66 So, also, see the supreme court of Vermont, in the case of Trow v. Vermont Central R. R. Co., 24 Vt. 494, 58 Am. Dec. 191, where a distinction between "proximate" and "remote" negligence is clearly defined. See, also, sustaining these principles, Hill v. Warren, 2 Stark. 377; Munroe v. Leach, 7 Metc. (Mass.) 274; Parker v. Adams, 12 Metc. (Mass.) 415, 46 Am. Dec. 694; Brownell v. Flagler, 5 Hill, 282; Brown v. Maxwell, 6 Hill, 592, 41 Am. Dec. 771; Williams v. Holland, 6 Car. & P. 23.

against a railroad company to recover damages for the killing of a pair of horses, alleged to have been caused by the negligence of the defendant in running its locomotive and cars, evidence that a fence alongside of the defendant's track was out of repair, and that the horses came through an open gate in the fence onto the track, is inadmissible, in the absence of any allegation in the complaint showing that the gate was left open, or allowed to remain open, through the negligence of the defendant, which operated as a proximate cause of the injury.[67] So, under a complaint which charges the injury complained of to have been caused by the negligence of a defendant railway company in permitting a bridge on its road to become and remain out of repair, and failing to keep proper watch and oversight of the same, the plaintiff will not be allowed to show that the bridge was constructed originally in an improper and negligent manner, and this for the reason that the proofs and allegations must correspond with each other.[68] Negligence is sufficiently charged in a complaint which states that the defendant railroad company was unlawfully and negligently occupying a street-crossing with its engines in violation of a city ordinance, and that by reason of that fact, and without negligence on the part of the plaintiff, the injury complained of resulted.[69]

§ 4279. **Parties plaintiff.**—A party in the actual possession of cattle at the time of the injury can maintain an action for an injury to them while in his possession.[70]

§ 4280. **Several acts of negligence.**—Where several acts of negligence cause but one injury, the plaintiff may allege all the acts of negligence in one count, and aver that they were the cause, and any one of them proved upon the trial will sustain his complaint.[71]

§ 4281. **Against railroad companies.**—The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable from the

67 Jahant v. Central Pacific R. R. Co., 74 Cal. 9, 15 Pac. 362.

68 Knahtla v. Oregon etc. R. R. Co., 21 Or. 136, 27 Pac. 91.

69 Denver etc. R. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261.

70 Polk v. Coffin, 9 Cal. 56.

71 Dickins v. New York Cent. R. R. Co., 13 How. Pr. 228.

ordinary working of the engine, is *prima facie* proof of negligence sufficient to go to the jury.[72] And the fact that a railroad company permits dry grass, which will readily take fire, to remain on its track, is competent evidence on the question of negligence, although not negligence *per se*.[73] The negligent allowing of brush and rubbish to accumulate upon the right of way must be pleaded, in order to permit its proof.[74] But an allegation that defendant negligently set out fire and permitted it to escape from its right of way is sufficient.[75] There seems to be a difference between the care exercised by reasonably careful and prudent railway companies and that exercised by ordinarily prudent persons.[76] Under a statute making railroad companies liable for fires "communicated" by their engines, a railroad company is liable for the destruction of woods half a mile from its track by a fire started by a spark from one of its engines and spreading across land of different proprietors and a highway in a direct line to said woods.[77] Such corporation, however, is not liable for damages caused by sparks emitted from one of its locomotives, if the same was in good repair, properly constructed, and supplied with the best appliances in use to prevent the escape of fire, unless the sparks escaped through the negligence of the agents and servants of the company.[78]

A complaint alleging that the defendant company, so carelessly and negligently managing its engine and train as to set fire to dry grass on land adjoining its right of way, which, without negligence on the plaintiff's part, spread and caused the damage complained of, charges actionable negligence against the company.[79] If the defense of contributory negligence is available in an action against a railroad company for damages by fire caused by operating its line of road, it cannot be invoked in the

72 Hull v. Sacramento Valley R. R. Co., 14 Cal. 387, 73 Am. Dec. 656.

73 Perry v. Southern Pacific R. R. Co., 50 Cal. 578. See, also, Cleland v. Thornton, 43 Cal. 437; Clark v. San Francisco etc. Ry., 142 Cal. 614, 76 Pac. 507.

74 Noland v. Great Northern Ry., 31 Wash. 430, 71 Pac. 1098.

75 Crissey etc. Co. v. Denver etc. Ry., 17 Colo. App. 275, 68 Pac. 670.

76 Abrams v. Seattle etc. Ry., 27 Wash. 507, 68 Pac. 78.

77 Perley v. Eastern R. R. Co., 98 Mass. 414, 96 Am. Dec. 645. See, also, Illinois Cent. R. R. Co. v. McClelland, 42 Ill. 355; Illinois Cent. R. R. Co. v. Mills, 42 Ill. 407.

78 Smyth v. Stockton etc. R. R. Co. (Cal.), 4 Pac. 505, 3 West Coast Rep. 575; Anderson v. Oregon R. R. Co., 45 Or. 211, 77 Pac. 119.

79 Haugen v. Chicago etc. R. R. Co., 3 S. Dak. 394, 53 N. W. 769.

absence of an averment in the pleadings upon which it can be based.[80]

§ 4282. **Proof.**—In an action against a railroad company for damages due to setting out a fire by a locomotive, it is sufficient to establish a *prima facie* case for plaintiff to show that the fire was communicated from an engine of the railroad company to his property, and the damage therefrom.[81] The fact of a setting out of a fire by operation of a railroad is evidence of negligence.[82] If the engine that set the fire is identified, it is not error to exclude testimony of fires set by other engines.[83] If the engineer had usually been careless, the jury may presume that he was so the time in question.[84]

§ 4283. **Worrying animals.**—In New York, a joint action does not lie against the joint owners of the dogs by whom the sheep of a third person have been worried and killed.[85]

§ 4284. **Ownership.**—It is not necessary to prove that the defendant owned the dog. It is sufficient to prove that the defendant kept the dog.[86]

§ 4285. **Vicious habits.**—When injury to plaintiff's horse was inflicted by that of the defendant while trespassing, it was held unnecessary to make any averments of vicious habits.[87] A city is not liable for injury received by a fireman, from a vicious horse in use in the fire department, on account of representations of the fire chief that the horse was gentle, and a failure to provide proper appliances.[88]

§ 4286. **Collision.**—In case of collision occasioned by the fault of a vessel, under compulsory pilotage, in going at too great

80 Union Pacific Ry. Co. v. Tracy, 19 Colo. 331, 35 Pac. 537.

81 Anderson v. Oregon R. R. Co., 45 Or. 211, 77 Pac. 119.

82 Atchison etc. Ry. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68.

83 Crissey etc. Co. v. Denver etc. Ry., 17 Colo. App. 275, 68 Pac. 670.

84 Norwich Ins. Co. v. Oregon R. R. Co., 46 Or. 123, 78 Pac. 1025.

85 Van Steenberg v. Tobias, 17 Wend. 562, 31 Am. Dec. 310; Auchmuty v. Ham, 1 Denio, 495. See Grant v. Ricker, 74 Me. 487.

86 Wilkinson v. Parrott, 32 Cal. 102; Marsel v. Bowman, 62 Iowa, 57, 17 N. W. 176.

87 Dunckle v. Kocker, 11 Barb. 387; Popplewell v. Pierce, 10 Cush. (Mass.) 509.

88 Lynch v. City of North Yakima, 37 Wash. 657, 80 Pac. 79.

speed, where no contributory negligence on the part of the master or crew is proved, the owners of the vessel are not liable.[89] When a vessel is properly in charge of a licensed pilot, the owner is not responsible for damages which may ensue from the negligence or misconduct of the pilot.[90]

§ 4287. **Overflowing land.**—The fact that plaintiffs could have prevented the damage by pulling off a board from defendant's flume is no defense, because they were not obliged to avoid the injuries complained of by committing a trespass.[91] The measure of damage is the value of the crop destroyed, considering its market value after harvest, less the costs of caring for and marketing, measured by the amount of produce on similar lands in the neighborhood, and elements affecting the probable yield.[92] But in Idaho the rule seems to be that the damage is the value of the growing crop at the time of its destruction, without regard to its market value after harvest.[93] Permanent injury to the land by overflow should be specifically pleaded and proven.[94]

§ 4288. **Construction of water-ditch.**—The question of negligence in the management of a water-ditch, and the degree of it, must necessarily depend in a great measure upon the surrounding facts, such as the existence and exposure of property below the dam.[95] The owner of a dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors.[96] In consequence of the negligent construction of a cut made by the defendants, the waters of a neighboring river flooded the adjoining land. The plaintiff owning land east of the cut closed the culvert to prevent his land being flooded, but the owners on the west reopened it and the plaintiff's land was flooded in consequence. It was held that defendants were

89 General Steam Nav. Co. v. British etc. Nav. Co., L. R., 4 Exch. 238.

90 Griswold v. Sharpe, 2 Cal. 17. As to sufficiency of complaint in an action for damages for flooding plaintiff's basement, see Durgin v. Neal, 82 Cal. 595, 23 Pac. 133.

91 Wolf v. St. Louis Ind. Water Co., 15 Cal. 319.

92 Catlin Consol. Canal Co. v. Euster, 19 Colo. App. 117, 73 Pac. 846; Candler v. Washoe Lake etc. Co., 28 Nev. 422, 82 Pac. 458.

93 Lester v. Highland etc. Co., 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341.

94 Watson v. Colusa-Parot etc. Co., 31 Mont. 513, 79 Pac. 14.

95 Wolf v. St. Louis Ind. Water Co., 10 Cal. 541; Lowery v. San Joaquin R. R. Canal Co., 134 Cal. 185, 66 Pac. 225.

96 Fraler v. Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562.

liable for the whole damage, whether the opening was right or wrong.[97] In an action for damages on account of seepage, evidence that plaintiff was paid for his land in condemnation proceedings is not admissible if such proceedings were not pleaded.[98]

§ 4289. **Defect in construction of dam.**—In an action for damages for breaking defendant's dam and flooding the plaintiff's mining claim, a complaint in one count charging that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants, broke away," etc., is sufficient. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficient material, under our system of pleading, to require separate counts.[99] Whether the absence of waste-water gates in a dam is negligence is a question for the jury.[100]

§ 4290. **Degree of care necessary.**—In an action to recover damages for an alleged injury to plaintiff's land, resulting from the careless management of defendant's water-ditch, which traversed the land, it is held that the defendant was bound to exercise no greater care to avoid the alleged injury to the adjoining lands than prudent persons would employ about their own affairs, under similar circumstances.[101] Where the employee of a corporation having the management of an irrigating canal opens a waste-gate to relieve the canal, and thereby injures a landowner, the corporation is liable; but plaintiff cannot recover for damage from seepage that might readily have been foreseen when he consented to the place and method of construction of the canal.[102]

§ 4291. **Form of complaint.**—A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable water-ditch for the purpose of conveying

97 Collins v. Middle Level Commissioners, L. R., 4 C. P. 279.

98 Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 Pac. 295.

99 Hoffman v. Tuolumne County Water Co., 10 Cal. 413.

100 Weidekind v. Tuolumne County Water Co., 65 Cal. 431, 4 Pac. 415.

101 Campbell v. Bear River etc. W. & M. Co., 25 Cal. 679.

102 Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 Pac. 255.

water, and at which time and place the defendants were also the owners of a certain other water-ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth, and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage in the sum of three thousand dollars, and thereof they bring suit, is sufficient.[103] Complaints in damages for mismanagement of irrigation canals must be liberally construed.[104] Where such complaint is not definite and specific in itself in regard to the relative situation of the plaintiff's land and the levee constructed by defendants, its deficiencies may be supplied, as against a general demurrer, by the aid of facts of which the courts take judicial notice.[105]

§ 4292. **Mining.**—If a party engaged in coal mining causes water, with earth and refuse, to descend upon the land of another so as to destroy the value of such land for cultivation, as the direct result of the act of the miner, and not the result of the law of gravitation, the person whose land is injured may recover damages.[106]

§ 4293. **Excuse.**—In a case of collision between a steamer and a sailing-vessel, matter of excuse on the part of the steamboat must be set forth clearly in the answer of the claimants, and must be proved as laid.[107] He who avers a fact in excuse for his own malfeasance must prove it.[108] In a collision cause, the defendant cannot rely on a simple negative, but must state the circumstances relating to the collision.[109]

103 Tuolumne County Water Co. v. Columbia etc. Water Co., 10 Cal. 193.

104 Idaho Rev. Codes, § 4207; Stuart v. Noble Ditch Co., 9 Idaho, 765, 76 Pac. 255.

105 De Baker v. Southern California Ry. Co., 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610.

106 Robinson v. Black Diamond Coal Co., 50 Cal. 460; Smith v. Fletcher, L. R., 7 Exch. 305.

107 The Washington Irving, Abb. Adm. 336, Fed. Cas. No. 17243.

108 Finn v. Vallejo Street Wharf Co., 7 Cal. 253.

109 The Why Not, L. R., 2 Adm. & Ecc. 265.

§ 4294. **Factor.**—A factor whose discretion in making sales is not limited by instructions is not, by selling forthwith, made liable for misfeasance, where it appears that he acted in consonance with the general opinion of dealers in the article at the time.[110]

§ 4295. **General denial.**—In an action for injury to property, alleged in the complaint to have been caused by the negligence of the defendant's agents, an answer denying every allegation in the complaint puts in issue the defendant's liability; and it is not necessary to aver that the injury was done by other persons, who were responsible therefor, and not the defendant.[111] In an action for damages for diversion of water of plaintiffs, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in a third party. Such a defense should have been specially pleaded, and the third party made a party to the action.[112] That the overflow or leakage was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants open their case.[113] In an action for alleged diversion of water by means of a dam constructed by the defendants, it may be shown as a defense, under the denial of injury to the plaintiff, that the plaintiff participated with the defendants in the maintenance of the dam and diversion of the water, as a tenant in common with the defendants, and it is not necessary specially to plead such fact as an estoppel.[114] Where the answer denies any diversion or injury, the plaintiff's contention on appeal that the answer did not raise any issue between the parties will not be sustained.[115]

§ 4296. **Injury by dam.**—The want of reasonable care on the part of another who is injured by the breaking of a dam cannot

110 Millbank v. Dennistoun, 10 Bosw. 382.

111 Schular v. Hudson River R. R. Co., 38 Barb. 653.

112 Humphreys v. McCall, 9 Cal. 59, 70 Am. Dec. 621. As to defenses to action for diversion of water, see Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Wixon v. Devine, 91 Cal. 477, 27 Pac. 777.

113 Jackson v. Feather River Water Co., 14 Cal. 18.

114 Churchill v. Baumann, 95 Cal. 541, 30 Pac. 770.

115 Winters v. Swift, 2 Idaho, 61, 3 Pac. 15.

be set up in defense to an action for damages for the injuries thus suffered.[116]

§ 4297. Contributory negligence.—In an action for negligence, the plaintiff cannot recover if his own or his agent's negligence contributed to the injury complained of.[117] So where the plaintiff left his horse feeding on a narrow wharf, from which the horse was thrown into the water from a collision.[118] The owner of a cow who suffers her to go at large on the public street of a city, on a railroad track, at a time when cars are passing, with no one to take charge of her, in the absence of gross negligence on the part of the railroad, cannot recover for injuries to the cow.[119] But a negligent act or omission of the plaintiff is not ground for defense, unless it contributes to produce the injury complained of.[120] It must be the proximate cause of the injury.[121] Proximate cause means negligence at the time the injury happened.[122]

§ 4298. Pleading contributory negligence.—The defense of contributory negligence must be pleaded in most of the states.[123] But the court may grant a nonsuit if plaintiff's testimony shows such contributory negligence that a new trial would be allowed,

116 Fraler v. Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562.

117 Johnson v. Hudson River R. R. Co., 20 N. Y. 68, 75 Am. Dec. 375; Clark v. Eighth Ave. R. R. Co., 32 Barb. 657; Brooklyn etc. R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 429; Mangam v. Brooklyn City R. R. Co., 36 Barb. 230; Cox v. President etc. Westchester Turnpike Road, 33 Barb. 414.

118 Morris v. Phelps, 2 Hilt. 38; citing Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273; Rathbun v. Payne, 19 Wend. 399; Burckle v. New York Dry Dock Co., 2 Hall, 151.

119 Munger v. Tonawanda R. R. Co., 4 N. Y. 349, 53 Am. Dec. 484; Corwin v. New York etc. R. R. Co., 13 N. Y. 42, 2 E. D. Smith, 257; Bowman v. Troy etc. R. R. Co., 37 Barb. 516. As to negligence on the part of the plaintiff and the burden of showing and disproving it, see Williams v. O'Keefe, 24 How. Pr. 16; Ernst v. Hudson River R. R. Co., 24 How. Pr. 97; reversing 32 Barb. 159, 19 How. Pr. 205. For mutual, co-operating negligence, see Thomas v. Kenyon, 1 Daly, 132.

120 Haley v. Earle, 30 N. Y. 208.

121 Needham v. San Francisco etc. R. R. Co., 37 Cal. 409; Flynn v. San Francisco etc. R. R. Co., 40 Cal. 14, 6 Am. Rep. 695.

122 Needham v. San Francisco etc. R. R. Co., 37 Cal. 409; Maumus v. Champion, 40 Cal. 121. See, also, Karr v. Parks, 40 Cal. 188; Schierhold v. North Beach etc. R. R. Co., 40 Cal. 447; McCoy v. California Pacific R. R. Co., 40 Cal. 532, 6 Am. Rep. 623; Seigel v. Eisen, 41 Cal. 109.

123 De Amado v. Friedman (Ariz.), 89 Pac. 588; Birsch v. Citizens' El. Co., 26 Mont. 574, 69 Pac. 340; Smith v. Ogden etc. R. R. Co., 33 Utah, 129, 93 Pac. 185; Williams v. San Francisco etc. Ry. Co., 6 Cal. App. 715, 93 Pac. 122

even though defendant has not pleaded such negligence.[124] In such case plaintiff's case raises a presumption of contributory negligence.[125]

FORMS IN ACTIONS FOR DAMAGES FROM NEGLIGENCE.

§ 4299. Complaint against agent for not using diligence to sell goods.

Form No. 1166.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant agreed with the plaintiff, as his agent, and for compensation to be paid by plaintiff, to sell for him certain goods, to-wit, [describe them], of the value of . . . dollars; and thereupon received the same from him for that purpose.

II. That the defendant did not use due diligence to sell the same, but unreasonably delayed so to do; and by reason thereof, the same were afterwards sold by the defendant for the plaintiff, and produced . . . dollars less than the same would have produced had the defendant used due diligence in selling the same; and whereby plaintiff incurred . . . dollars expenses in warehousing same, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4300. Complaint against agent for carelessly selling to an insolvent.

Form No. 1167.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant undertook with the plaintiff, as his agent, and for the compensation to be paid by him, to sell for him goods of the plaintiff, to-wit, [designate goods], of the value of . . . dollars, and thereupon received the same from him for that purpose.

II. That the defendant did not use due diligence to sell, or in selling the same, but negligently sold the said . . . for the plain-

124 Brown v. Oregon Ry. etc. Co., 41 Wash. 688, 84 Pac. 400.

125 Birsch v. Citizens' El. Co., 36 Mont. 574, 93 Pac. 940; Harrington v. Butte etc. Ry. Co., 37 Mont. 169, 95 Pac. 8, 16 L. R. A. (N. S.) 395.

tiff to a person in embarrassed circumstances, then well knowing said person's financial embarrassments, without receiving the price therefor, or taking security for the payment thereof; whereby the plaintiff has hitherto lost, and is likely wholly to lose the price, to plaintiff's damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4301. Complaint against agent for selling for a worthless bill.

Form No. 1168.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant undertook with the plaintiff, as his agent, and for a compensation to be paid by him, to sell for him [state what], for cash, or an approved bill or note at thirty days or less, and not otherwise [or state the fact].

II. That the defendant did not use due diligence in selling the same, but negligently and without exercising ordinary business care, sold the same for a bad and insufficient bill of exchange, for . . . dollars, having . . . months to run, and which is worthless and of no value to the plaintiff; and although the same became payable before this action, it is still unpaid, to the damage of the plaintiff in the sum of . . . dollars.

[Demand of Judgment.]

§ 4302. Complaint against an auctioneer for selling below the owner's limit.

Form No. 1169.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant was engaged in the business of an auctioneer, and in consideration that the plaintiff would deliver to him [describe the goods], to be sold by him for the plaintiff for a compensation, undertook, as such auctioneer, at the time and place aforesaid, to sell the same, at and for no less money than the sum of . . . dollars, and not to sell them otherwise.

II. That the plaintiff delivered said goods to the defendant for that purpose.

III. That the defendant, without the knowledge or consent of the plaintiff, sold said goods for less than the sum to which he was so limited as aforesaid, to-wit, for . . . dollars, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4303. Complaint against an auctioneer for selling on credit against orders.

Form No. 1170.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant was engaged in the business of an auctioneer, and in consideration that the plaintiff would deliver to him [describe goods], to be sold by him for the plaintiff for a compensation, undertook as such, at the time and place aforesaid, to sell the same for cash, and not otherwise.

II. That the plaintiff delivered said goods to the defendant for that purpose.

III. That the defendant afterwards sold said goods on credit without the plaintiff's consent, and that the parties to whom such sale was made are, and then were, wholly insolvent, and the debt is of no value; to the plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4304. Complaint against auctioneer or agent for not accounting.

Form No. 1171.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., at . . ., the plaintiff shipped from the port of . . ., consigned to the defendant, then his agent, at . . ., to sell for cash, [describe the goods], of the value of . . . dollars, and gave notice of said consignment to the defendant, which agency, for a valuable consideration, he undertook and entered upon.

II. That he received said goods, and thereafter sold the same, or some part thereof, on account of the plaintiff, for . . . dollars.

III. That a sufficient and reasonable time has elapsed since said goods were received and sold by defendant, yet he has neglected and refused, and still neglects and refuses, to render

to the plaintiff a just and true account of such sale, and of the proceeds thereof, and has also neglected and refused to pay over the proceeds to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4305. Complaint against forwarding agent for not forwarding goods as agreed.

Form No. 1172.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the defendant was a forwarding agent, and keeper of a warehouse, at . . ., for the reception of goods intended to be forwarded by him, for hire, from . . . to . . .

II. That on the . . .,day of . . ., 19.., the plaintiff delivered to the defendant certain merchandise, to-wit, [designate the same], the property of the plaintiff, of the value of . . . dollars, which the defendant received and undertook, for hire, to forward in a reasonable time from . . . to . . ., by vessel, and meanwhile to store and safely keep the same.

III. That after defendant received said goods, such a vessel did, within a reasonable time then following, to-wit, on or about the . . . day of . . ., 19.., sail from said . . . to . . ., and the defendant might and ought to have delivered the said goods to the master of such vessel for the purpose aforesaid.

IV. That the defendant, not regarding his duty in that respect, did not do so, or otherwise forward said goods within a reasonable time, but kept and detained the same in his said warehouse, for a long and unreasonable time, to-wit, four months, whereby the said goods perished, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4306. Complaint against an attorney for negligence in the prosecution of suit.

Form No. 1173.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is, and at the times hereinafter mentioned was, an attorney of the supreme court of this state; that

the plaintiff, on or about the month of . . ., 19.., retained and employed him as such attorney, to prosecute and conduct an action in the superior court of the county of . . ., state aforesaid, on behalf of this plaintiff, against one A. B., for the recovery of . . . dollars, due from him to this plaintiff, and the defendant undertook to prosecute said action in a proper, skillful, and diligent manner, as the attorney of the plaintiff.

II. That the defendant might, in case he had prosecuted said action with due diligence and skill, have obtained final judgment therein for this plaintiff before the . . . day of . . ., 19.., but he so negligently and unskillfully conducted said action, that by his negligence, delay, and want of skill, he did not obtain judgment until the . . . day of . . ., 19.., and that meanwhile said A. B. had become insolvent; whereby the plaintiff was hindered and deprived of the means of recovering said sum of money, and that the same has not, nor has any part thereof, been recovered or made by plaintiff, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4307. Complaint for negligent defense.

Form No. 1174.

[Title.]

The plaintiff complains, and alleges:

I. That the defendant is, and at the times hereinafter stated was an attorney at law, and that the plaintiff, in the month of . . ., 19.., at . . ., retained him as such, to defend on behalf of this plaintiff an action brought against him by A. B., then pending in the . . . court of said state, for the recovery of . . . dollars, and the defendant undertook to defend said action in a proper, skillful, and diligent manner, as the attorney of the plaintiff.

II. That such proceedings were had in such action that on or about the . . . day of . . ., 19.., it became the duty of the defendant, as the attorney of this plaintiff, to interpose an answer on his behalf to the complaint therein, but he wholly neglected so to do, and by reason thereof, and through his neglect, judgment by default was obtained against the plaintiff in said action, and by reason thereof this plaintiff was compelled to pay to the said A. B. . . . dollars, the sum so recovered by him, and was put to costs and charges in his endeavor to defend such

action, amounting to the sum of . . . dollars, and lost the means of recovering the same back from said A. B., to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4308. Complaint for negligence in examining title.

Form No. 1175.

[TITLE.]

The plaintiff complains, and alleges:

I. That at a time hereinafter mentioned, the plaintiff made a contract with one A. B. for the purchase from him of certain real property [describe the premises], for the sum of . . . dollars, which property said A. B. assumed to have power to convey in fee, and clear of all incumbrances.

II. That the defendant was an attorney, and the plaintiff at . . ., in the month of . . ., 19.., employed him as such to examine the title of A. B. to said property, and to ascertain if the title was good, and if any incumbrances existed thereon, and to cause and procure an estate therein, in fee simple, and clear of all incumbrances, to be conveyed to the plaintiff, which the defendant, for compensation, agreed to do.

III. That defendant negligently and unskillfully conducted such examination, and did not use endeavors to cause or procure a good and sufficient title in fee, clear of incumbrances to be conveyed to the plaintiff; but wrongfully advised and induced the plaintiff to pay said A. B. the sum of . . . dollars, being said purchase money of the premises, when in fact said A. B. had no title thereto [or, when said property was subject to incumbrances, [specifying them and amount], and the plaintiff, in order to release the premises from said incumbrances, was obliged to pay the holders thereof the sum of . . . dollars], to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4309. Complaint against a contractor for leaving the street in an insecure state whereby plaintiff's horse was injured.

Form No. 1176.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant had contracted with . . ., to lay down pipes in and under the high-

way known as . . . street, in . . . , for the purpose of supplying the said . . . with gas, and to make the proper trenches for the purpose; and when such pipes were laid down, to fill up properly the said trenches, and to put and leave the said highway clear and in a reasonably secure condition.

II. That the defendant and his servants, on the . . . day of . . ., 19.., took up part of said highway, and made trenches and holes therein, and laid down said pipes, and displaced the earth and material of said highway, and carelessly and negligently left the said highway in a dangerous and improper state, in consequence whereof a horse of the plaintiff, of the value of . . . dollars, which was then and there lawfully driven along the said highway, fell into and sunk therein, and was wounded and lamed, and rendered of no value, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4310. Complaint against municipal corporation for damage done by mob or riot.

Form No. 1177.

[TITLE.]

The plaintiff complains, and alleges:

I. That at and before the times hereinafter mentioned, the plaintiff was the occupant of [state the building], and therein he conducted a business, as [state business, also incorporation of defendant].

II. That on the . . . day of . . . 19.., a mob of disorderly and riotous persons collected together in said city and created a riot.

III. That on said day the rioters broke into the plaintiff's said premises, and carried away therefrom and destroyed his goods and merchandise.

IV. That the said defendant, though having due notice of the said riot immediately after its breaking out, did not itself protect the plaintiff's property, but neglected so to do.

V. That the value of his said goods and chattels so destroyed or injured by the said rioters was . . . dollars, and he also sustained great damage by the breaking into his premises, and injury to the building, and the breaking up of his business for . . . weeks thereafter, by reason of the destruction of his stock of goods, to-wit, in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4311. Complaint against railroad company for killing cattle.

Form No. 1178.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant was a corporation duly organized under the laws of this state, and was owner of a certain railroad known as the . . . railroad, together with the track, cars, locomotives, and other appurtenances thereto belonging.

II. That on the . . . day of . . . , 19 . . , the plaintiff was the owner and possessed of certain cattle, to-wit, five cows and two oxen [or any other stock, as the case may be], of the value of . . . dollars, and which cows and oxen casually, and without the fault of said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant at . . .

III. That the said defendant by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed said locomotives and cars, that the same ran against and over the said cows and oxen of the said plaintiff, and killed and destroyed the same, to the plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4312. Complaint against railroad company for negligently setting fire.

Form No. 1179.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant was at the times hereinafter mentioned, and still is, a railroad corporation organized under the laws of the state of . . . , operating a railroad through the said county of . . ., and had been operating the said railroad continuously since about the . . . day of . . ., 19. . , and for more than . . . months prior to the . . . day of . . ., 19. .

II. That on the . . . day of . . ., 19. . , the plaintiff was the owner [or, lessee], and in possession, of those certain premises described as [insert description], which premises immediately adjoin the lands and right of way of the defendant, and that there were on said premises at said time . . . stacks of hay and a frame barn containing . . . bushels of oats [describe property burned],

all of which were the property of the plaintiff, and were of the value of . . . dollars.

III. That defendant, on and prior to said . . . day of . . ., 19.., negligently permitted dry grass, and other combustible material to accumulate and remain along its said right of way adjacent to plaintiff's said premises, and that on said last-named day the defendant's servants, while running one of its trains on said road past plaintiff's said premises, negligently and carelessly managed said train, and failed to employ suitable appliances to prevent the escape of sparks and fire from the engine thereof, and negligently and carelessly allowed burning coals and fire to be thrown or dropped from said engine so that the same set fire to the said dry grass and other material so upon its said right of way, and negligently and carelessly suffered said fire to escape from its right of way, and to spread upon plaintiff's said premises, whereby plaintiff's said barn and property aforesaid were burned and destroyed, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4313. Complaint for kindling a fire on defendant's land whereby plaintiff's property was burned.

Form No. 1180.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff was possessed of about . . . acres of land, in . . ., on which there was an orchard and fences, and also a barn containing . . . tons of hay.

II. That the defendant on that day intentionally kindled a fire on his land next adjoining to the plaintiff's, and at the distance of . . . yards therefrom, and so negligently watched and tended the said fire that it came into the plaintiff's said land, consumed said barn and hay of the value of . . . dollars, and also [state special damage].

[DEMAND OF JUDGMENT.]

§ 4314. Complaint for chasing plaintiff's cattle.

Form No. 1181.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant

negligently chased and drove about [describe the cattle] of the plaintiff.

II. That by reason thereof, the said [describe the cattle] of the plaintiff, of the value of . . . dollars, were greatly damaged and injured, and . . . of them died, and the residue of them were injured and rendered of no value to the plaintiff, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4315. Complaint for keeping dog accustomed to bite animals.

Form No. 1182.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the defendant wrongfully kept a dog, well knowing him to be of a ferocious and mischievous disposition, and accustomed to attack and bite [sheep and lambs, or as the case may be].

II. That on the . . . day of . . ., 19. . , at . . ., the said dog, while in the keeping of the defendant, attacked and bit [or, hunted, chased, bit, and worried], [sheep or lambs, or as the case may be], of the plaintiff.

III. That in consequence thereof, the said [sheep and lambs, or as the case may be] of the plaintiff, of the value of . . . dollars, died, and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4316. Complaint for negligently leaving horses unhitched in street.

Form No. 1183.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the defendant, being the owner and in possession of a certain span of horses and a wagon, drove the same onto . . . street in the city of . . ., and carelessly and negligently left the same on said street without hitching or tying said horses in any manner, and without leaving any one in charge thereof.

II. That through the negligence of said defendant in not securing the same said horses ran away with said wagon, and struck and collided against the buggy of the plaintiff, in which he was riding in said street, and overturned the same and injured the plaintiff. [State injuries and damage.]

[DEMAND OF JUDGMENT.]

§ 4317. Complaint for shooting plaintiff's dog.

Form No. 1184.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant maliciously shot and killed a dog, the property of the plaintiff, of the value of . . . dollars, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4318. Complaint for untying plaintiff's boat, by reason of which it was carried by the current against a bridge and injured.

Form No. 1185.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff was possessed of a fishing-boat, called [etc.], of the value of . . . dollars.

II. That the defendant maliciously untied said boat, and it therefore floated with the stream against a bridge, and was thereby broken and destroyed, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4319. Complaint for flowing water from roof on plaintiff's premises.

Form No. 1186.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff was lawfully possessed of a dwelling-house and premises, in the county aforesaid, and in which the plaintiff and his family then lived.

II. That the defendant wrongfully erected a building near the said dwelling-house of the plaintiff, in so careless and improper a manner, that by reason thereof, on said day, and at other times

afterwards, and before this action, large quantities of rain-water ran from said building upon and into the said dwelling-house and premises of the plaintiff, and the walls, ceilings [or otherwise, state damage done, according to the fact], and other parts thereof were thereby wet and damaged, and became not fit for habitation, to the damage of plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4320. Complaint for negligence of millowners, whereby plaintiffs' land was overflowed.

Form No. 1187.

[TITLE.]

The plaintiffs complain, and allege:

I. That on the . . . day of . . ., 19.., the plaintiffs were, and still are, the owners of a valuable mining claim [or otherwise designate the property], situated at . . ., upon which they had bestowed great labor in putting the same in working order.

II. That at the same time the defendants were the owners of [or were possessed of and using] a reservoir situated on . . ., wherein they collected a large body of water, which would otherwise have flowed down the said stream, and were engaged in furnishing such water to miners and others, by means of a ditch or canal.

III. That afterwards, on the . . . day of . . ., 19.., the plaintiffs were engaged in their work as aforesaid, and the defendants' said reservoir, by reason of some defect in its construction, or insufficiency for the purpose for which it was constructed, broke away, discharging an immense and unusual body of water, which they had collected in said reservoir; which said water so discharged flowed in and upon plaintiffs' mining claim [or as the case may be], filling the same with large quantities of earth, stone, and rubbish, to the damage of plaintiffs in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4321. Complaint against water company for negligent escape of water.

Form No. 1188.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff was in the possession and occupancy of that certain building situate on . . .

street, in the city and county of San Francisco, known as No. . . . , and was engaged in carrying on therein a general merchandise business, and owned and had stored therein large quantities of goods, to-wit, . . . , of the value of . . . dollars.

II. That the defendant is, and at all times herein mentioned was, a corporation duly incorporated and existing under the laws of the state of California, and that the business of said corporation has been and is to supply the inhabitants of said city and county with fresh water, which water was and is supplied through iron pipes heretofore laid by the defendant through the principal streets of the said city and county, and the said pipes were and are owned and controlled by the defendant.

III. That at all times herein mentioned a water-pipe or main was laid on said . . . street, through which water was then flowing in great quantity, and with great velocity, and under great pressure, and that said pipe was then owned and controlled by the defendant, and was used by it in conducting and distributing water to the inhabitants of said city and county.

IV. That on said last-mentioned day defendant, by its agents and servants, was engaged in repairing said water-pipe or main, situate, as aforesaid, on . . . street, while the water was flowing through said main, but in so doing did not use proper or any care therein, as it could and should have done, by shutting off the flow of water through said main during the process of making said repairs, but on the contrary, said defendant and its agents and servants were guilty of gross negligence and carelessness in endeavoring to make said repairs while the water continued to flow through said principal main, and thereby a large quantity of water was permitted to escape, and did escape, from said main with great force and velocity and under great pressure, and that by reason thereof said water ascended to a great height, to-wit, to the height of forty feet and upwards, and fell upon the roof of the building occupied by the plaintiff, and descended into the floors below, and flowed over, upon, and around goods which this plaintiff then owned and had there stored, and completely destroyed and rendered valueless large quantities of the same, which were then of great value, to-wit, of the value of one thousand dollars and upwards, to the great injury and damage of this plaintiff, in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4322. Complaint against municipality for building street so as to dam up river and flow plaintiff's premises.

Form No. 1189.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation and existence of defendant city.]

II. That the said city has, by virtue of its charter, the care and control of all its streets within the corporate limits of said city and the right and duty to build and grade the same and that the defendant, by its agents and servants, in the year 19.., graded and built a raised highway in said city and still maintains the same, leading from the bridge across the . . . river southwesterly to the limits of said city, a distance of about one mile.

III. That in building and making said highway the said city raised the grade thereof above the level of the surface of the surrounding ground about four feet, and that the said street is built upon and across a large flat tract of marsh-land dividing the . . . and . . . rivers, over a large part of which tract of land water runs from the . . . to the . . . river at every stage of high water, which is very frequent; that in constructing the said road, the same ought to have been so constructed that the water could pass through said road without obstruction, and for that purpose said road should have been supplied with sufficient sluices and culverts at short intervals for the passage of said water over said flat tract of land from the . . . river to the . . . river, as has been the usual and accustomed course of said water from time immemorial; but that the said defendant, disregarding its said duty, by its agents and servants, negligently built and constructed the said graded road without providing the same with culverts, bridges, and sewers so as to enable the waters of said . . . river to pass through and flow in the natural and accustomed course into the . . . river, and that on account of the said neglect and unskillful construction of the said road said waters of the . . . river, at high water, during the month of . . ., 19.., were obstructed by the said road and grade, and were caused to flow back upon and submerge lots [describe property], which lots were then owned and occupied by the plaintiff, and to submerge, drown, injure, and destroy the crops thereon, the property of the plaintiff; all to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4323. Complaint for undermining plaintiff's land.

Form No. 1190.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the plaintiff was possessed of certain land, a part of his farm in the town of, etc. [Briefly described.]

II. That on the . . . day of . . ., 19. . , the defendant wrongfully and negligently excavated the land adjacent to the plaintiff's said land, without leaving proper and sufficient support for the soil of the plaintiff's land in its natural state, whereby it sank and gave way, to the damage of plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4324. Complaint for undermining plaintiff's building.

Form No. 1191.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, plaintiff was possessed of certain land with buildings thereon [briefly describe the premises], which were supported by the adjacent land and the soil thereof, and that the plaintiff was entitled to have them so supported.

II. That on the . . . day of . . ., 19. . , the defendant wrongfully and negligently excavated the land adjacent to plaintiff's said land and buildings, and removed the earth therefrom, without leaving sufficient support for plaintiff's said land and buildings, by reason whereof the same sank and gave way, and the house fell in and was destroyed, and the furniture of the plaintiff was damaged and broken; and the plaintiff was compelled to pay . . . dollars in procuring another house, and . . . dollars in removing and repairing his goods, and . . . dollars in removing the ruins of the house and rebuilding the same, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4325. Reversioner, allegation by.

Form No. 1192.

That at the times hereinafter mentioned, the plaintiff was, and still is, owner of certain land [briefly describe the same], which was then in the occupation of A. B., as tenant thereof to the plaintiff.

§ 4326. Complaint for not using due care and skill in repairing.

Form No. 1193.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a watchmaker, at . . ., and on the . . . day of . . ., 19. . , the plaintiff delivered to him, as such, a gold watch of the plaintiff, of the value of . . . dollars, to be repaired by the defendant, for reward.

II. That the defendant then and there undertook said employment, and to use due care and skill in repairing said watch, and to take due care thereof while in his possession, and to redeliver the same to the plaintiff on request.

III. That the defendant did not take proper care of the said watch while in his possession, and did not use due care or skill in repairing the said watch, but, on the contrary, did his work in so careless and unworkmanlike a manner that no benefit was derived therefrom, and the said watch was broken and rendered worthless, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4327. Complaint against watchmaker for not returning watch.

Form No. 1194.

[TITLE.]

The plaintiff complains, and alleges:

I. [As in form No. 1193.]

II. [As in form No. 1193.]

III. That after a reasonable time for the repair of said watch, and on or about the . . . day of . . ., the plaintiff requested the defendant to redeliver the said watch; but he then did and still does refuse to redeliver said watch, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4328. Denial of negligence in sale.

Form No. 1195.

[TITLE.]

The defendant answers to the complaint, and alleges:

That he was not negligent in and about selling said goods, but sold the same with due diligence, and for as large a price as he could obtain.

§ 4329. Denial of negligence in giving credit.

Form No. 1196.

[TITLE.]

The defendant answers to the complaint, and alleges:

That he sold said goods to one A. B., who was a merchant at . . ., in good standing and credit, for the sum of . . . dollars; and for the payment of said sum he took the bill of the said A. B., drawn on and accepted by one C. D., payable in . . . months after date, which bill was at the time held and considered an approved bill.

§ 4330. Denial of injury.

Form No. 1197.

[TITLE.]

The defendant answers to the complaint, and alleges:

The said dog did not kill the sheep alleged, or any one of them, nor did he injure or worry them, or any of them.

§ 4331. The same—Collision on highway.

Form No. 1198.

[TITLE.]

The defendant answers to the complaint, and alleges:

That at the time mentioned in the complaint, the defendant was driving his said carriage in the highway, and the horse of the plaintiff, being at the same time there, was so carelessly, negligently, and improperly managed by the plaintiff, that by reason thereof the carriage of the defendant, without any fault on the part of the defendant, and by want of due care in the management of his horse by the plaintiff, was driven against said horse, and thereby said horse sustained the injury alleged; and that if any damage happened to said horse it was caused by such accident and not by the fault of the defendant.

CHAPTER CXIII.

NUISANCES.

§ 4332. Definitions of nuisances.—A nuisance is anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.[1] A house of prostitution is a nuisance *per se*.[2] A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.[3] Every nuisance not included in the definition of the last sentence is a private nuisance.[4] The board of health of San Francisco has power to determine what are nuisances, to notify the property-owners, if they can be found, and to remove the nuisance, the costs of such removal to become a charge and a lien upon the premises.[5] Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.[6] The fact whether a structure is a public nuisance is a question, not for the court, but for the jury.[7] All encroachments upon privileges which are open to the whole community, though they may have been uninterruptedly prolonged, are nevertheless liable to be suppressed.[8] A public nuisance can never be legitimated.[9]

§ 4333. Nuisance and trespass—Distinction.—The distinction between nuisance and trespass is that nuisance is only a conse-

1 Cal. Civ. Code, § 3479.
2 Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.
3 Cal. Civ. Code, § 3480.
4 Cal. Civ. Code, § 3481.
5 Cal. Pol. Code, § 3028.
6 Cal. Civ. Code, § 3482.
7 People v. Davidson, 30 Cal. 383.
8 Weld v. Hornby, 7 East, 194; Carter v. Murcott, 4 Burr. 2163; Knox v. Chaloner, 42 Me. 156.
9 Angell on Watercourses, 436; Woolrych's Law of Waters, 270; Knox v. Chaloner, 42 Me. 150; Renwick v. Morris, 3 Hill, 621; Coates v. Mayor etc., 7 Cow. 585; People v. Cunningham, 1 Denio, 524, 43 Am. Dec. 709; Commonwealth v. Upton, 6 Gray, 473; Woodruff v. North Bloomfield etc. Co., 1 West Coast Rep. 183; Van Rensselaer v. Albany, 15 Abb. N. C. 457; Sullivan v. Royer, 72 Cal.

quence or result of what is not directly or immediately injurious, but its effect is injurious, while trespass is a direct and immediate invasion of property.[10]

§ 4334. **Nuisance versus trespass—Limitations.**—An action for damage from nuisance must be brought within two years in California.[11] An action for trespass upon real property is limited to three years after the trespass;[12] and it is sometimes quite difficult to distinguish a trespass from a nuisance. The courts of England often experienced difficulty in determining whether trespass or case was the right remedy. This same difficulty arises under the codes when the statute of limitations is invoked. One of the best tests by which to distinguish trespass is found in the answer to the question, When was the damage done? If the damage does not come directly from the act, but is simply an after-result from the act, it is essentially consequential, and not a trespass. It is the difference between striking another with a stick and placing the stick in his way so he runs into it; between running water onto another's land and building a dam on your own land so the water backs up and onto the other's land. It is no dispossession, no ouster, nor even a trespass, to flow water backward on another person's land. It is denominated in law a nuisance, and the only modern remedy is by an action on the case.[13] Likewise the escaping of sewage and gases onto plaintiff's premises to his damage is a nuisance, and not trespass.[14]

§ 4335. **Limitations—Continued.**—Where an orchard is injured each succeeding year, the owner may recover damages accruing within two years of the time the action is brought, on the ground of a continuing nuisance.[15]

248, 1 Am. St. Rep. 51, 13 Pac. 655; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149.

10 Angell on Watercourses, 576. As to joinder of causes of action for nuisance and for personal injuries to the plaintiff, see Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024.

11 Cal. Code Civ. Proc., § 339, subd. 1.

12 Cal. Code Civ. Proc., § 338.

13 Hicks v. Drew, 117 Cal. 305-309, 49 Pac. 189; Daneri v. Southern California Ry. Co., 122 Cal. 507, 55 Pac. 243.

14 Cameron v. San Francisco, 68 Cal. 390, 9 Pac. 430; Donahue v. Stockton Gas etc. Co., 6 Cal. App. 276, 92 Pac. 196.

15 Sterrett v. Northport Min. etc. Co., 30 Wash. 164, 70 Pac. 266.

§ 4336. Complaint versus owner of condemned building.—A complaint by the people to abate a public nuisance, consisting of a wooden building within the fire limits, alleging facts tending to show that the maintenance of the building in its present condition is an unnecessary menace to the safety of the town from fire; that by the maintenance thereof defendant has, and now does, endanger the public safety of the town, and threatens to continue to maintain the building in its present condition, is sufficient as against a general demurrer.[16]

§ 4337. Building adjacent.—Under the civil law, if a man build a house upon land of his own and sell it, neither he nor a subsequent grantee can build on their land adjacent so as to destroy windows which were a necessary and essential part of the house.[17] But if he has sold the vacant lot and kept the house, without reserving the benefit of the lights, the vendee might build against his house.[18] If two men own adjoining lots, and one of them has erected a brick building on his lot, the wall of which leans so as to project over the lot of the other, and over a low wooden building thereon, so as to prevent the raising and repairing of the wooden building, the brick wall is a nuisance, and its maintenance imports damage to the other party, notwithstanding the fact that the wall is safe and secure.[19] A building leaning over an adjoining lot so as to prevent erection of a wall flush with the line of the lot is a nuisance which may be abated; but no damages should be allowed if none is incurred therefrom, and the fact that every building in the block was set too far to the north is immaterial.[20]

§ 4338. Bridge.—The fact that a bridge is a great public benefit will not prevent its being a nuisance, if it obstructs navigation.[21] A bridge over a navigable stream, erected for public

16 People v. Wing, 147 Cal. 382, 81 Pac. 1104.

17 Palmer v. Fletcher, 1 Lev. 122; Sid. 167; 1 Keb. 553; Rosewell v. Prior, 6 Mod. 116; Coutts v. Gorham, Moo. & M. 396; Compton v. Richards, 1 Price, 27; Story v. Odin, 12 Mass. 157, 7 Am. Dec. 46. See, also, Canham v. Fiske, 2 Cromp. & J. 126; 2 Tyrw. 156.

18 Tenant v. Goldwin, 2 Ld. Raym. 1093.

19 Meyer v. Metzler, 51 Cal. 142.

20 Barnes v. Berendes, 139 Cal. 32, 69 Pac. 491, 72 Pac. 406.

21 King v. Ward, 4 Adol. & E. 384; Pennsylvania v. Wheeling etc. Bridge Co., 13 How. 518, 14 L. Ed. 249. See People v. Horton, 5 Hun, 516, 64 N. Y. 610.

purposes, and producing a public benefit, and leaving a reasonable space for the passage of vessels, is not a nuisance.[22] If an abutment to a bridge is wrongfully built in the channel of a stream, a remedy, if any exists, is against him by whom the injury was committed.[23] The state of Pennsylvania, as the proprietor of public works, suffered special damage in its property by reason of a bridge across the Ohio river, and this damage continued from day to day, was not capable of proof and computation in each item thereof, and so was not reparable by the course of the common law. It was held that a bill in equity by the state, to enjoin the bridge as a public nuisance, could be maintained.[24]

§ 4339. **Corporations.**—If a corporation is disturbed in the enjoyment of its franchise or incorporeal right, such disturbance is technically a nuisance. [25] Thus a toll-bridge corporation may restrain a city from unlawfully laying out its bridge as a highway.[26] So a railroad company which is unlawfully disturbed in the enjoyment of its franchise may maintain a bill for an injunction as of a nuisance.[27]

§ 4340. **Private nuisance.**—Where a bill against a private nuisance does not show plainly that complainant is without a remedy at law, it must be dismissed.[28] The fact that a nuisance is public does not deprive the individual to whom it is an obstruction to the free use and enjoyment of his private property.[29] The erection of an obstruction below high-water mark is a private nuisance to the littoral property-owner;[30] as is also the carrying on of blasting on city lots for over a year; and damages may be

22 Mississippi etc. R. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; Works v. Junction R. R. Co., 5 McLean, 425, Fed. Cas. No. 18046; Pennsylvania v. Wheeling etc. Bridge Co., 13 How. 519, 14 L. Ed. 249.

23 Crowell v. Sonoma County, 25 Cal. 313.

24 Pennsylvania v. Wheeling etc. Bridge Co., 13 How. 518, 14 L. Ed. 249.

25 Charles River Bridge v. Warren Bridge, 6 Pick. 376; Boston Water Power v. Boston etc. R. R. Co., 16 Pick. 512. As to complaint in action for usurpation of municipal franchise, see People v. City of Riverside, 66 Cal. 288, 5 Pac. 350.

26 Central Bridge v. Lowell, 4 Gray, 474.

27 Charles River Bridge v. Warren Bridge, 6 Pick. 376; Boston etc. R. R. Co. v. Salem etc. R. R. Co., 2 Gray, 1.

28 Parker v. Winnipiseogee Lake etc. Woolen Co., 2 Black, 545, 17 L. Ed. 333.

29 Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82.

30 San Francisco Sav. Union v. R.

had for injury owing to concussion of the air.[31] A distillery with sties in which large quantities of hogs were kept, the offal from which render the waters of a creek unwholesome, and the vapors from which render a dwelling uninhabitable, is a nuisance.[32] It is not necessary that the corruption of the atmosphere be such as to be dangerous to health; it is sufficient that the effluvia are offensive to the senses, and render habitations uncomfortable.[33] A dense smoke, laden with cinders, liable to continue twelve hours twice a month, and to penetrate houses at distances of from forty to two hundred feet, in a part of the town occupied by mechanics for their homes and for trades occasioning a certain amount of smoke, is a nuisance.[34] But in view of the damage to very large iron works which an injunction would cause, and where the injury could be compensated for at law, an injunction ought not to be granted.[35] Where defendants built a platform in front of plaintiff's lot, and on his side of the way, as plaintiff presumptively owned to the middle of the street, he could maintain a private suit.[36]

§ 4341. Private nuisance—Allegations.—In an action for a private nuisance it is not necessary to allege or prove any special damage; but in a private action for a public nuisance special damages must be averred and proved.[37] The complaint must show some special injury; and failure to show that other and adjacent property-owners in town will not suffer like detriment and injury with plaintiff makes the complaint fatally defective.[38] The specific facts must be alleged, showing the special injury.[39] It becomes the gist of the action.[40]

G. R. Petroleum etc. Co., 144 Cal. 134, 103 Am. St. Rep. 72, 77 Pac. 823, 66 L. R. A. 242.

31 Longtin v. Persell, 30 Mont. 306, 104 Am. St. Rep. 723, 76 Pac. 699, 65 L. R. A. 655.

32 Smith v. McConathy, 11 Mo. 517.

33 Eames v. New England Worsted Co., 11 Metc. 572.

34 Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

35 Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202. See, also, Rhodes v. Dunbar, 57 Pa. St. 274, 98 Am. Dec. 221.

36 Higbee v. Camden etc. R. R. Co., 4 C. E. Green (19 N. J. Eq.) 276. See Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

37 Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437; Smith v. McConathy, 11 Mo. 517; Platte etc. Ditch Co. v. Anderson, 8 Colo. 131, 6 Pac. 515; Walley v. Platte etc. Ditch Co., 15 Colo. 579, 26 Pac. 129.

38 Siskiyou L. & M. Co. v. Rostel, 121 Cal. 511, 53 Pac. 1118.

39 Spring Valley Water Works v. Fifield, 136 Cal. 14, 68 Pac. 108.

40 Baker v. Boston, 12 Pick. 196, 22 Am. Dec. 421.

§ 4342. **Public gaming-house.**—A public gaming-house is a nuisance.[41] A public bowling-alley, kept in connection with a lager-beer saloon in a populous town, is not *per se* a public nuisance.[42]

§ 4343. **Public nuisances.**—The following have been held public nuisances, viz.: The invasion of a common and public right which every one may enjoy, such as the use of a highway, or of a canal, or of a public landing-place;[43] the erection of a house on a highway;[44] the appropriation of that part of the river or bay below low water or low tide.[45] Any obstruction to the navigation of a public navigable stream is, upon established principles, a public nuisance.[46] It does not follow as a legal conclusion that a wharf erected below high-water mark in tide-waters, and upon the soil thereunder belonging to the state, is a public nuisance, or an injury to commerce and navigation. Whether such a wharf is a public nuisance is a question of fact. An injunction will be granted to restrain the erection of a wharf in tide-waters where it is a public nuisance, or will be followed by some form of irreparable damage.[47] A common scold is a nuisance.[48] The keeping of a saloon and a theater in connection, where drunken, noisy, and boisterous people meet and sing far into the night, is a nuisance.[49] Also, a house of prostitution;[50] or the pollution of the waters of a stream by offal of a slaughterhouse, is a public nuisance.[51] There need not be an actual breach or disturbance of the peace, nor actual or threatened violence, but any immoral or criminal act which disturbs the quiet and tranquillity of society, to the injury of public order and decorum, which would be a nuisance at common law.[52] A slaughterhouse from which the offal is thrown into the sea, and thereafter washes upon the shore in a

41 See United States v. Ismenard, 1 Cranch C. C. 150, Fed. Cas. No. 15450.

42 State v. Hall, 32 N. J. L. 158.

43 Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82; Spring Valley W. W. v. Fifield, 136 Cal. 14, 68 Pac. 108.

44 Gunter v. Geary, 1 Cal. 467; People v. Davidson, 30 Cal. 383.

45 Gunter v. Geary, 1 Cal. 462.

46 Mayor etc. of Georgetown v. Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012; Woodruff v. North Bloomfield etc. Co., 1 West Coast Rep. 183.

47 People v. Davidson, 30 Cal. 379.

48 See United States v. Royall, 3 Cranch C. C. 620, Fed. Cas. No. 16202.

49 Reaves v. Territory, 13 Okla. 396, 74 Pac. 951.

50 Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

51 Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149.

52 State v. Nease, 46 Or. 433, 80 Pac. 897.

thickly settled community, is a public nuisance.[53] To keep a large quantity of gunpowder near where persons dwell is a nuisance.[54] A house on fire, or those in its immediate vicinity which serve to communicate the flames, are a nuisance which it is lawful to abate; and the private rights of the individual yield to considerations of general convenience and the interest of society. The constitutional provision requiring payment for private property taken for public use does not apply. Nor can one who abates such a nuisance be held personally responsible for trespass.[55]

§ 4344. **Public nuisance—When action lies.**—An action will not lie for damages for a public nuisance, unless plaintiff has sustained some special damage.[56] A public nuisance, as to a county suing only to protect its property, is a private nuisance.[57] The facts that the parties who bring an action to abate a nuisance caused by obstructing a public road own land fronting on the road, and have no other means of access, do not show such special damage to the plaintiffs in addition to that sustained by the public as enables them to maintain the action.[58] The special damage must be such as might legitimately flow from the nuisance, and must be specially pleaded.[59] A property-owner who is compelled to witness indecent conduct and listen to loud, boisterous, and indecent noises from a house of prostitution, thereby suffers a special injury, and may enjoin the same, even though it be a public nuisance.[60]

53 Wash. Bal. Codes & Stats., § 3084, subd. 7; Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055.

54 Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744; Kleebauer v. Western Fuse etc. Co. (Cal.), 69 Pac. 246; Barden v. Crocker, 10 Pick. 388; Lansing v. Smith, 4 Wend. 9, 21 Am. Dec. 89; Harrison v. Sterett, 4 Har. & M. 540; Story v. Hammond, 4 Ohio, 376; Shaw v. Cummiskey, 7 Pick. 76.

55 Surocco v. Geary, 3 Cal. 73, 58 Am. Dec. 385.

56 Com. Dig. Nuisances; Butterfield v. Forrester, 11 East, 61; King v. Directors etc., 12 East, 432; Rose v. Miles, 4 Mau. & Sel. 101; Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; Mayor of Pittsburg etc. v. Scott, 1 Pa. St. 309; Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744; Woodruff v. North Bloomfield etc. Co., 1 West Coast Rep. 183; Wesson v. Washburn Iron Co., 13 Allen, 95, 90 Am. Dec. 181; Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437. For rules which govern a court of equity in a suit for the abatement of a nuisance, see Mississippi etc. R. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311; United States v. Choctaw R. R. Co., 3 Okla. 404, 41 Pac. 729.

57 Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

58 Aram v. Shallenberger, 41 Cal. 449. But see Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341.

59 Lewiston T. Co. v. Shasta W. W. R. Co., 41 Cal. 564.

60 Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

§ 4345. **Remedy.**—By judgment the nuisance may be enjoined or abated as well as damages recovered.[61] To entitle a party to an injunction in a case of nuisance, the injury to be restrained must be irremediable, and such as cannot be adequately compensated by damages.[62] In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs.[63] Courts of equity, pursuing the analogy of the law that a party may maintain a private action for special damages, even in the case of public nuisance, will grant an injunction against a public nuisance at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy. But the plaintiff in such case, to maintain his suit in equity, must aver and prove an individual injury.[64] Where an individual is damaged by a public nuisance, he has the same remedy as when injured by a private nuisance.[65] And plaintiff must prove that the damage he has sustained "is not common to others."[66]

The complaint should set forth by positive averment facts sufficient to show that the plaintiff has sustained special injury, different in kind from that sustained by the general public.[67] But although the complaint does not by explicit, positive averment state a special damage or injury to the plaintiff different in kind from that sustained by the general public, yet if that essential fact appears by plain and necessary implication, and no objection to the pleading is taken by special demurrer, the pleading will be upheld, upon a motion for judgment on the pleadings made at the commencement of the trial.[68]

§ 4346. **Riparian proprietor.**—Where a river is made a boundary to the land, the grantee becomes a riparian proprietor, and

61 Will v. Sinkwitz, 41 Cal. 594; Cal. Code Civ. Proc., § 731.

62 Middleton v. Franklin, 3 Cal. 241.

63 Hudson v. Doyle, 6 Cal. 102; affirmed in Courtwright v. Bear River A. W. M. Co., 30 Cal. 576.

64 Crowder v. Tinkler, 19 Ves. 616; Corning v. Lowerre, 6 Johns. Ch. 439; Mississippi etc. R. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311.

65 Welton v. Martin, 7 Mo. 307; Stetson v. Faxon, 19 Pick. 147, 31 Am. Dec. 123; Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; Shaw v. Cummiskey, 7 Pick. 76; Holman v. Inhabitants etc., 13 Metc. (Mass.), 297.

66 Co. Lit. 56a; Stetson v. Faxon, 19 Pick. 155, 31 Am. Dec. 123; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513; Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055.

67 Redway v. Moore, 3 Idaho, 312, 29 Pac. 104.

68 Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

is entitled to the land the river covers *ad filium medium aquæ*, and any [in case of a grant] subsequent grantee under the same description is alike entitled.[69] A county owning land near a river, but not bordering on it, has property "adjacent" to the river, for the purpose of an action to enjoin the discharge of debris therein to its damage.[70]

§ 4347. **Steam-engine in cellar.**—The erection of a steam-engine and machinery and a gristmill in the cellar, under an auction store, is held not be such an injury as to require a restraining power of the court; at least not until the question of nuisance shall be determined by a jury, and even then the remedy at common law is adequate.[71]

§ 4348. **Street railroads.**—Where a railroad-track is on a public street, owners of property in the vicinity, to sustain a complaint against its construction, must establish that it is a public nuisance, and that they have sustained special damage.[72] The operation of a railroad switch-track over city property, which results in shaking of ground by passing engines and cars, and makes smoke and noise close to the premises of plaintiff, obstructs the free use and comfortable enjoyment of such premises, and is a nuisance.[73] Where a company is authorized by law to construct a street railroad with switches and turnouts, the presumption of the law is that the switches and turnouts are necessary, and the burden of proving that they are a nuisance is cast on the plaintiff.[74] In an action by an owner and occupant of a lot fronting on a street for special damages, by reason of a nuisance caused by the obstruction of the public street in front of the lot, testimony as to the market value of the lot and the effect of the nuisance as to such market value is not admissible.[75]

69 Angell on Watercourses, 19; People v. Canal Appraisers, 13 Wend. 355; Canal Appraisers etc. v. People, 17 Wend. 571; Ex parte Jennings, 6 Cow. 518, 16 Am. Dec. 447; Commissioners v. Kempshall, 26 Wend. 404.

70 Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

71 Middleton v. Franklin, 3 Cal. 241. See Saltonstall v. Banker, 8 Gray, 195.

72 Black v. Philadelphia etc. R. R. Co., 58 Pa. St. 249; Severy v. Central Pacific R. R. Co., 51 Cal. 194.

73 Stockdale v. Rio Grande Western Ry., 28 Utah, 201, 77 Pac. 849.

74 Carson v. Cent. R. R. Co., 35 Cal. 325.

75 Severy v. Central Pacific R. R. Co., 51 Cal. 194.

§ 4349. **Verdict, effect of.**—In an action to abate a nuisance, a general verdict in favor of the plaintiff is sufficient to sustain a judgment abating the same;[76] but neither party is entitled to a jury as a matter of right, because its verdict can be advisory only.[77] So if special findings are not inconsistent with it.[78]

§ 4350. **Jurisdiction of action.**—In the absence of statutory changes, the action to abate a nuisance is "a case in equity," and from judgment rendered in it an appeal lies.[79] The demand for damages is merely incidental to the main purpose of the suit.[80] Under the peculiar wording of section 5 of article 6 of the California statute conferring jurisdiction upon the superior court of actions to prevent or abate a nuisance, the court sits as a special, and not as an equitable, tribunal. In such actions, therefore, when a trial is had before a jury, and a general verdict for damages is given for the plaintiff, the judgment may order an abatement of the nuisance. The findings of the jury in such case are not merely advisory upon the court.[81] The fact that acts complained of are made misdemeanors by the Penal Code does not make them any less nuisances, nor does it exclude the civil remedy.[82] An action for a nuisance is not abated or barred by a subsequent abatement of the nuisance by the plaintiff.[83] Nor does the abatement of a nuisance prejudice the right of any person to recover damages for its past existence.[84] But as the county court had no jurisdiction of the action for damages, except as an incident to the power to abate, the abatement before suit brought deprived that court of the jurisdiction for any purpose.[85] If plaintiff seeks merely a judgment for damages in a sum less than three hundred dollars, he may bring the action in the justice's court;[86] but he cannot ask for abatement of the nuisance.[87] And

76 Blood v. Light, 31 Cal. 115; Learned v. Castle, 3 West Coast Rep. 154, 67 Cal. 41, 7 Pac. 34; affirmed 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

77 Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300.

78 Blood v. Light, 31 Cal. 115.

79 People v. Moore, 29 Cal. 427; McCarthy v. Gaston Ridge Mill etc. Co., 144 Cal. 542, 78 Pac. 7.

80 Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300.

81 Learned v. Castle, 67 Cal. 41, 7 Pac. 34; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655. See Warring v. Freear, 64 Cal. 54, 28 Pac. 115.

82 People v. Truckee L. Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581.

83 Call v. Buttrick, 4 Cush. 345.

84 Cal. Civ. Code, § 3484.

85 Grigsby v. Clear Lake Water Co., 40 Cal. 396.

86 McCarthy v. Gaston Ridge Mill etc. Co., 144 Cal. 542, 78 Pac. 7.

87 State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

if defendant justifies his act of obstructing a road upon the ground that he has a right to fence it, as owner of the land, and alleges his ownership, it raises a question of title, and deprives the justice's court of jurisdiction.[88]

§ 4351. **Jurisdiction of action—Continued.**—The statute of California defining what are nuisances, and prescribing a remedy, does not take away any common-law remedy in the abatement of the nuisances which the statute does not embrace.[89] The county courts formerly had original jurisdiction of actions to prevent or abate a nuisance.[90] The action is not a "special case."[91] The superior courts have constitutional jurisdiction of cases of nuisances. The grant of such jurisdiction by the statute to other courts cannot take away the constitutional jurisdiction.[92]

A court of chancery cannot make a decree to restrain, or give compensation for a nuisance or tort to real property lying in another jurisdiction; hence it cannot entertain a bill by one railroad corporation to restrain another from doing acts continually injurious to the estate and franchise of the complainants by crossing their railroad and intruding within their exclusive limits, if outside of the jurisdiction of the court.[93] But an action for damages may be maintained in the state in which the property injured is situated, although the business which occasions the injury is carried on upon lands in another state.[94] In a suit for the abatement of a nuisance, a court of equity, confining its inquiries within the limits of its local jurisdiction, must be governed by the same rules which a court of law would act upon in trying an indictment for the same nuisance.[95] Where a bill is brought in a federal court to abate a nuisance, the jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance.[96] In cases of private nuisance, the jurisdiction of courts of equity and courts of law is concurrent, though

88 Little v. Denn, 34 N. Y. 452.

89 Stiles v. Laird, 5 Cal. 122, 63 Am. Dec. 110.

90 People v. Moore, 29 Cal. 427.

91 Parsons v. Tuolumne Water Co., 5 Cal. 43, 63 Am. Dec. 76.

92 Yolo v. Sacramento, 36 Cal. 193; Courtwright v. Bear River A. W. & M. Co., 30 Cal. 573. See Warring v. Frcar, 64 Cal. 54, 28 Pac. 115; McCarthy v. Gaston Ridge Mill etc. Co., 144 Cal. 542, 78 Pac. 7.

93 Northern Indiana R. R. Co. v. Michigan Central R. R. Co., 15 How. 233.

94 Ruckman v. Green, 16 N. Y. Sup. Ct. (9 Hun,) 225.

95 Mississippi etc. R. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311.

96 Id.

many cases will sustain an action at law which would not justify relief in equity.[97]

§ 4352. **Venue, in quiet title to easement.**—An action to quiet title or to determine an adverse claim to an easement in the waters of a spring situated upon the lands of the defendant, and to a right of way over the defendant's land for the purpose of conducting such waters to the premises of the plaintiff, and to obtain an injunction against interference with the plaintiff's pipes from such spring, is a real action, which must be brought in the county where the subject-matter of the action is situated, and a demurrer to the complaint in such action, when brought in another county, upon the ground that the court has no jurisdiction of the subject-matter of the action, should be sustained, and the action dismissed.[98]

§ 4353. **Damages.**—An action may be brought under section 3479 of the California Civil Code for the enjoining or abating of a nuisance as well as for damages therefor.[99] However, it is an equitable action, this statute merely permitting damages in the same action without a separate action at law;[100] and a general demand for a jury to try the entire cause, both legal and equitable issues, may properly be refused.[101] Plaintiff may be restored to the full enjoyment of his property, and be paid for the damage besides.[102] The damages are a mere incident to the action.[103] Different elements of damage arising from the same nuisance do not constitute different causes of action.[104] A wrongdoer who contributes to the damage cannot escape entirely because his proportion cannot be accurately measured.[105] A landlord is liable for damages due to his renting premises for a house of prostitution. [106] Landowners are entitled to damages for a yearly injury

97 Parker v. Winnipiseogee etc. Woolen Co., 2 Black, 545, 17 L. Ed. 333. See, also, Barton v. Union Cattle Co., 28 Neb. 350, 26 Am. St. Rep. 340, 44 N. W. 454, 7 L. R. A. 457.

98 Pacific Yacht Club v. Sausalito Bay Water Co., 98 Cal. 487, 33 Pac. 322. See Fritts v. Camp, 94 Cal. 394, 29 Pac. 867.

99 Cal. Code Civ. Proc., § 731.

100 Courtwright v. Bear River etc. Water Co., 30 Cal. 573.

101 Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300.

102 Hopkins v. Western Pacific R. R. Co., 50 Cal. 190.

103 Meek v. De Latour, 2 Cal. App. 261, 83 Pac. 300.

104 Astill v. South Yuba W. Co., 146 Cal. 55, 79 Pac. 594.

105 Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

106 Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

to their crops from sulphur fumes until the completion of the total and permanent injury, and not after that; but for total and permanent injury to land, such injury must be complete before suit brought.[107] The measure for permanent injury to land is the difference between the value before and after the injury.[108] An action on nuisance may be had without seeking an abatement.[109]

§ 4354. **Easement.**—A liberty, privilege, or advantage in land, without profit, existing distinct from an ownership in the soil, is an easement.[110] So the right to use a public highway is a public easement.[111] A private easement is a privilege, service, or convenience, by prescription, grant, or necessary implication, and without profit, as a way over his land, a gateway, a watercourse, and the like.[112] An easement may be created by grant, or it may be acquired by prescription. The grant may be either express or implied. A reservation of an easement in the deed by which the lands are conveyed is equivalent for the purpose of the creation of the easement to an express grant of the easement by the grantee of the lands.[113] The right of landing with and drawing seines upon another's land is an easement,[114] and, therefore, may be acquired by prescription, like a right of way.[115]

§ 4355. **Injunction.**—A nuisance existing under a local law, if it amounts not to a national one, will not be enjoined by the United States circuit court.[116] Although indictment is the proper remedy in the case of a public nuisance, yet when it is obviously necessary that such nuisance should be immediately suppressed, a court of chancery may interfere by injunction until process by indictment can be put in motion.[117] The plaintiff is entitled to an

107 Watson v. Colusa-Parrot Min. etc. Co., 31 Mont. 513, 79 Pac. 14.

108 Id.

109 Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70.

110 Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207; 1 Crabb on Real Property, 125.

111 Peck v. Smith, 1 Conn. 103, 132, 6 Am. Dec. 216; Smith's Lead. Cas. 98.

112 Kitch. 105; 3 Cru. Dig. 484; Servitudes of Civil Law Inst. 2, 3; 1 Burr. Dict. 530.

113 Wagner v. Hanna, 38 Cal. 116, 99 Am. Dec. 354.

114 Hart v. Hill, 1 Whart. 138.

115 Angell on Watercourses, 77. See Cal. Civ. Code, §§ 552, 801-811.

116 Griffing v. Gibb, 1 McAll. 212, Fed. Cas. No. 5819.

117 Angell on Watercourses, 751; Rowe v. Granite Bridge, 21 Pick. 344; Denver v. Mullen, 7 Colo. 345, 3 Pac. 693, 2 West Coast Rep. 852. See Tuebner v. California St. R. R. Co., 66 Cal. 171, 4 Pac. 1162; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618; Hargro v. Hodgdon, 89 Cal. 623, 26

injunction at once, unless the removal of the nuisance is physically impossible; also, to prevent a threatened injury to his right of way.[118] An action for the abatement of a nuisance is a suit in equity, and an injunction against its continuance may be issued therein, although it is not specifically prayed for in the complaint.[119] Nor is it necessary to show that an injury is inevitable, to enable a party to maintain an action for a mandatory injunction to abate a nuisance; but it is sufficient, as matter of final relief, if facts are stated showing that danger is probable and imminent.[120] However, if the injury complained of is not *per se* a nuisance, but may or may not become one, and is remote, uncertain, and speculative, or productive only of possible injury, then equity will not interfere.[121] The common-law remedy for a public nuisance will not be affected by a statute imposing a penalty on the offense unless an intent is conceived to exclude these remedies.[122] An injunction will issue notwithstanding the injury is occasional, as from the burning of brick-kilns; nor will it make any difference that the property injured consists of ornamental trees; articles of luxury are as much within the protection of the law as articles of necessity.[123] The making of smoke and noise or the jarring of city premises, so as to interfere with its comfortable enjoyment, is a nuisance which may be enjoined.[124]

§ 4356. **Parties plaintiff.**—Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance.[125] A civil action may be brought in the name of the people of the state to abate a public nuisance, by the district attorney of any county, or by the city attorney of any town or city, in which such nuisance exists, and either of such attorneys must bring the action when directed by the legislative board of any such town, city, or county.[126] A com-

Pac. 1106; Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437.

118 Tuolumne Water Co. v. Chapman, 8 Cal. 392; Kittle v. Pfeiffer, 22 Cal. 491.

119 Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655.

120 Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265.

121 West v. Ponca City Mill. Co., 14 Okla. 646, 79 Pac. 100.

122 Renwick v. Morris, 7 Hill, 575. As to what cases equity will enjoin a nuisance, see Parker v. Winnipiseogee Lake Woolen Co., 2 Black, 545, 17 L. Ed. 333; Price v. Grantz, 118 Pa. St. 402, 4 Am. St. Rep. 601, 11 Atl. 794; Janesville v. Carpenter, 77 Wis. 288, 20 Am. St. Rep. 123, 46 N. W. 128, 8 L. R. A. 808.

123 Campbell v. Seaman, 63 N. Y. 568, 20 Am. Dec. 567.

124 Stockdale v. Rio Grande Western Ry. Co., 28 Utah, 201, 77 Pac. 849.

125 Cal. Code Civ. Proc., § 731.

126 Id.

mon nuisance being deemed an injury to the whole community, every person in the community is supposed to be aggrieved by it, and has the right to abate it if a special injury to him.[127] A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it.[128] And formerly the action to abate could be maintained only by the owner of the premises injured against the owner in fee of the premises on which the nuisance exists.[129] The landowner cannot recover for a destruction of crops by a nuisance prior to the date of acquiring title, unless he then had possession, or was entitled to possession of the property.[130] But a tenant in common may maintain such action without joining his cotenant as a party plaintiff or defendant.[131] A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished.[132]

§ 4357. Plaintiff—Private persons.—A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.[133] The complaint must show that such plaintiff will suffer some injury therefrom special and peculiar to himself, and different from that to which the public is subjected.[134] The owner of land adjoining public land which is wrongfully claimed by another is not thereby specially injured.[135] The injury must be different in kind, and not merely in degree.[136] An adjoining property-owner may maintain an action

127 Gunter v. Geary, 1 Cal. 462; Cal. Civ. Code, § 3495.

128 Gunter v. Geary, 1 Cal. 462; Cal. Civ. Code, §§ 3502, 3503.

129 Ellsworth v. Putnam, 16 Barb. 568.

130 Watson v. Colusa-Parrot Min. etc. Co., 31 Mont. 513, 79 Pac. 14.

131 Woodruff v. North Bloomfield etc. Co., 8 Sawy. 628, 16 Fed. 25; Mississippi etc. R. R. Co. v. Ward, 2 Black, 485, 17 L. Ed. 311.

132 Cal. Pen. Code, § 370 et seq.

133 Cal. Civ. Code, § 3493; Attorney-General v. Cleaver, 18 Ves. 215; Crowder v. Tinkler, 19 Ves. 616; Corning v. Lowerree, 6 Johns. Ch. 439; Georgetown v. Alexander Canal Co., 12 Pet. 98, 9 L. Ed. 1014; Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13245. See Works v. Junction R. R. Co., 5 McLean, 425, Fed. Cas. No. 18046; Fogg v. Nevada etc. Co., 20 Nev. 429, 23 Pac. 840; Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149; Wylie v. Elwood, 134 Ill. 281, 23 Am. St. Rep. 673, 23 N. E. 570, 9 L. R. A. 726; Zettel v. West Bend, 79 Wis. 316, 24 Am. St. Rep. 715, 48 N. W. 379.

134 Harniss v. Bulpitt, 1 Cal. App. 140, 81 Pac. 1022.

135 Anthony Wilkinson Live-Stock Co. v. McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. (N. S.) 733.

136 Donahue v. Stockton Gas etc. Co., 6 Cal. App. 276, 92 Pac. 196.

to restrain the maintenance of a house of prostitution.[137] Several persons having independent claims to relief may join in a suit to restrain a nuisance which affects the respective claims of both.[138] Certain obstructions and injuries to highways are declared to be nuisances, and an action to abate the same must be brought by the road overseer or commissioners of highways.[139] Such action cannot be brought in the name of the county as plaintiff.[140] An allegation of the pollution of water on plaintiff's premises, and poisoning the soil so as to make it unproductive, sets out a special damage, not suffered by the public in general.[141]

§ 4358. Parties defendant.—When an owner contracts for doing certain work upon his property, if a nuisance necessarily occurs in the ordinary mode of doing such work, the owner is liable; but if a nuisance happens by the negligence of the contractor or his servants, the contractor alone is responsible.[142] A landowner may be restrained from permitting his tenant to maintain a house of prostitution, it appearing that defendant leased the premises knowing they were to be used for that purpose; for such a house is a nuisance *per se*, and the tenant is not a necessary party defendant.[143] In an action of nuisance or trespass, the defendant has no right to inquire into the good faith of the plaintiff's possession.[144] Where a nuisance is committed by several, the plaintiff may sue any one of those who did the wrong, and the nonjoinder of the others cannot be pleaded in abatement.[145] But if the parties committing the tort are joint owners of the land, and the tort consisted in the omission of some act which they are bound as such owners to perform, then all must be joined in the action.[146] If one of two tenants in common of a mill is guilty of malfeasance by using it to the nuisance of a stranger, the other owner, not participating, is not liable.[147] And where several parties owning mining claims on the affluents of

137 Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

138 Murray v. Hay, 1 Barb. Ch. 59, 43 Am. Dec. 773.

139 See Cal. Pol. Code, §§ 2743-2747.

140 San Benito County v. Whitesides, 51 Cal. 416.

141 Donahue v. Stockton Gas etc. Co., 6 Cal. App. 276, 92 Pac. 196.

142 Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298.

143 Farmer v. Behmer, 9 Cal. App. 773, 100 Pac. 901.

144 Eberhard v. Tuolumne Water Co., 4 Cal. 308.

145 1 Chit. Pl. 75; Sutton v. Clark, 6 Taunt. 29.

146 1 Chit. Pl. 76.

147 Angell on Watercourses, 592; Simpson v. Seavey, 8 Greenl. 138.

a river work them independently of each other by the hydraulic process in such a manner that their debris flows down into the main river and becomes mingled into one indistinguishable mass, passes on, and is deposited above the course of the river in the valley below, a bill in equity by a party injured against all the parties thus contributing to the nuisance to enjoin it may be maintained.[148] So, also, any one aiding in maintaining a nuisance may be joined with his principal, or sued separately.[149] But the liability of one excavating in a street, and of a city negligently permitting the excavation to remain open, is several, and not joint. Consequently, they cannot be joined in the same action.[150] A municipal corporation, owning and holding property for public purposes, is liable to an adjoining owner for injuries from a nuisance maintained upon its property.[151]

§ 4359. **Joinder of causes.**—Plaintiff may join two causes of action for distinct nuisances, as actions belonging to the same class.[152]

§ 4360. **Prior action at law.**—In general, courts of equity do not take jurisdiction in cases of nuisance until the party aggrieved has established his right by an action at law, unless some special ground is shown, such as irreparable injury, multiplicity of suits, or the like.[153]

§ 4361. **Who liable.**—The author of a nuisance is answerable for all damages thereof, and after a recovery of damages for its erection, another action may be maintained for its continuance.

148 Woodruff v. North Bloomfield etc. Co., 8 Sawy. 628, 16 Fed. 25; overruling Keyes v. Little York etc. Co., 53 Cal. 724. See, also, Hillman v. Newington, 57 Cal. 56; Chipman v. Palmer, 77 N. Y. 56, 33 Am. Rep. 566; Gay v. State, 90 Tenn. 645, 25 Am. St. Rep. 707, 18 S. W. 260; Crossly v. Lightower, 3 L. R. Eq. 279.

149 Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Eastman v. St. Anthony Falls etc. Co., 12 Minn. 137; People v. Gold Run etc. Min. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

150 Trowbridge v. Forepaugh, 14 Minn. 133.

151 Briegel v. Philadelphia, 135 Pa. St. 451, 20 Am. St. Rep. 885, 19 Atl. 1038.

152 Astill v. South Yuba Water Co., 146 Cal. 55, 79 Pac. 594; Cal. Code Civ. Proc., § 427.

153 Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black, 545, 17 L. Ed. 333; Irwin v. Dixion, 9 How. 10, 13 L. Ed. 25; Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 561, 14 L. Ed. 249; in which authorities may be found the history of the jurisdiction of courts of equity in these cases; see, also, Kennerty v. Etiwan Phosphate Co., 17

One selling and delivering lumber upon a public street is equally liable with the buyer in an action for damages caused by such obstruction, although he had no interest in its maintenance.[154] Each continuance of a nuisance is a new nuisance.[155] So that, if a person erects a mill to the nuisance of another, every occupier of it afterwards who permits a continuance of the nuisance is subject to an action;[156] but such person is not liable for damages caused by the nuisance when conducted by his predecessor in interest.[157] If the purchaser be ignorant of the consequences and damage occasioned, he must have notice of it, and a request must be made to remove the nuisance before an action can be brought. But, of course, where the nuisance is committed by the defendant himself, no notice or request of removal before action is necessary.[158] In an action against the grantee of land for the continuance of a nuisance erected by his grantor, notice to the defendant that the erection was a nuisance is essential to the plaintiff's cause of action, and it is not for the defendant to show want of such notice.[159] The person whose duty it was to remove the nuisance, or to keep a hole protected, is alone liable.[160] A landlord is liable to his tenant for injury from the bursting of a defective sewer.[161]

Where the owner of the premises knows, or by the exercise of reasonable care can ascertain, that they have upon them a nuisance dangerous to the public or to an adjoining owner, it is his duty to abate it before leasing the property; and if he leases without doing this, he is liable to respond in damages to any one injured in consequence of the nuisance, and this is so although he did not create the nuisance.[162] And the same liability rests upon

S. C. 411, 43 Am. Rep. 607; Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795.

154 Wilson v. West & Slade Mill Co., 28 Wash. 312, 68 Pac. 716.

155 Angell on Watercourses, 587.

156 Angell on Watercourses, 588, and cases there cited; Watson v. Colusa-Parrot Min. etc. Co., 31 Mont. 513, 79 Pac. 14; Prentiss v. Wood, 132 Mass. 486; Duryea v. Mayor, 26 Hun, 120. See Ellsworth v. Putnam, 16 Barb. 565.

157 Watson v. Colusa-Parrot Min. etc. Co., 31 Mont. 513, 79 Pac. 14.

158 Angell on Watercourses, 590.

159 Castle v. Smith (Cal.), 36 Pac. 859. Compare Pierce v. German Sav. etc. Soc., 72 Cal. 180, 1 Am. St. Rep. 45, 13 Pac. 478; Ahern v. Steele, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193, 5 L. R. A. 449.

160 Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304.

161 Alston v. Grant, 24 Eng. L. & Eq. 122; Tenant v. Goldwin, 2 Ld. Raym. 1089; Cooper v. Barber, 3 Taunt. 99.

162 Timlin v. Standard Oil Co., 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786.

a tenant who sublets the premises knowing, or being chargeable with knowledge, of the existence of the nuisance.[163]

§ 4362. **Allegation of request.**—By some of the courts of New York, a request is held necessary against a mere continuer of a nuisance.[164] It is difficult, however, upon principle, to see any reason in the rule, if there be such a rule, which requires notice to discontinue the doing of an unlawful act before bringing an action therefor; but "where a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without entering upon his land, reasonable notice must be given before entering to abate it."[165] Where the action is for damages for a nuisance erected by a previous owner, it should appear that before the commencement of the action the defendant had notice or knowledge of the existence of the nuisance; but plaintiff need not prove a request to abate.[166]

§ 4363. **Continuance.**—Every continuance of an obstruction is in itself an offense.[167] The action lies against him who erects a nuisance and against him who continues a nuisance erected by another;[168] and every use of an erection which is a nuisance is a new nuisance. And one who continues a nuisance may be sued without notice or request to him to abate it.[169]

§ 4364. **Bay or river as highway.**—All that part of a bay or river below low water or low tide is a public highway, common to all citizens, and if any person appropriate it to himself exclusively, the presumption is that it is a detriment to the public.[170] The fact that title to the bed of a navigable slough has been vested in a person, by purchase from the state as tide-lands, gives him no right to obstruct navigation.[171]

163 Timlin v. Standard Oil Co., 126 N. Y. 514, 22 Am. St. Rep. 845, 27 N. E. 786.

164 Hubbard v. Russell, 24 Barb. 407. But see, contra, Brown v. Cayuga etc. R. R. Co., 12 N. Y. 492.

165 Cal. Civ. Code, § 3503. See, also, Cal. Civ. Code, § 3502.

166 Penney v. Berry, 61 Mo. 359; Southworth v. Schofield, 51 N. Y. 513.

167 Renwick v. Morris, 7 Hill, 575.

168 Staple v. Spring, 10 Mass. 72; Hodges v. Hodges, 5 Metc. (Mass.) 205; Cal. Civ. Code, § 3483.

169 Conhocton Stone Co. v. Buffalo etc. R. R. Co., 52 Barb. 390.

170 Gunter v. Geary, 1 Cal. 462; Woodruff v. North Bloomfield etc. Co., 1 West Coast Rep. 183.

171 Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807.

§ 4365. **Obstructing a street.**—The obstruction of a public street without legal permission is a nuisance, whether beneficial to the public or not, and may be abated by the town or removed by action or otherwise.[172] The county has special interest in the preservation of county roads.[173] The city has the same right as the people of the state to prevent unlawful obstruction of the streets.[174] In an action to abate a nuisance caused by the interference of private individuals with a public road, neither the county nor its supervisors are necessary parties.[175] A person building a storehouse on a street, who, in consequence of the city's raising the carriageway of the street, raises the sidewalk so as to make it conform to the carriageway, thereby obtaining vaults and an area for the benefit of his building, does not do a public work nor relieve himself from the penalty of making a nuisance, if a nuisance is made by what he does.[176] Buildings erected on public grounds or highways acquire no right either on account of time or expenditure.[177] It is a nuisance to erect a building on a highway.[178] Thus defendants dug a deep hole on their premises close to the line of a public street, and threw out earth and stones upon the sidewalk; the plaintiff, in trying to pass the obstruction on the sidewalk, went a little upon the defendant's land, fell into the hole, and was injured; it was a dark night, and defendants had provided no light; the plaintiff was using due care. It was held that the fact that, under the above circumstances, he went upon defendant's land, and was injured there, did not bar his action.[179] Such is not a nuisance as to one not a stranger to the premises.[180] If a city, in the exercise of its right to grade highways, creates a stagnant pond on a man's land close to his house, it is liable in damages.[181] The breaking up of a street of a town for the purpose of laying gas-pipes without lawful authority will be enjoined

172 Town of West Seattle v. West Seattle Land etc. Co., 38 Wash. 359, 80 Pac. 549.

173 County of Sierra v. Butler, 136 Cal. 547, 69 Pac. 418; San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396.

174 People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54.

175 Learned v. Castle, 67 Cal. 41, 7 Pac. 34.

176 Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427; Miller v. Pierce Co., 34 Wash. 592, 76 Pac. 103.

177 Philadelphia v. Philadelphia etc. R. R. Co., 58 Pa. St. 253.

178 Gunter v. Geary, 1 Cal. 467. That keeping a wagon habitually in the public street is a nuisance, see Cohen v. New York, 113 N. Y. 532, 10 Am. St. Rep. 506, 21 N. E. 700, 4 L. R. A. 406.

179 Vale v. Bliss, 50 Barb. 358.

180 Veraguth v. City of Denver, 19 Colo. App. 473, 76 Pac. 539.

181 Nevins v. City of Peoria, 41 Ill. 503, 89 Am. Dec. 392.

in equity.[182] A toll-gate erected on a public highway which belongs to a state or people is a nuisance, and may be abated as such.[183] An object which is calculated to frighten a horse of ordinary gentleness is as much of a nuisance as an obstruction.[184]

§ 4366. **Ordinary care to avoid.**—In cases of obstruction to highways, the plaintiff cannot recover if he did not use ordinary care to avoid the injury.[185] The plaintiff is not required to plead or prove any fact giving him a title to the way. If the defendant has any right to interrupt him, that is a matter of defense, and until he proves such right he is a wrongdoer.[186]

§ 4367. **Relief—Injunction.**—A demand for damages for obstructing plaintiff's way, and that defendants be compelled to open the way, may be united.[187] If the plaintiff has suffered a particular injury from the obstruction of a public way, a bill will lie for an injunction.[188]

§ 4368. **Complaint—Obstructing highway.**—A complaint alleging that now, and for several years past, defendant owned certain premises; that during all such times there has existed a public highway or public road for the accommodation of the plaintiff and the public in general across defendant's premises, and that no other highway or road exists across the premises, is sufficient to allow proof of a road established either by prescription, dedication, or otherwise.[189] It must be alleged and proved that defendant either built, was the owner, or controlled a reservoir from which waters flow over a public highway as a nuisance.[190] An

182 Attorney-General v. Cambridge Consumers' Gas Co., L. R., 6 Eq. 282; not following Attorney-General v. Sheffield Gas Consumers' Co., 3 De G. M. & G. 304.

183 El Dorado County v. Davidson, 30 Cal. 520; Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39.

184 Clinton v. Howard, 42 Conn. 295.

185 Smith v. Smith, 2 Pick. 621, 13 Am. Dec. 464; Irwin v. Sprigg, 6 Gill (Md.), 200, 46 Am. Dec. 667.

186 See St. John v. Moody, 2 Lev. 148, 1 Vent. 274; Winford v. Wollaston, 3 Lev. 266.

187 See Getty v. Hudson River R. R. Co., 6 How. Pr. 269. See, also, Cal. Code Civ. Proc., § 731; Will v. Sinkwitz, 41 Cal. 594.

188 Cook v. Mayor of Bath, L. R., 6 Eq. 177; Kittle v. Pfeiffer, 22 Cal. 491.

189 Thurston County v. Walker, 27 Wash. 500, 67 Pac. 1099.

190 Eaton v. People, 30 Colo. 345, 70 Pac. 426.

action to enjoin the running of water over a public highway is properly brought in the name of the county.[191]

§ 4369. **Right of way.**—A right of way must be by grant or prescription; mere convenience gives no right.[192] To the creation of a right of way that amounts to an easement, and not merely to a right of way in gross, two tenements are necessary—the dominant, to which the right of way belongs, and the servient, upon which the obligation rests.[193] In the one there is, and in the other there is not, a dominant tenement, though a right of way may be granted in gross. This is never presumed when it can fairly be presumed to be appurtenant to some other estate.[194] And it must be granted in writing, describing the interest conveyed.[195]

§ 4370. **Special damages.**—In a private action for obstructing a public highway, some special damage must be laid, though it is otherwise in respect to a private way.[196] Use of a sidewalk by the owner of a lot, for the purpose of passing to and from the street, is equally legitimate and equally an ordinary use as that of passing longitudinally along the street.[197]

§ 4371. **Water-right—Actual appropriation.**—A water-right is only acquired by an actual appropriation and use of the water. The property is not in the *corpus* of the water, but is only in its use.[198] A right may be acquired to its use which will be regarded and protected as property.[199] But this right carries with it no specific property in the water itself.[200] Until a claimant is himself in a position to use the water, the water-right does not exist

191 Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418; Lincoln County v. Fish, 38 Wash. 105, 80 Pac. 435.

192 Seabrook v. King, 1 Nott & McC. 140; Lawton v. Rivers, 2 McCord, 445, 13 Am. Dec. 741.

193 Washburn on Easements, 3; Wolfe v. Frost, 4 Sandf. Ch. 72.

194 Washburn on Easements, 28.

195 Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Bonelli v. Blakemore, 66 Miss 136, 14 Am. St. Rep. 550, 5 South. 228.

196 Lansing v. Wiswall, 5 Denio. 213; Aram v. Shallenberger, 41 Cal. 449; Lewiston T. Co. v. Shasta W. W. R. Co., 41 Cal. 564. See Thelan v. Farmer, 36 Minn. 225, 30 N. W. 670.

197 Schindler v. Schroth, 146 Cal. 433, 80 Pac. 624.

198 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

199 Kidd v. Laird, 15 Cal. 179, 76 Am. Dec. 472.

200 McDonald v. Askew, 29 Cal. 206.

in such sense that the mere diversion or use of the water by another is a ground of action for the conversion.[201]

The natural water in a ravine on the public lands belongs to the first appropriator thereof, and for either a diversion or appropriation thereof an action will lie;[202] and an appropriation for mill purposes stands on the same footing.[203] And such appropriation cannot be constructive;[204] it must be for some useful purpose.[205] To make a valid appropriation of water, there must be some actual beneficial purpose existing at the time or contemplated in the future as the object for which the water is utilized.[206] And a mere diversion of water without applying it to a beneficial use within a reasonable time is unlawful.[207]

§ 4372. Appropriation, how effected.—The erection of a dam across a natural watercourse is an actual appropriation.[208] Surveys, notices, stakes, and blazing of trees, followed by work and actual labor, without abandonment, will, in every case where the work is completed, give title to the water over subsequent claimants.[209] A notice of intention to appropriate the waters of a stream is evidence of possession, but of itself alone is not sufficient.[210] The mere act of commencing a ditch with the intention of appropriating is not sufficient of itself.[211] To acquire a prescriptive right to overflow the lands of another, there must have been an uninterrupted enjoyment, under claim of right, for a period of five years.[212] To effect the appropriation of water, any gulch, dry ravine, or depression in land may be used as a part of the ditch for conducting the water, and so may the lower portion of the same channel from which the water is taken.[213]

201 Kimball v. Gearhart, 12 Cal. 27.

202 Hoffman v. Stone, 7 Cal. 49; affirmed in Merced Min. Co. v. Fremont, 7 Cal. 325, 68 Am. Dec. 262; Butte Canal etc. Co. v. Vaughn, 11 Cal. 150, 70 Am. Dec. 769.

203 McDonald v. Bear River Co., 13 Cal. 220.

204 Kelly v. Natoma Water Co., 6 Cal. 105.

205 Weaver v. Eureka Lake Co., 15 Cal. 271; Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554; McKinney v. Smith, 21 Cal. 374.

206 Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.

207 Combs v. Agr. Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966. See Farmers' High Line etc. Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767.

208 Kelly v. Natoma Water Co., 6 Cal. 105.

209 Kimball v. Gearhart, 12 Cal. 27.

210 Thompson v. Lee, 8 Cal. 275.

211 Kimball v. Gearhart, 12 Cal. 27.

212 Grigsby v. Clear Lake Water Co., 40 Cal. 396. As to partial appropriation, see Smith v. O'Hara, 45 Cal. 371.

213 Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.

§ 4373. **Easement reserved.**—An aqueduct from a spring in a separate parcel of land to a mill belonging to the same owner, with the right to use the water from the spring, was reserved by implication to the grantor as against his grant of that parcel of land by metes and bounds, without reservation of, or reference to, the easement.[214]

§ 4374. **Diversion of water a nuisance.**—To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element.[215] It is a private nuisance.[216] So a ditch to carry away water which was rightfully flowing to a mining claim is as much a nuisance as a dam to flood it.[217]

An action will lie by the riparian proprietor for diverting water from a stream when the same is needed for agricultural purposes. Proprietors above him may use the water for irrigation, mills, or otherwise, but must return it to its natural channel.[218] The right of irrigation is limited by the fact whether the quantity of water in the stream is materially lessened. The use must be such as returns the water to the channel, and does not materially lessen its volume, so that the proprietor may have enough for his purposes.[219]

§ 4375. **Water-right—Not easement.**—Every person through whose land a natural watercourse runs has a right, *publici juris,* to the benefit of it for all the useful purposes to which it may be applied, and no proprietor of land on the same watercourse, either below or above, has a right unreasonably to divert it from

214 Seymour v. Lewis, 13 N. J. Eq. 439, 78 Am. Dec. 108; citing Nicholas v. Chamberlain, Cro. Jac. 121; Lampman v. Milks, 21 N. Y. 505. See, also, Hanson v. McCue, 42 Cal. 303, 10 Am. Dec. 299.

215 Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310.

216 Tuolumne Water Co. v. Chapman, 8 Cal. 397.

217 Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310; Yolo County v. City of Sacramento, 36 Cal. 193.

218 For the law on this subject, see Gale & Wheaton on Easements, 234. See, also, Greenslade v. Halliday, 6 Bing. 379; Evans v. Merriweather, 3 Scam. (4 Ill.) 496, 38 Am. Dec. 106; Ingraham v. Hutchinson, 2 Conn. 584; Colburn v. Richards, 13 Mass. 420, 7 Am. Dec. 160; Anthony v. Lapman, 5 Pick. 175; Blanchard v. Baker, 8 Greenl. 253, 23 Am. Dec. 504; Arnold v. Foot, 12 Wend. 330; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391.

219 See Angell on Watercourses, 122. Consult, also, case cited above. And to same effect, see Clark v. Pennsylvania R. R. Co., 145 Pa. St. 438, 27 Am. St. Rep. 710, 22 Atl. 989. As to right to use water for irrigation, see Alta Land etc. Co. v. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.

flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, not as an easement nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it.[220]

§ 4376. **Diverting water—Injury continuing.**—No equitable remedy can be had for a mere past diversion of a watercourse; but when the injury is continuing relief may be sought in equity.[221] Where the complaint alleged that the defendants had dug a mining-ditch above one previously constructed by defendants, and thereby diverted the water of the stream from plaintiff's ditch, it did not aver that the injury was continuing, or threatened to be continued, or likely to be continued, it was sufficient for the recovery of damages, but not for an injunction.[222] A riparian proprietor is entitled to an injunction to restrain the continued unlawful diversion of the waters of a stream adjoining his land, although the injury caused by the diversion is incapable of ascertainment, or of being estimated in damages.[223]

§ 4377. **Land bounded by pond.**—When land is conveyed bounding upon a lake or pond, if it is a natural pond, the grant extends only to the water's edge.[224] But if it is an artificial pond, like a mill-pond, caused by the flowing back of the water of the river, the grant extends to the middle of the stream in its natural state.[225] Where plaintiffs owned the water of an artificial mill-pond two hundred years old, and defendants cut and carried away ice from the same, both parties claiming title to the land covered by said pond, it was held that, although defendants owned to the middle of the original stream, they were liable, having no more right to take the ice than they would have had to divert the water.[226]

220 Johnson v. Jordan, 2 Metc. (Mass.) 239, 37 Am. Dec. 85; Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14312; Embrey v. Owen, 6 Exch. 369; Crossley v. Lightower, L. R., 3 Eq. 296.

221 Tuolumne Water Co. v. Chapman, 8 Cal. 392.

222 Coker v. Simpson, 7 Cal. 340.

223 Heilbron v. Fowler etc. Canal Co., 75 Cal. 426, 7 Am. Rep. 183, 17 Pac. 535.

224 Angell on Watercourses, 40; West Roxbury v. Stoddard, 7 Allen, 167.

225 State v. Town of Gilmanton, 9 N. H. 461; Hathorn v. Stinson, 1 Fairf. 238, 25 Am. Dec. 228; Robinson v. White, 42 Me. 209. See Angell on Watercourses, 41, and cases there cited.

226 Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462.

§ 4378. **Prescription.**—Rights to the use of water become fixed after five years' appropriation of the same;[227] and the use of water for the time limited by the statute within which an action must be commenced to determine the right to it raises a presumption of title.[228] But the burden of proving adverse possession for five years, as against a party claiming a prior right, rests on the party claiming the right by prescription.[229] An allegation that for ten years prior to the commencement of the action the plaintiff "had the undisputed usufructuary right to the use of the waters" of a certain stream, does not allege a right to the use of the waters by prescription.[230]

§ 4379. **Prior possession of water.**—The foundation of the right to water is the first possession, and this right is usufructuary, and consists not so much in the fluid as in its use.[231] The first appropriator of water of a stream has a right to its use and enjoyment to the extent of his original appropriation,[232] for mining purposes,[233] or for mill purposes,[234] or for gardening purposes.[235] And that right is not abandoned by turning it into its natural watercourse, and mingling it with the natural stream, to conduct it to another point below;[236] nor for afterwards changing the use to which he first applied the water.[237]

§ 4380. **Possession, how alleged.**—An averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water.[238] A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters

227 Crandall v. Woods, 8 Cal. 136.

228 American Co. v. Bradford, 27 Cal. 360.

229 Id. See, also, Grigsby v. Clear Lake etc. Co., 40 Cal. 396.

230 Heintzen v. Binninger, 79 Cal. 5, 21 Pac. 377.

231 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

232 Butte Canal etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769.

233 Bear River etc. Water etc. Co. v. New York Min. Co., 8 Cal. 327, 68 Am. Dec. 325.

234 Ortman v. Dixon, 13 Cal. 33.

235 Rupley v. Welch, 23 Cal. 452.

236 Butte Canal etc. Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769.

237 Davis v. Gale, 32 Cal. 27, 91 Am. Dec. 554; McDonald v. Bear River Co., 13 Cal. 220; Maeris v. Bicknell, 7 Cal. 261, 68 Am. Dec. 257.

238 McDonald & Blackburn v. Bear River etc. Water etc. Co., 13 Cal. 220; Leigh Co. v. Ind. Ditch Co., 8 Cal. 323.

of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action.[239] A general allegation in the complaint that plaintiffs were entitled to all the water flowing into the canyon at the head of their ditch, entitles them to prove a diversion of the water from the smaller branch of the canyon supplying water to that point.[240] Title to the water need not be alleged, as possession is sufficient title.[241] It is not necessary for the plaintiff to state in his complaint how or of whom he acquired his superior right to the use of water; but he must, in order to obtain relief, show in his pleading that he has such prior right, and that the defendant has unlawfully deprived him of it.[242] A complaint alleging that, for the purpose of securing a water-supply for its mill, the plaintiff took possession of certain springs by entering upon the lands and constructing the necessary ditches, reservoirs, and pipe-lines, and thereby conducted the water to the mill, and had adverse possession of the water and springs for a period of more than five years, although not containing the words "appropriated" or "appropriation," sufficiently alleges an appropriation of the water as against a general demurrer.[243] A complaint by a ditch company for itself and on behalf of its stockholders and the users of water from its ditch, in an action to restrain the wrongful diversion of water, should state the names of the users of the water, the date of their appropriations, the amount of land for which the water is needed, and all the facts necessary to show valid prior appropriations which have not been waived or abandoned.[244] Where, in a suit to recover damages for diverting water claimed for irrigating purposes, and for an injunction, the defendant made no claim to be the riparian proprietor of certain streams, but claimed the waters by prior appropriation and prescription, it was held that, in order to support the claim for damages, the material allegations in the complaint were prior appropriation of the water by the plaintiff, and the diversion thereof by the defendant, and that it was unnecessary to aver riparian ownership in the plaintiff. It was also held that to enable the plain-

239 Leigh Co. v. Ind. Ditch Co., 8 Cal. 323.

240 Priest v. Union Canal Co., 6 Cal. 170.

241 Penfield v. Rich, 1 Wend. 380.

242 Downing v. Agr. Ditch Co., 20 Colo. 546, 39 Pac. 336.

243 Shenandoah etc. Milling Co. v. Morgan, 106 Cal. 409, 39 Pac. 802.

244 Farmers' etc. Ditch Co. v. Agr. Ditch Co., 3 Colo. App. 255, 32 Pac. 722. See Farmers' etc. Reservoir Co. v. Southworth, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; Combs v. Agr.

tiff to obtain the injunction it was only necessary, in addition to the facts averred in the complaint which were relied upon for a judgment for damages, to aver facts sufficient to obtain equitable relief, without repeating the averments already made.[245]

§ 4381. **Quantity of water.**—An averment as to the precise quantity of water required for the use of the mill, and to which plaintiff claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res adjudicata* in a subsequent suit.[246] Where the right rests in contract, the amount of water to which the plaintiff was entitled should be alleged according to the fact.[247]

§ 4382. **Rights of first appropriator.**—The rights of the first appropriator of water are equally protected from damage by subsequent appropriators above him as well as below him.[248] If a party, by "priority of appropriation," has actually acquired "the better right" to the use of water from a natural stream, he may bring and maintain an action jointly against all parties junior in right to himself, whenever the result of their acts, either joint or several, deprives him of such better right or substantially interferes therewith.[249] The question to be determined in controversies between prior and subsequent locators is, Have the use and enjoyment of the water for the purposes for which the first appropriator claims it been impaired by the acts of the subsequent claimant?[250] One who appropriates water in a stream for mining purposes must so use it as not to injure or destroy orchards or gardens bordering on the stream and located prior to the appropriation.[251]

Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.

245 Jerrett v. Mahan, 20 Nev. 89, 17 Pac. 12.

246 McDonald v. Bear River etc. Water etc. Co., 15 Cal. 145.

247 Wilbur v. Brown, 3 Denio, 356. As to the sufficiency of this averment, see Twiss v. Baldwin, 9 Conn. 291; Williams v. Morland, 2 Barn. & Cress. 910; Shears v. Wood, 7 Moore, 345.

248 Hill v. King, 8 Cal. 336; Phœnix Water Co. v. Fletcher, 23 Cal. 481.

249 Saint v. Guerrerio, 17 Colo. 448, 31 Am. St. Rep. 320, 30 Pac. 335. Compare Hillman v. Newington, 57 Cal. 56; People v. Gold Run etc. Min. Co., 66 Cal. 149, 56 Am. Rep. 80, 4 Pac. 1152.

250 Hill v. Smith, 27 Cal. 476.

251 Wixon v. Bear River etc. Water etc. Co., 24 Cal. 367, 85 Am. Dec. 69.

§ 4383. Diversion of water—Parties plaintiff.—The several owners of the waters of a stream may unite as plaintiffs in an action to restrain a diversion of the waters by a third person, or to abate an obstruction therein as a nuisance; but they cannot for that reason unite in an action for damages. And if the several owners of the stream join as plaintiffs in an action for damages for diverting the waters of the stream, and for an injunction to restrain the defendants from the further diversion thereof, the complaint is subject to a demurrer, both for a misjoinder of parties plaintiff and for a misjoinder of causes of action.[252]

§ 4384. Riparian rights.—In California, the right to water must be treated as a right running with the land;[253] and he to whom it first comes has a right to its reasonable use, as for watering cattle and for domestic purposes; but he has no right to build a dam across it and spread out the water so that it is lost by absorption, and thereby to injure another riparian proprietor below.[254] A riparian owner may restrain an upper riparian owner from maintaining a dam across the foot of a lake which is the source of the stream; and the fact that he helped clean out such stream and used the water so stored up does not estop him from such action.[255] Possession of public lands gives a right to the use of water for natural wants, but not generally to divert it.[256]

§ 4385. Running water.—So long as the water of a stream continues to flow in its natural course, it cannot be made the subject of private ownership.[257] And when the water of a stream leaves the possession of a party, all his right to any interest in it is gone.[258] If the plaintiff was only entitled to surplus water, his complaint must allege that surplus water existed, or would have existed but for the defendant's acts.[259]

252 Foreman v. Boyle, 88 Cal. 290. 26 Pac. 94. See Tennant v. Pfister, 51 Cal. 514; Barham v. Hostetter, 67 Cal. 274, 7 Pac. 689; Miller v. Highland Ditch Co., 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523.

253 Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140.

254 Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128.

255 Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272.

256 American Co. v. Bradford, 27 Cal. 360. See Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399.

257 Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472.

258 Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408.

259 Wilbur v. Brown, 3 Denio, 356.

§ 4386. **Water-ditch.**—Where the plaintiffs have a right of way for their ditch upon the surface, and the defendants have also a right to mine in the bowels of the earth beneath, which rights are not necessarily incompatible, the maxim, *Qui prior est tempore, potior est jure,* is not of controlling weight, but it falls under the maxim, *Sic utere tuo ut alienum non lædas.*[260] The question of negligence in the management of a water-ditch, and the degree of it, must necessarily depend in a great measure upon the surrounding facts, such as the existence and exposure of property below the dam, and the like; for what under one state of facts would be prudence might, under a different condition of things, be gross or even criminal negligence.[261] How far, in cases where negligence is charged against the defendants, a court of equity will interfere by injunction is not decided.[262]

§ 4387. **Rights of millowners.**—The grant of a mill carries with it raceways and conduits supplying the mill with water, and water-rights essential to the enjoyment of the mill.[263] So a reservation of a mill from a grant would reserve easements essential to it in the land granted.[264]

§ 4388. **Dam as nuisance—When action lies.**—To authorize the abatement of a dam on the ground of its being a nuisance, it must at the time it is abated be considered as a nuisance. The fears of persons, however reasonable, that a thing will become a nuisance, public or private, do not constitute an actionable nuisance, or one which may be abated.[265] The common law allows the owner the soil over which a floatable but unnavigable stream flows to build a dam across it, and to erect a mill thereon, pro-

260 Clark v. Willett, 35 Cal. 534.

261 Wolf v. St. Louis Ind. Water Co., 10 Cal. 541.

262 Clark v. Willett, 35 Cal. 534.

263 4 Kent Com. 467; Hinchliffe v. Earl of Kinnoul, 5 Bing. N. C. 1; 6 Scott, 650; Hall v. Lund, 1 Hop. & C. 676; Whitney v. Olney, 3 Mason, 280, Fed. Cas. No. 17595; United States v. Appleton, 1 Sumn. 492, Fed. Cas. No. 14463; Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19; Johnson v. Jordan, 2 Metc. 234, 37 Am. Dec. 85; Carbrey v. Willis, 7 Allen, 369, 83 Am. Dec. 688; Oakley v. Stanley, 5 Wend. 523; Le Roy v. Platt, 4 Paige, 77; Farrar v. Stackpole, 6 Greenl. 154, 19 Am. Dec. 201; New Ipswich Fact. v. Bachelder, 8 N. H. 190; Pickering v. Stapler, 5 Serg. & R. 107, 9 Am. Dec. 336; Elliott v. Sallee, 14 Ohio St. 10; Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748; Washburn on Easements, 42, 43.

264 Pettee v. Hawes, 13 Pick. 323.

265 Gates v. Blincoe, 2 Dana, 158, 26 Am. Dec. 440.

vided he makes a convenient and suitable passageway for the public, by or through the dam.[266] The owner of the dam is bound to so govern and control it that injury may not result to his neighbors.[267] The thing complained of cannot be abated until it actually becomes a nuisance. Yet an erection may be a nuisance at a time when it is causing no actual damage.[268]

An action to abate a nuisance in a highway by water, obstructing the free use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land.[269] If a nuisance in a highway only affects the plaintiff in common with the public at large in the use of the highway, he cannot have his private action; but if the free use of his private property is interfered with by such nuisance, he may have his private action to abate the same.[270] Such action may be maintained by the road overseer or the commissioner of highways.[271] Injury to the naked right to have the water flow as it would naturally do is sufficient to maintain the action.[272] But where plaintiffs owned certain mining claims and quartz-lodes on the banks of a stream, above the mill and dam of defendant, defendant commenced raising his dam two feet higher; plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water upon plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz-mill, which they intended to construct. It was held that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained.[273]

266 Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561.

267 Fraler v. Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562. See Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685.

268 Amoskeag Mfg. Co. v. Goodale, 46 N. H. 56. See Angell on Watercourses, 580.

269 Blanc v. Klumpke, 29 Cal. 156; Small v. Harrington, 10 Idaho, 499, 79 Pac. 461; Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807.

270 Id. See Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813, 23 Pac. 878, 7 L. R. A. 134.

271 Cal. Pol. Code, § 2743.

272 Boliver Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 241; Putman v. Hussey, 12 Me. 407; Whipple v. Cumberland Mfg. Co., 2 Story, 661, Fed. Cas. No. 17516; Woodman v. Tufts, 9 N. H. 88; Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739; Williams v. Esling, 4 Pa. St. 486, 45 Am. Dec. 710; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265. See Angell on Watercourses, 142; Webb v. Moler, 8 Ohio, 548.

273 Harvey v. Chilton, 11 Cal. 120.

§ 4389. **Covenant in deed.**—If the purchaser of a mill-site and water-power accepts from the vendor a deed, without any covenant for his protection as to the height of the dam or extent of the flow to which he is entitled, and the purchaser is subject to an action of damage by reason of the improper height of the dam, he is without remedy either at law or in equity.[274]

§ 4390. **Dam as nuisance—Allegations.**—The union in one count of a complaint of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek . . . so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they . . . hoist for the purpose of clearing out said dams and flumes of slum, stone, and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable on the ground that it unites several distinct causes of action in one count. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means is not important enough to require several counts.[275]

§ 4391. **Injunction versus dam.**—A perpetual injunction to restrain the defendants from raising their dam higher than the point designated was allowed.[276] The court may enjoin the improper use of a dam which in itself is not a nuisance.[277] So an injunction will be granted for the diversion of water from a stream,[278] where the injury is continuing.[279] A riparian proprietor cannot dam up the waters of a stream so as to cause loss by evaporation, to the injury of other riparian owners. And the fact that such water originates in springs on the premises of the party erecting the dam is immaterial, as his property rights in the water are lost when it passes into the watercourse.[280]

274 Angell on Watercourses, 557; Hopper v. Lutkins, 3 Green Ch. 149.

275 Gale v. Tuolumne Water Co., 14 Cal. 25.

276 Ramsay v. Chandler, 3 Cal. 90.

277 Byers v. Colonial Ins. Co., 134 Cal. 553, 66 Pac. 732.

278 Tuolumne Water Co. v. Chapman, 8 Cal. 392.

279 Coker v. Simpson, 7 Cal. 340. See Rupley v. Welch, 23 Cal. 452.

280 Barneich v. Mercy, 136 Cal. 205, 68 Pac. 589.

§ 4392. **Degree of care with dam.**—In an action for injuries to a garden, occasioned by the breaking of a reservoir, the court instructed the jury that to entitle plaintiff to recover it must appear that the breaking of the reservoir resulted from the gross negligence of defendants, and then proceeded to explain that defendants must have taken the same care of their reservoir and of the water in it as they would have done, being prudent men, had the garden of plaintiff been their own property, and that otherwise they had been guilty of gross negligence, and were liable in damages. It was held that, although the instruction without the explanation was wrong, still with the explanation it was right, and could not have misled the jury.[281]

§ 4393. **Dam as nuisance.**—Where defendants erected a dam whereby the waters which during freshets found their way into the bay, across the land of the defendants, were diverted from their natural course, and made to flow upon the plaintiff's land, injuring the crops and rendering it unfit for cultivation, the dam is clearly a nuisance.[282] In Ohio, however, the use of streams of water for domestic, agricultural, and manufacturing purposes being to some extent *publici juris,* an action for a nuisance caused by an obstruction or diversion of the water of a stream for any such purpose will not lie, unless the damages occasioned thereby be real, material, and substantial.[283]

§ 4394. **Obstructing flow of tailings.**—In an action where the plaintiffs allege that they are the owners of a certain mining claim, which claim cannot be worked without the use of the canyon as an outlet for water and tailings; that the grade of the canyon is light; and that the defendants have erected and are maintaining a dam across the canyon at a point below their claim which obstructs the flow of water and tailings to such an extent as to render the working of their claim impracticable, upon an issue of title to the ground, to entitle the plaintiffs to recover, it should have appeared—1. That the plaintiffs owned the ground; 2. That the dam prevented them from working it to advantage; 3. Alternatively, that the defendants had no title to the bed

281 Todd v. Cochell, 17 Cal. 97.

282 Castro v. Bailey, Cal. Sup. Ct., Oct. T., 1869; citing Ashley v. Wolcott, 11 Cush. 192; Luther v. Winnisimmet Co., 9 Cush. 171.

283 Cooper v. Hall, 5 Ohio, 321; followed and approved in McElroy v. Goble, 6 Ohio St. 187.

of the canyon; or if they had, that their right was subsequently acquired; or, if prior, that the dam was not needed to enable the defendants to work to advantage.[284]

§ 4395. **Overflowing water-ditch.**—A complaint which alleges that the plaintiffs were on a certain day the owners and proprietors of a certain valuable water-ditch for the purpose of conveying water, and at which time and place the defendants were also owners of a certain other ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so carelessly and negligently attended to, that said ditch broke away, and the water therein flowed over and upon the said ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth, and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage in the sum of three thousand dollars, and thereof they bring suit, is sufficient.[285]

§ 4396. **Overflowing of dam and ditch.**—The overflowing of a dam is a nuisance.[286] While a ditch by which the waters of a stream have been appropriated is out of repair, and not in a condition to carry water, an action will not lie to abate as a nuisance a reservoir, constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained, and caused to flow unequally.[287]

§ 4397. **Raising dam.**—Because an appropriator diverted the water of a stream by means of a dam and ditch, it does not necessarily follow that he had a right to raise his dam higher and higher, as occasion might require, to obviate obstruction in the use of the water in the manner of its said original appropriation. In such cases, the question of his right must be subordinate to a subsequent appropriator.[288]

284 Stone v. Bumpus, 40 Cal. 430.

285 Tuolumne County Water Co. v. Columbia etc. Water Co., 10 Cal. 195.

286 Ramsay v. Chandler, 3 Cal. 90. See McKee v. President etc. Canal Co., 125 N. Y. 353, 21 Am. St. Rep. 740, 26 N. E. 305.

287 Bear River etc. Water etc. Co. v. Boles, 24 Cal. 359.

288 Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685.

§ 4398. **Relief from dam.**—Where plaintiff's mining claim was overflowed by means of a dam erected by the defendant, the decree should have ordered a reduction of the dam so as to prevent the overflow, or, if necessary, its entire abatement.[289]

§ 4399. **Breaking dam—Averment.**—In an action for damages, and for breaking defendant's dam and flooding plaintiff's mining claim, where the complaint is in one count, and charges that "defendant's said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of said defendants, broke away," etc., it was held that the complaint is sufficient.[290]

§ 4400. **Pollution of stream—Jurisdiction.**—A complaint alleging that the relators are owners of land situated in certain counties of the state which is irrigated by the waters of a certain creek, and that the defendants are operating stampmills, and polluting the stream with mineral refuse therefrom, thus rendering the water unfit for irrigating purposes, and the ultimate effect of which will be to destroy the value of vast tracts of land for agricultural uses, and praying that the defendants be perpetually enjoined from so polluting the water, tenders an issue of a private, and not of a public, character, for the trial of which the supreme court of Colorado will not assume original jurisdiction.[291]

§ 4401. **Diversion of water—Res adjudicata.**—In an action to recover damages for the diversion of water of a stream from plaintiffs' mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claim to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiffs' right to the exact quantity of water claimed, so as to be *res adjudicata* in a subsequent suit.[292] Judgment in an action to abate a nuisance is a bar to

289 Ramsay v. Chandler, 3 Cal. 90.

290 Hoffman v. Tuolumne County Water Co., 10 Cal. 416.

291 People v. Rogers, 12 Colo. 278, 20 Pac. 702. As to right of action for pollution of water, see Barnard v. Sherley, 135 Ind. 547, 41 Am. St. Rep. 454, and note, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568.

292 McDonald v. Bear River etc. Water etc. Co., 15 Cal. 145.

a consequent action to remove the same thing as an obstruction.[293]

In an action to maintain a riparian right to water, a defense of a prescriptive right of diversion is sufficiently pleaded by setting up the section of the Code of Civil Procedure under which the right was acquired.[294]

§ 4402. Irrelevant allegations.—In an action to abate a nuisance caused by running a ditch for the conveyance of water across the land of the plaintiff, the defendant set up in answer that it was mineral land belonging to the United States, and that the ditch was for mining purposes. Such allegations are irrelevant, and constitute no defense.[295]

§ 4403. Denial of ownership.—If the plaintiff sues to recover damages for flowing sand and sediment upon land averred in the complaint to be his, and the answer denies that plaintiff owns the land, and that defendant wrongfully flowed the sand and sediment upon the land, without denying that he caused the same to flow upon the land, it does not admit that defendant caused such material to flow upon the plaintiff's land. In such case, the plaintiff's ownership of the land is put in issue.[296]

§ 4404. General denial and justification of ownership.—In the case of a commissioner suing the owner of the land for obstructing a public highway, it is the undoubted right of the defendant to question the legal existence of the highway. Such a right, however, cannot be asserted by him in any case in a justice's court. When called upon to plead, if he only intends to deny the fact that he placed the obstruction in the road, he may rely upon a general denial of the complaint. If he wishes to justify upon the ground that he had the right to put the fence across it as owner of the land, he must allege that he is such owner; and this is sufficient to raise a question of title in a justice's court; for such an answer can mean nothing unless the defendant intends to question the public right of way over his land.[297]

293 Phelan v. Quinn, 130 Cal. 374, 62 Pac. 623.

294 Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379. See Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401.

295 Weimer v. Lowery, 11 Cal. 104.

296 Wood v. Richardson, 35 Cal. 149.

297 Little v. Denn, 34 N. Y. 452.

§ 4405. **Want of care.**—The want of reasonable care on the part of another, who is injured by the breaking, cannot be set up in defense to an action for damages for the injuries thus suffered in the breaking of defendant's dam.[298]

§ 4406. **Judgment.**—There being no proof to the effect that the enterprise in question, such as the slaughtering of cattle, cannot be conducted without causing a nuisance, its conduct cannot be enjoined, but may be curtailed so as to avoid maintenance of a nuisance.[299]

FORMS—NUISANCES.

§ 4407. **Complaint for erecting nuisance.**

Form No. 1199.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at all the times hereinafter mentioned, was, the owner and possessed of the house and lot number . . . street, . . .

II. That the defendant was also then and there the owner and possessed of certain other premises contiguous to [or, in the vicinity of] plaintiff's said premises.

III. That the defendant on or about the . . . day of . . . , 19. . , erected on his said premises a slaughterhouse and cattle-pens, and furnaces and vats for making lard and tallow, and thereafter kept in his said pens, and slaughtered in his said slaughterhouse, large numbers of cattle and hogs, and made thereat tallow and lard, and thereby and by means of said several acts and things caused noxious and offensive smells, and loud and offensive noises, and tainted and corrupted the atmosphere so as to render the dwelling-house and premises of the plaintiff unfit for habitation, and compelled plaintiff to remove from and abandon the same, and thereby also prevent him from renting or otherwise receiving any income therefrom [if other special damage accrued, state it], to the damage of the plaintiff in the sum of . . . dollars.

Wherefore the plaintiff demands judgment:

298 Fraler v. Sears Union Water Co., 12 Cal. 555, 73 Am. Dec. 562.

299 State v. Schaefer, 45 Wash. 9, 87 Pac. 949.

1. That the defendant be restrained by injunction from maintaining or using the same building as a slaughterhouse, or otherwise, to the nuisance of the plaintiff, or permitting it to be so used.

2. That the plaintiff recover from the defendant . . . dollars damages, and his costs.

§ 4408. Complaint for abatement of nuisance.

Form No. 1200.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at all the times hereinafter mentioned was, the owner in fee of [the house and lot No. . . . street . . .].

II. That the defendant is, and at all the said times was, the owner in fee of [the lot No. . . . street, . . . adjoining said property].

III. That on the . . . day of . . ., 19. . , the defendant erected upon his said lot a slaughterhouse, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there, [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff, or as the case may be].

IV. That the plaintiff has been compelled by reason of the premises to abandon the said house, and has been unable to rent the same.

Wherefore the plaintiff demands judgment, that the said nuisance be abated.

§ 4409. **Allegation of nuisance from noise and vibration of heavy machinery.**

Form No. 1201.

[TITLE.]

[Allege ownership and proximity of plaintiff's and defendant's property.]

That since about the . . . day of . . ., 19. . , the defendant has carried on, and still carries on, in certain buildings upon its said premises, the business of manufacturing [state what], by the use of heavy hammers and other noisy machinery, which are used with great violence and frequency, and thereby has caused, and still continues to cause, vibrations of the earth to take place and sundry great noises to continue night and day, and thereby

has done great damage to the said dwelling-house of said plaintiff, in the sum of . . . dollars.

That said noises and vibrations have interfered with, and still continue to interfere with, the comfort of the plaintiff and his family, in the occupation of said dwelling-house, making it difficult for them to sleep, and making it uncomfortable and impossible to enjoy the ordinary use of said premises as a dwelling-house, and to pursue the ordinary occupations of life therein.

§ 4410. Complaint for abatement of nuisance causing noise.

Form No. 1202.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [Allege as in form No. 1199.]

III. That on or about the . . . day of . . ., 19.., the defendant erected on his said lot a factory and put a steam trip-hammer therein and ever since has owned and operated said factory for manufacturing purposes, and in so doing has used said trip-hammer almost daily.

IV. That the use of said trip-hammer makes so loud a noise as to render it impossible, while it is being operated, to hear ordinary conversation in the plaintiff's said house, and causes great annoyance to him and his family.

V. That the plaintiff, on the . . . day of . . ., 19.., notified the defendant that such use of said trip-hammer was a nuisance, for said reasons, and requested him to discontinue its use, but the defendant refused so to do.

Wherefore the plaintiff demands judgment, that the said nuisance be abated.

§ 4411. Complaint for continuance of nuisance.

Form No. 1203.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at all times hereinafter mentioned was, the owner and possessed of [the house and lot No. . . . street, . . .].

II and III. [Follow form No. 1199.]

IV. That on the . . . day of . . ., 19.., the plaintiff requested the defendant to remove the said [slaughterhouse, or to cease using it for that purpose], but he has not done so.

[DEMAND OF JUDGMENT.]

§ 4412. Allegation where land has been transferred.

Form No. 1204.

That on or about the . . . day of . . ., 19.., the defendant A. B. conveyed said premises to the defendant C. D., who ever since has been in possession of the same and wrongfully maintains said nuisance.

That on the . . . day of . . ., 19.., the plaintiff requested him to remove and abate the same.

§ 4413. Complaint for obstructing way.

Form No. 1205.

[Title.]

The plaintiff complains, and alleges:

I. That he is, and at the time hereinafter mentioned was, possessed of a house in the town of . . ., county of . . . [or describe premises], and the same fronted upon a certain road or highway.

II. That he was accustomed to pass [with vehicles; or, on foot] along that certain highway [or, private way] leading to his said house.

III. That on the . . . day of . . ., 19.., the defendant obstructed the said highway, so that the plaintiff could not pass [with vehicles; or, on foot, as the case may be] along said highway, and has ever since obstructed the same.

IV. [State special damage.]

[Demand of Judgment.]

§ 4414. Complaint for obstructing private way.

Form No. 1206.

[Title.]

The plaintiff complains, and alleges:

I. That the plaintiff, at the time hereinafter mentioned, was, and still is, possessed of [here describe his premises; e. g. a meadow in the town of . . ., and county of . . .], and had a right of way therefrom over the adjoining land to the highway [or, to other land of the plaintiff] to pass and repass on foot freely at all times [or, with horses; or, with carts, designating the use of the way according to the fact].

II. That the defendant, on the . . . day of . . ., 19.., and at other times thereafter, and before this action, wrongfully ob-

structed said way by [building a fence across it], whereby the plaintiff was for a long time [or, was, and still is,] prevented from enjoying said way, to his damage in the sum of . . . dollars.

III. [Allege other and special damage if any.]

[Demand of Judgment.]

§ 4415. Allegation of nuisance by house of prostitution.

Form No. 1207.

[Title.]

[Allege ownership of adjoining premises.]

That about the month of . . . , 19. . , the defendant erected upon his said premises a building, and immediately occupied, and has ever since and does now occupy, the said building as a house of prostitution, and for the purpose of assignation and prostitution; and has therein maintained, and does therein maintain, and carry on said immoral practices, and does maintain said house as a public resort for immoral, lewd, and obscene purposes, and that defendant's said premises have been and are the resort, at all times of the night especially, of lewd, immoral, and dissolute characters, both male and female; that loud, offensive, and disorderly and unseemly behavior is constantly attendant thereupon, and assails the sight and hearing of plaintiff and his family and visitors.

That by reason of the premises the comfortable use and enjoyment of said property of plaintiff has been, and is, and will be greatly interfered with and destroyed; and the said property is rendered unsuitable and unsalable for residence purposes, and thereby greatly depreciated and lessened in value, to the plaintiff's damage to the amount of . . . dollars.

§ 4416. Complaint to abate gasworks.

Form No. 1208.

[Title.]

The plaintiff complains, and alleges:

[After alleging corporate character of defendant, if necessary, and also plaintiff's and defendant's ownership of adjoining premises, continue:]

III. That about the year 19. . the defendant erected a new tank for the purpose of its gasworks on its said premises, the

side of which said tank stands within a few feet of plaintiff's said premises.

That about the year 19.. the defendant began, and ever since has, and still does, make its gas at said works from naphtha, and that said tank was, and still is, used to store said naphtha for purposes aforesaid.

That the said naphtha is a noxious, offensive, and sickening mineral substance, and destructive to the health and comfort of those required to remain in close proximity to it.

That said tank was erected, and is maintained, in a negligent and unskillful manner, and by reason of the negligence and want of care in the construction, use, and maintenance of said tank, and the negligent and unskillful manufacture of gas from naphtha, the defendant has, since the year 19.. , and still does, maintain a nuisance injurious to the comfort and enjoyment of said plaintiff, and injurious to the rental value of said premises, to plaintiff's damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4417. Complaint to abate soap factory.

Form No. 1209.

[Title.]

The plaintiff complains, and alleges:

[Allege plaintiff's and defendant's ownership of adjoining premises, etc.]

That the defendant, on or about the . . . day of . . . , 19.. , erected on said premises a certain boiler and other apparatus for manufacturing soap, and thereupon began, and has since continued, and is now engaged in, the boiling of large quantities of grease, dead carcasses, offal of beasts, and other dead animal matter on said premises, whereby many unwholesome and offensive smokes and stenches have been and still are emitted, so that the air surrounding the premises of the plaintiff has been, and still is, filled and impregnated with the smokes and stenches, and rendered offensive and unhealthful, to the great injury of the plaintiff and his family.

That by reason of said smokes and stenches entering the said dwelling-house of the plaintiff the comfort of the plaintiff and his family, and their health, as well as the enjoyment of their said home, have been and are greatly impaired, and the value of

said premises diminished; and he is thereby hindered from selling said premises, which he much desires to do; and [here state grounds of special damage], to the plaintiff's damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4418. Complaint in equity by city to enjoin erection of building in public street.

Form No. 1210.

[Title.]

The plaintiff complains, and alleges:

I. That the plaintiff is now, and since the . . . day of . . ., 19.., has been, a municipal corporation organized and existing under and by virtue of the laws of the state of . . .

II. That there is now, and for . . . years last past has been, a public street and highway existing in the said city known as . . . street, . . . feet in width, and extending from [describe street], which has been, and now is, a public highway of great importance and largely and constantly used by teams and foot-passengers for the purpose of travel and trade.

III. That on or about the . . . day of . . ., 19.., the defendant caused to be made an excavation, about . . . feet long and . . . feet in width, in said street [describe location], and has begun to lay walls and foundations in said excavation, and is continuing to build said walls and foundations, and gives out and states that he will immediately erect thereon a permanent building of one or more stories in height, whereby said street will be greatly impaired in its usefulness and the width thereof reduced to . . . feet, and the same will be rendered less convenient for public travel and convenience.

IV. That this plaintiff has duly notified said defendant not to erect said building, but that defendant threatens to continue and complete the same, and that plaintiff fears and believes that he will do so, thereby causing a multiplicity of suits, and working an irreparable injury to the plaintiff; that the plaintiff has no adequate remedy at law.

Wherefore, etc. [Prayer for perpetual injunction.]

§ 4419. Complaint in equity to enjoin threatened nuisance by deposit of garbage on neighboring lands.

Form No. 1211.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [Allege plaintiff's and defendant's ownership of adjoining property.]

III. That defendant, in or about the month of . . ., 19. ., began to deposit on his said lot, and still continues to deposit thereon, large quantities of garbage, offal, manure, decayed vegetables, and animal matter, and to allow others to deposit such articles and material thereon, and gives out and threatens that he intends to continue to use said lot for the purpose of depositing said garbage and material thereon.

IV. That the effect of such deposit of garbage and other material on said lot has been to fill, and in the future will continue to fill, the air in and about the plaintiff's said dwelling-house with offensive and unhealthy stenches, and to endanger the plaintiff's health and that of his family, to their great annoyance and discomfort, and to the irreparable injury of the plaintiff, by rendering his house uninhabitable, and greatly diminishing the value thereof.

Wherefore, the plaintiff demands judgment: 1. That the defendant, and all persons claiming or acting under him, be perpetually enjoined and restrained from using or permitting the use of said lot and premises for the uses aforesaid; 2. For the costs and disbursements of this action; 3. For such other or further relief as may be equitable.

§ 4420. Complaint in equity to enjoin nuisance caused by polluting waters of stream by refuse of starch factory.

Form No. 1212.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff for . . . years last past has been, and now is, the owner of a farm in . . . county, described as follows: [insert description], upon which are the plaintiff's home and farm-buildings, and where the plaintiff with his family has at all times resided, and still continues to reside.

II. That the said farm is situated on the . . . river, about one half-mile of the boundary-line thereof being the thread of the

center of said river, and that said river is a public navigable river running through said county, and mostly consisting of spring water, and, except for the acts of the defendant hereinafter named, of a clear and wholesome quality, and suitable for use for domestic and farm purposes.

III. That the defendant for . . . years last past has owned and operated, and still owns and operates, a large manufacturing establishment upon the bank of said river several miles upstream from plaintiff's said farm, and that said defendant has continuously during said . . . years wrongfully and negligently thrown and emptied into said river, and continues to empty into said river, large quantities of slops, garbage, refuse, offal, starch, rotten potatoes, and pulp, which are offensive and unhealthful, and have been and are carried down stream, polluting the waters of said river, and especially along and in front of the plaintiff's said farm, generating a poisonous scum thereon, and infecting the air with offensive and noxious smells and miasma, to the great injury and detriment of the plaintiff and his family.

IV. That the plaintiff has suffered, and still suffers, a special and peculiar injury resulting from the said wrongful acts of the defendant, in that he is now, and has been during all of said time, deprived of the use of the water of said river for farm and domestic purposes, and is deprived from cutting ice thereon, and in that the waters of said river have been and are rendered unwholesome and poisonous, and that the air surrounding the plaintiff's said dwelling-house has been and is rendered unhealthful, thus reducing the value of said farm in the sum of . . . dollars, making his said home unfit for habitation for himself and his family, all to the great damage of the plaintiff.

V. That the said nuisance is continuous and constantly recurring, and that it will work an irreparable injury to the plaintiff and to his said farm, and will result in interminable litigation unless the plaintiff have relief in equity, and that the plaintiff has no adequate remedy at law; that the defendant threatens and gives out that he will continue to operate said factory and empty the said slops and refuse in the said river in the future in the same manner as heretofore, and that the plaintiff believes and fears that he will do so unless restrained by the injunctional order of this court.

Wherefore, the plaintiff demands judgment, that the said defendant, his agents and servants, he perpetually enjoined and restrained from emptying or throwing any of said slops or refuse matter into said river, that a temporary injunction issue in this cause, that the plaintiff have judgment against the defendant for his damages, already suffered, to-wit, the sum of . . . dollars, with costs, and that he have such other or further relief as may be just and equitable.

§ 4421. Complaint for diverting water from quartzmill.

Form No. 1213.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at the time hereinafter mentioned was, possessed of a quartzmill capable of running five stamps, situated [state where], on . . . creek, in this state.

II. That for more than five years previous to the said time hereinafter mentioned, the plaintiff has had the undisputed usufructuary right to the use of all the water of said creek.

III. That on the . . . day of . . ., 19. . , the defendant erected a dam across the bed of said creek above the said mill, and thereby diverted the water from the said mill, and ever since has continued the same dam and obstruction to the free flow of the water in said creek, so that less water ran into the plaintiff's mill.

IV. That by reason thereof the plaintiff has been unable to run more than two stamps, whereas, before the said diversion of the water, he was able to run five stamps; to the damage to the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4422. Allegation of right by prior appropriation.

Form No. 1214.

That on the . . . day of . . ., 19. . , and before the diversion hereinafter mentioned, the plaintiff appropriated all the waters of said gulch [or, creek] to his use, and from that time till the time hereinafter mentioned has enjoyed the uninterrupted use of the same.

§ 4423. Complaint by prior appropriator for diversion of water.

Form No. 1215.

[TITLE.]

The plaintiff complains, and alleges:

I. That for . . . years last past, and up to the time of the filing of the complaint herein, plaintiff and his grantors have been, and the plaintiff now is, the owner of all that certain real estate situated in the county of . . ., state of California, described as follows: . . .; and of the right to use, for irrigating the same, all of the flow of that certain stream of water situated in said county and known as . . . creek.

II. That by plaintiff and his grantors for and during all of said . . . years last past the use of said stream of water has been as follows, to-wit: for the first . . . years thereof plaintiff's grantors, under an honest claim of right so to do by prior appropriation, did use for irrigating purposes all of the flow of said stream adversely to all persons, peaceably, and without let or hindrance whatever, and from that time to this date plaintiff's and his grantors' use thereof has been in such manner and extent above stated, except that within the last past three years the defendants have interrupted such use, as hereinafter alleged.

III. That at frequent times during the past three years the defendants have diverted water from said stream without consent of plaintiff or his grantors, and have maintained, and do now maintain, in said stream dams and obstructions to the flow of said water which divert the water of said stream away from the ditches of the plaintiff, so that the same is lost to the plaintiff, and thereby interfere with the comfortable enjoyment and free use by plaintiff of its said property.

IV. That the defendants threaten to continue to maintain said obstruction in said stream, and to continually divert said water and prevent plaintiff from using the same.

[DEMAND OF JUDGMENT.]

§ 4424. Complaint for diverting water from flouring-mill.

Form No. 1216.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at the time hereinafter mentioned was,

possessed of a flouring-mill, situated on a certain creek known as the . . ., in the town of . . ., county of . . ., in this state.

II. That the water of the said creek was accustomed to flow into the said mill.

III. That on the . . . day of . . ., 19. . , the defendant diverted the water of the said creek away from said mill, so that less water ran into it than before.

IV. That by reason thereof the plaintiff has been unable to grind more than . . . barrels of flour per day, whereas, before the said diversion of water he was able to grind . . . barrels per day; to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4425. Complaint for diverting water from sawmill.

Form No. 1217.

[Title.]

The plaintiff complains, and alleges:

I. That the plaintiff, before and at the time of the committing of the grievance hereinafter stated, was possessed of a certain water-mill, called the . . . sawmill, with the appurtenances, situated on . . . creek [or, . . . river; or, . . . brook], at . . ., in the county of . . .

II. That the said plaintiff had a right to use and employ all the water of said [creek; or, river; or, brook], running in its natural channel to said mill, without its being unreasonably retarded, or in any way obstructed and diverted therefrom.

III. That the said defendant did, on the . . . day of . . ., 19. . , dig up and remove the bank of said stream, and did divert a great part of the water thereof, so naturally running in said stream, from the bed of said [creek], and from the said mill of the said plaintiff, and hath from thence hitherto, and up to the commencement of this suit, kept up and continued the diversion of said water from the bed of said creek, and from the said mill of this plaintiff.

IV. That the said mill, before said diversion of the water of said creek, was able and used to saw . . . thousand feet of lumber in every twenty-four hours; but by reason of said diversion of the water of said stream, now, and during the time aforesaid, the said mill is and was able to saw only . . . thousand feet of lumber in every twenty-four hours. By means whereof the said

plaintiff has been deprived during all that time of the usual profits of his said mill, and still continues deprived thereof, to the damage of the said plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4426. Complaint for erecting dam above plaintiff's dam.

Form No. 1218.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., and ever since that day, the plaintiff has been in the actual possession of an ancient grist-mill, situated on [state what stream] in [etc.], called [etc.], together with an ancient dam, to raise a head of water as high as should be necessary for said mill, and of the right to have the whole water of said stream, without obstruction or impediment, flow into and upon the pond for the benefit of said mill, as ancient rights and privileges, appurtenant to said mill.

II. That the defendant did, on the . . . day of . . ., 19.., erect a new dam across the said stream, above the plaintiff's dam aforesaid, within the limits of the plaintiff's pond and ground, and thereby cut off part of his said pond, backed the water above, and stopped its natural course as it anciently used to run; and that he still continues his new dam and obstruction, thereby frequently stopping the water from reaching the plaintiff's mill, and obliging the same to stand idle for want of water; and at other times letting out the water through said new dam so suddenly, and in such large quantities, as to tear away part of the plaintiff's said dam; whereby the plaintiff's mill aforesaid has become useless and of no value, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4427. Complaint for backing up water on plaintiff's quartz-mill.

Form No. 1219.

[TITLE.]

The plaintiff complains, and alleges:

I. That before and at the time of the committing of the injuries hereinafter mentioned, he was possessed of a certain quartz-mill, situate on Butte Creek, in Butte County, in this state, and above the premises of the defendant hereinafter mentioned, and

had the right to have the water flow from his said mill, and in the natural channel of said creek, without any obstruction whatever.

II. That on the . . . day of . . ., 19. . , the defendant erected a dam to a great height across the bed of said creek, and below the plaintiff's said mill, and ever since has kept the same up, and has thereby obstructed and stopped, during all that time, the natural flow of the water of said creek, and raised it in the bed of said creek, and backed it upon the said mill and premises of the plaintiff, and upon the wheels and works of said mill, to-wit, to the height of . . . feet, thereby impeding and checking the natural flow of the water therefrom, and preventing the said water from carrying off the tailings from said mill, and otherwise impeding and preventing the operation of said mill, and diminishing the value thereof, to the damage of the plaintiff in the sum of . . . dollars.

[Demand of Judgment.]

§ 4428. Complaint for trespass by city officers while abating alleged public nuisance.

Form No. 1220.

[Title.]

The plaintiff complains, and alleges:

I. [Allege incorporation and existence of the defendant city.]

II. That on the . . . day of . . ., 19. . , and upon sundry other days and times of day, and before the commencement of this action, the defendant unlawfully entered upon the lands and premises of the plaintiff, lying and being in the said city of . . ., described as follows: [give description], and dug up and carried away . . . thousand cubic feet of earth, and thereby destroyed about . . . surface square feet of said lot, to the damage of the plaintiff in the sum of . . . dollars.

[Demand of Judgment.]

§ 4429. Complaint in equity for continuing trespass caused by building and maintaining stone foundation-wall on plaintiff's lot.

Form No. 1221.

[Title.]

The plaintiff above named complains of the defendant above named, and for cause of action alleges:

I. That the defendant, the L. M. street-railway company, is a street-railway corporation, organized and existing under the laws of this state, and prior to the year 19.. was, and still is, the owner of, and engaged in operating, a street railway in the city and county of . . ., in the state of . . .

II. That the plaintiff herein is the owner of, and has estate in fee simple in and to, the following-described land, situate in the city and county of . . ., and state of . . ., to-wit: [describe lots], which said lots have thereon two two-story frame buildings and one one-story frame building, which said buildings are on the northerly line of said lots, and cover the same nearly or quite to the north line thereof, and that the plaintiff is now in possession of the said lands and buildings, and that she and her immediate grantors have been in possession thereof for twenty-eight years last past.

III. That in the year 19.. the said defendant was, and still is, the owner of lots two, three, and four, [etc.], in said block . . ., that the said lots numbered five and . . . belonging to the said L. M. street-railway company adjoin the premises of the plaintiff on the northerly line thereof.

IV. That in the said year 19.. the said defendant erected upon its land a large brick building, about forty feet in height and covering all its lands, which said building was to be used as a repair-shop for the repairing of its cars, machinery, and appliances used in operating its lines of street railway, and in erecting said building, and for the purpose of laying a foundation-wall therefor, excavated the ground along the south line of its said lots numbered five and . . ., adjoining the premises of the plaintiff, to the depth of several feet, and below the foundation-walls of the buildings of the plaintiff erected and then standing upon her said lots . . ., [etc.], and excavated beneath and undermined the foundation-wall sustaining the said buildings of the plaintiff, and dug into and removed the soil from the premises of said plaintiff, without the plaintiff's consent; and without her consent, and against her protest, built and erected, and caused to be built and erected, upon its said lands and upon the lands of the said plaintiff a heavy foundation-wall of stone, three feet or more in thickness, which said foundation-wall and the footing-stones of the same extend into and upon the premises of said plaintiff, and extend underneath the foundation-wall sustaining the said build-

ings of the said plaintiff, for a distance varying from five to nine inches and upwards along the whole northerly line of said lots numbered . . ., [etc.].

V. That by reason of the undermining of the foundation-wall of the buildings of the said plaintiff and the removal of the soil thereof, as aforesaid, the plaintiff's buildings sank down and settled, throwing the said buildings out of plumb, and caused the same to pitch and lean to the north, cracking and breaking the plastering in the said buildings, causing the cellar-walls of said buildings to cave in and the floors of said buildings to sink down, and so wrenching and straining the said buildings as to prevent the doors thereof from opening and shutting until the same were rehung and changed, to the great damage of the said plaintiff and her said buildings, to-wit, in the sum of . . . dollars.

VI. That the plaintiff further alleges that the said defendant, the L. M. street-railway company, claims the right to keep and maintain, and does still keep and maintain, the said foundation-wall of its said building upon the premises of the said plaintiff, and refuses to take down and remove the same or any part thereof therefrom.

VII. That the said described lands of the said plaintiff are of great value, are situate in the business district, and are quite suitable for business purposes, and that it was and is the intention of the plaintiff, as soon as she is able to do so, to erect thereon a brick building covering said lots, for business purposes, but that she is and will be prevented from occupying and using the whole of said land for such purpose by reason of the intrusion of the foundation-wall of the defendant's said building thereon, and that the value of her said lands is greatly diminished, and the same made unsalable, and the plaintiff greatly damaged in consequence, to-wit, in the sum of . . . dollars.

VIII. That the said lot . . . of said plaintiff has a frontage of . . . feet on . . . avenue, and the said lot . . ., which adjoins said lot . . . on the west, has a frontage of . . . feet on . . . street, in said city of . . ., making a strip of land . . . feet in width extending through the center of said block from . . . avenue to . . . street, and that a frontage of . . . feet upon a business street is the smallest frontage salable or available for business purposes, and that any reduction of a lot below . . . feet largely diminishes and destroys the value thereof, and that

the said foundation-wall of the said defendant's said building, extending into and upon her lands as aforesaid, and underneath the foundation-walls of her buildings erected thereon, deprives her of the full use, occupation, and enjoyment of said lot, and will prevent her and her grantees and assigns from using and occupying the same for the purpose of building and erecting a foundation-wall to sustain the buildings now or hereafter erected thereon.

IX. The plaintiff further alleges, that the points and places where the said foundation-wall of the defendant's building extends into and upon the lands of the plaintiff as aforesaid is below the surface of the earth, and below the foundation-wall of her buildings standing thereon, and said foundation-wall of defendant's building cannot be cut off and removed from the plaintiff's land from the plaintiff's premises without taking away and removing the soil, and tearing down and removing the foundation-wall of her buildings erected and standing upon her lands, and that the removal and cutting off of the said foundation-wall of the defendant's building extending upon the plaintiff's premises would entail upon the plaintiff great cost, damage, and expense.

Wherefore, the plaintiff demands judgment, that she may be adjudged and decreed to be the owner of said lots . . . and . . . of block . . ., in . . . subdivision in the . . . ward of the city of . . ., in fee simple, and as such owner be entitled to the free and full use and occupation thereof without let, hindrance, or obstruction by the said defendant.

2. That the foundation-wall of the defendant's building, so far as it extends into and upon the lands of the said plaintiff and underneath the foundation-walls of the buildings standing upon the plaintiff's lands, be adjudged and decreed to be an unlawful incumbrance and obstruction thereon, and that the said defendant be adjudged and directed, within a certain time to be in said judgment ascertained and limited, to remove the same therefrom without digging up the soil of the said premises of the plaintiff or trespassing upon her premises for the purpose of so doing.

3. That the said defendant be decreed and directed by said judgment to replace upon the premises of said plaintiff the soil and other material unlawfully removed therefrom in such manner as to sustain the plaintiff's building and the foundation-walls thereof.

4. That the plaintiff be further adjudged and decreed to have and recover from the said defendant such damages as she may be found to have suffered by reason of the premises, together with the costs and disbursements of this action, and that she have such further and other relief in the premises as to the court may seem just and equitable.

§ 4430. Answer—Denial of plaintiff's possession.

Form No. 1222.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not, is not now, and never was, possessed of the premises described in the complaint, or any part thereof.

§ 4431. Denial of nuisance.

Form No. 1223.

[TITLE.]

The defendant answers to the complaint:

That the defendant's premises have not been used as a slaughterhouse, either as alleged or otherwise.

[Or, that defendant did not erect said [dam], as alleged, or otherwise, or at all.]

§ 4432. Justification on account of impassable highway.

Form No. 1224.

[TITLE.]

The defendant answers to the complaint:

I. That at the time alleged in the complaint there was a public highway adjoining plaintiff's said premises, which was then so miry and out of repair that it was impassable for vehicles and horses.

II. That the defendant at said time was lawfully attempting to pass over said highway with a vehicle and team of horses, and by reason of the said condition thereof was unable to do so, whereupon he took down a portion of plaintiff's fence and passed over a portion of plaintiff's premises around said founderous portion of said highway, and returned to said highway as soon as he conveniently could, and did no unnecessary damage, which acts are the acts complained of by the plaintiff in his said complaint.

§ 4433. **Specific denial of title.**

Form No. 1225.

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff at the time of the commencement of this action was the owner, or entitled to the possession of, the premises described in the complaint.

§ 4434. **Admission of conducting business, but denial that same is nuisance.**

Form No. 1226.

[TITLE.]

The defendant answers to the complaint:

That defendant admits that at the times named in said complaint he has operated a planing-mill [or, tannery; or otherwise, according to the fact] upon the premises named in the complaint; but defendant denies that the operation of said planing-mill [or other factory] caused offensive or unusual noises, or volumes of dust [or otherwise specifically negative the nuisance charged in the complaint], as alleged in said complaint, or that the same in any way interfered with the healthful enjoyment by the plaintiff or his said family of his said premises.

§ 4435. **Denial of plaintiff's title.**

Form No. 1227.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the plaintiff was not at the times alleged in the complaint the owner of [or in possession of] the premises described in the complaint, as therein alleged.

§ 4436. **License to maintain coal-hole in sidewalk.**

Form No. 1228.

[TITLE.]

The defendant answers to the complaint:

That defendant admits that he owned the premises described in the complaint in fee, and that he caused to be placed in the sidewalk in front of said dwelling-house a coal-hole, which was provided with a cover and guards, in strict accordance in all respects with the requirements of a license or permission duly

granted to the defendant by the duly constituted municipal authorities of the city of . . .

That the said coal-hole, with its said cover and guards, was placed in said sidewalk by the defendant in an absolutely safe condition, and in accordance with all the requirements of said license, and that said premises were thereupon, and on or about . . ., 19. . , rented by the defendant to one X. Y., who thereupon took entire possession of said premises, and still retains the same, the defendant retaining no control or possession of the same.

That defendant at no time had any notice or knowledge that the said coal-hole was unsafe or out of repair, and the defendant alleges upon information and belief that if the said coal-hole was at any time unsafe or out of repair, the same was due to the neglect and default of said tenant, and not to any neglect or default on the part of this defendant.

§ 4437. Prescriptive right to use water.

Form No. 1229.

[TITLE.]

The defendant answers to the complaint, and alleges:

That at the times named in the complaint he was, and still is, the owner, and in the possession of, a certain mill and dam situated upon [describing the premises]; and that for more than . . . years prior to the commencement of this action this defendant and his grantors have continuously and without interruption exercised the right of diverting the water of said river by said dam, and using said water for the operation of said mill, and have thereby acquired the right to so direct and use said water; and that the acts complained of by the plaintiff herein consist in such proper diversion and use of said water.

§ 4438. Judgment abating nuisance and for damages in action at law.

Form No. 1230.

[TITLE.]

The issue in this action having been tried before the court and a jury, and a verdict rendered finding that the said . . . described in the complaint is, and since the . . . day of . . . , 19 . . , has been, a nuisance, and the jury having assessed the plaintiff's damages for the maintenance of said nuisance at . . . dollars:

Now, on motion of G. H., attorney for plaintiff,—

It is adjudged, that the plaintiff, A. B., do have and recover of C. D., defendant, the sum of . . . dollars, damages, and the sum of . . . dollars, his costs as taxed, and that the plaintiff have execution therefor.

It is further adjudged, that the nuisance described in the said complaint, to-wit: [here describe the same], be abated and removed, and that a warrant to the sheriff of . . . county do issue out of this court, under the seal thereof, commanding said sheriff to abate and remove the said nuisance at the expense of said defendant, in the following manner, to-wit: [here specify manner of abatement], unless within . . . days from service of notice of entry of this judgment the defendant himself abate and remove the same; and that in case such warrant be issued and executed, the said sheriff collect the expense of such abatement and removal of the said defendant in the manner provided by law.

CHAPTER CXIV.

ACTIONS ON ACCOUNTS.

§ 4439. **Essential averments.**—At the common law, an allegation in an action on an account that the defendant is indebted to plaintiff in the sum, etc., for goods sold and delivered on, etc., and that there was then due to the plaintiff from the defendant said sum, implies a contract, a promise to pay, and that the period when the same was promised to be paid had expired, and constitutes a good *indebitatus* count in debt.[1] An averment of request is not necessary.[2] The allegation of value is material;[3] but an implied promise to pay is matter of law, and should not be pleaded.[4] Where a demand would be necessary if the plaintiff sued for damages for conversion, he must aver a demand where he sues upon the implied contract, waiving the tort.[5] A contract to pay generally, and without time or terms specified, creates a debt payable presently, and no previous call or demand of payment is required, and none need be averred. Bringing the action is a sufficient demand.[6] On an agreement to pay on request, though no request is necessary if the promisor be the principal debtor, it is necessary if he is a surety.[7] Equity has no jurisdiction of a suit for an accounting if there is no allegation that the account is long and complicated.[8] Nor is an accounting allowable against the holder of a note bought at a trustee's sale, where it is not averred that the amount of the bid was not credited on the note.[9]

§ 4440. **Items of account.**—In California, and many of the other code states, the code contains the following provision: "It

1 1 Chit. Pl. 345; 2 Chit. Pl. 142; Emery v. Fell, 2 T. R. 28; Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542. See, also, Hughes v. Woosley, 15 Mo. 492, as to form of complaint on an account.

2 Acome v. American Mineral Co., 11 How. Pr. 24.

3 Gregory v. Wright, 11 Abb. Pr. 417.

4 Farron v. Sherwood, 17 N. Y. 227.

5 Spoor v. Newell, 3 Hill, 307.

6 Lake Ontario etc. R. R. Co. v. Mason, 16 N. Y. 451.

7 Nelson v. Bostwick, 5 Hill, 37, 40 Am. Dec. 310.

8 Kaston v. Paxton, 46 Or. 308, 114 Am. St. Rep. 871, 80 Pac. 209.

9 Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745.

is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular."[10] If the account as delivered is not satisfactory, and the other party intends to object to the introduction of evidence on the subject, an order for its exclusion should be obtained previous to the trial.[11] A count for the value of the use and occupation of plaintiff's land does not present a claim upon which a bill of particulars can be required.[12] A court of equity has inherent power to require a bill of particulars in a proper case.[13]

In an action to recover many items of demand claimed by one and the same right, the items may be, for the sake of brevity and convenience, thrown into one count.[14] The balance of a stated account may become an item of a succeeding current account.[15] If the action be in fact for an accounting, it may be treated as one cause of action of an equitable nature, and stated accordingly.[16]

§ 4441. Mutual, open, and current account—Set-off.—A "mutual, open, and current account, where there have been reciprocal demands," within the meaning of the statute of limitations, is one consisting of demands upon which each party respectively might maintain an action.[17] If all the items on one side of the account were intended by the parties as payment or credits on account, it is not a mutual, open, and current account where there are reciprocal demands.[18] So where one party was selling to the other

10 Cal. Code Civ. Proc., § 454; Conner v. Hutchinson, 17 Cal. 281; Providence Tool Co. v. Prader, 32 Cal. 638, 91 Am. Dec. 598; Rogers v. Duff, 97 Cal. 68, 31 Pac. 836; Farwell v. Murray, 104 Cal. 464, 38 Pac. 199; Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Goodrich v. James, 1 Wend. 289; N. Y. Code, § 531; Wis. Rev. Stats., ch. 125, § 20; Minn. Code Proc., § 92; Colo. Code Civ. Proc., § 64; Nev. Comp. Laws, § 1119; N. C. Code Civ. Proc., § 118; S. C. Code Proc., § 181; Fla. Code Civ. Proc., § 108.

11 Kellogg v. Paine, 8 How. Pr. 329.

12 Moore v. Bates, 46 Cal. 30.

13 Nelson Bennett Co. v. Twin Falls Land etc. Co., 14 Idaho, 5, 93 Pac. 789.

14 Longworthy v. Knapp, 4 Abb. Pr. 115.

15 Brown v. Guise (N. Mex.), 91 Pac. 716.

16 Adams v. Holley, 12 How. Pr. 326. See Blanchard v. Jefferson, 28 Abb. N. C. 236, 17 N. Y. Supp. 927.

17 Warren v. Sweeney, 4 Nev. 101.

18 Id.; Purvis v. Kroner, 18 Or. 414, 23 Pac. 260; Fitzpatrick v. Estate of Phelan, 58 Wis. 254, 16 N. W. 606.

party goods from time to time, and charging the same, and the other gave him the money, which he credited on the account as payment, the credit did not make the account mutual within the statute of limitations, and each item was barred in two years after its delivery.[19] The time is now changed to four instead of two years.[20] But where the defendants delivered to the plaintiffs an article of personal property, for which the latter gave the former credit at a specified valuation, a mutual account was created.[21] In Nevada, it was decided that such a credit would not constitute a mutual account consisting of reciprocal demands, but it would create a mutual account if delivered without any understanding that it should be applied as payment.[22] Mutual accounts are made up of matters of set-off, where there is an existing debt on the one side and a credit on the other, or where there is an understanding, express or implied, that mutual debts shall be satisfied or set off *pro tanto*. A payment made on an account, and not intended as a set-off *pro tanto*, does not make a mutual account. Striking a balance converts the set-off into a payment. And until such balance is struck a mutual account exists.[23]

§ 4442. **Joint adventure.**—A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where, in consideration of an outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculation of every kind for a certain period of time, although the parties may not have been technically partners. Nor is it a misjoinder of causes of action to demand in the same action that defendant account for and refund a proportion of the outfit and advances made by plaintiff as agreed in the same contract.[24] If defendants are improperly joined, there should be a dismissal, at plaintiff's cost, as to the defendants improperly joined; but persons who have received, through connivance, a portion of the funds of a corporation, to which funds a creditor must resort for the payment

19 Adams v. Patterson, 35 Cal. 122.

20 Cal. Code Civ. Proc., § 337, as amended 1907.

21 Norton v. Larco, 30 Cal. 132, 89 Am. Dec. 70.

22 Warren v Sweeney, 4 Nev. 101.

23 Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70. See Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566.

24 Garr v. Redman, 6 Cal. 574. See Blanchard v. Jefferson, 28 Abb. N. C. 236.

of his claim, are proper parties in an action for an accounting brought by the creditor.[25]

§ 4443. **Partners.**—An action of account at law may be brought by one partner against another,[26] in any business.[27]

§ 4444. **Running accounts.**—In suits on running account, the whole should be included in a single action.[28] Various items of an account though accrued at different times, may be united.[29]

§ 4445. **When action lies.**—The action of account lies between merchants between whom there is a privity;[30] against an attorney for money received from his client;[31] by a *cestui que trust*, against trustee appointed by will for an account;[32] by a receiver against his deputy, and also by a sheriff against his deputy;[33] against a receiver appointed to receive rents and debts of another.[34]

§ 4446. **Sufficiency of common counts.**—The courts of almost all the states, with the exception of one or two, uphold the sufficiency of the common counts, in actions under the code, in all cases where such forms were sufficient at common law.[35] In

25 Schaake v. Eagle Automatic Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

26 Co. Lit. 171; 1 Montg. Pl. 45; Duncan v. Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Atwater v. Fowler, 1 Edw. Ch. 417; Ogden v. Astor, 4 Sandf. 313.

27 See Lanfair v. Lanfair, 18 Pick. 299; overruling dicta in McMurray v. Rawson, 3 Hill, 59. See, also, Kelly v. Kelly, 3 Barb. 419.

28 Guernsey v. Carver, 8 Wend. 492, 24 Am. Dec. 60; Bonsey v. Wordsworth, 36 Eng. L. & Eq. 283; 18 Com. B. 325; Wood v. Perry, 3 Exch. 442.

29 Dows v. Hotchkiss, 10 N. Y. Leg. Obs. 281; Adams v. Holley, 12 How. Pr. 326. See, also, Phillips v. Berick, 16 Johns. 136, 8 Am. Dec. 299; Stevens v. Lockwood, 13 Wend. 644, 28 Am. Dec. 492; Staples v. Goodrich, 21 Barb. 317; Longworthy v. Knapp, 4 Abb. Pr. 115.

30 2 Greenleaf on Evidence, 35; 1 Com. Dig., Ac. A. B.

31 Bredin v. Kingland, 4 Watts, 420; 3 Chit. 383.

32 Bredin v. Dwen, 2 Watts, 95.

33 1 Rolle, 118-120; 1 Com. Dig. 191.

34 1 Com. Dig. 190; 1 Rolle, 116; 6 Mod. 92.

35 Abadie v. Carrillo, 32 Cal. 172; Wilkins v. Stidger, 22 Cal. 235, 83 Am. Dec. 64; Magee v. Kast, 49 Cal. 141; Merritt v. Glidden, 39 Cal. 559, 2 Am. Rep. 479; Pavisich v. Bean, 48 Cal. 364; Curran v. Curran, 40 Ind. 473; Johnson v. Kilgore, 39 Ind. 147; Board of Commissioners v. Verbarg, 63 Ind. 107; Bouslog v. Garrett, 39 Ind. 338; Gwaltney v. Cannon, 31 Ind. 227; Raymond v. Hanford, 6 N. Y. Sup. Ct. (Thomp. & C.) 312; Fells v. Vestvali, 2 Keyes, 152; Ball v.

Minnesota and Oregon, the use of the common count in such connection is not permitted.[36]

§ 4447. **Time in which action must be brought.**—As amended in 1907, the California code provides that an action to recover a balance due upon a mutual, open, and current account, or upon an open book-account, must be brought within four years from the date of the last item of the mutual account, or from the date of each item of the book-account;[37] while an ordinary account not founded upon an instrument of writing must be sued on within two years from the date of each item.[38]

§ 4448. **Essential averments of account stated.**—Where the parties to an account have examined it, and agreed upon a certain sum of money as the balance justly due thereon from one party to the other, then such account has become an account stated, and an action thereon is not founded upon the original items, but upon the balance ascertained by the accounting.[39] The material allegations in such action are—1. That plaintiff and defendant came to an accounting together; 2. On such accounting defendant was found indebted to the plaintiff in a specified sum; 3. Which defendant promised to pay; 4. And has not paid. What constitutes an account stated is a question of law.[40] An account cannot be stated with reference to a debt payable on a contingency.[41] An averment that one party made a statement of an account and

Fulton Co., 31 Ark. 379; Jones v. Mial, 82 N. C. 252; Emslie v. City of Leavenworth, 20 Kan. 562; Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Meagher v. Morgan, 3 Kan. 372, 87 Am. Dec. 476; Clark v. Fensky, 3 Kan. 389; Carroll v. Paul's Ex'rs, 16 Mo. 226; Farron v. Sherwood, 17 N. Y. 227; Hosley v. Black, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377; Green v. Gilbert, 21 Wis. 395; Grannis v. Hooker, 29 Wis. 65; White Pine County Bank v. Sadler, 19 Nev. 98, 6 Pac. 941.

36 Foerster v. Kirkpatrick, 2 Minn. 210; Bowen v. Emmerson, 3 Or. 452.

37 Code Civ. Proc., §§ 337, 344; Mayberry v. Cook, 121 Cal. 588, 54 Pac. 95; Adams v. Patterson, 35 Cal. 122.

38 Code Civ. Proc., § 339.

39 Benites v. Bicknell, 3 Utah, 369, 3 Pac. 203; Orr v. Hopkins, 3 N. Mex. 142, 3 Pac. 61; Hendy v. March, 75 Cal. 566, 17 Pac. 702; Coffee v. Williams, 103 Cal. 550, 37 Pac. 504; McCarthy v. Mt. Tecarte etc. Co., 111 Cal. 328, 43 Pac. 956; Holmes v. Page, 19 Or. 232, 23 Pac. 961. See Truman v. Owens, 17 Or. 523, 21 Pac. 665; Nostrand v. Ditmis, 127 N. Y. 355, 28 N. E. 27; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Kingsley v. Melcher, 56 Hun, 547, 10 N. Y. Supp. 63.

40 Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Graham v. Camman, 13 How. Pr. 361.

41 Baird v. Crank, 98 Cal. 293, 33 Pac. 63.

delivered it to the other, who made no objection to it, is not an averment that an account was stated between them. At most, these are matters of evidence, tending to show, but not conclusively, an account stated.[42] Where, after the death of one partner, an account is stated between defendant and the copartnership, admitting a balance due by him for goods sold in the lifetime of the deceased, the surviving partner may recover without averring the death of the other partner and the survivorship.[43]

A complaint stating that whereas said defendant was justly indebted to plaintiffs in the sum of three thousand dollars, for money paid, laid out, and expended for the use and benefit of said defendant, and at his special instance and request, to-wit, at, etc., on the first day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiffs on an account then stated between them; and the said defendant being so indebted to the plaintiffs, afterwards, to-wit, on the day and year aforesaid, at the place aforesaid, undertook, and faithfully promised the plaintiffs, to pay the same, etc., and that said sum is due and unpaid, sufficiently states a cause of action.[44] A complaint, although it refers to an account, should indicate the nature and character of the claim, and the period within which it arose.[45]

§ 4449. **Account, how stated, and effect of.**—An account stated is an agreement between parties who have had previous transactions with each other, fixing and determining the amount due from one to the other.[46] The mere rendering of an account does not make a stated one. Yet if it is received, its correctness admitted, balance claimed, or offer made to pay, it becomes a stated account.[47] An account in writing showing a balance, or that there is none, does not require a signature to make it a stated account.[48] An account stated need not be in writing.[49] And it is not affected by its balance being introduced into a subsequent account. The complaint must show a demand in favor of the

42 Emery v. Pease, 20 N. Y. 62.

43 Holmes v. De Camp, 1 Johns, 34, 3 Am. Dec. 293.

44 De Witt v. Porter, 13 Cal. 171. That an express promise to pay need not be proved, see Claire v. Claire, 10 Neb. 54, 4 N. W. 411.

45 Farcy v. Lee, 10 Abb. Pr. 143.

46 Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878.

47 Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093.

48 Baker v. Biddle, Baldw. 394, Fed. Cas. No. 764.

49 Converse v. Scott, 137 Cal. 239, 70 Pac. 13.

plaintiff acceded to by the defendant.[50] Where a party receives an account, and keeps it for a reasonable time without objecting to it, he will be considered as acquiescing in it, and it will have the force of an account stated.[51] But where a merchant sends an account current to another residing in a different country, and he keeps it through two years without making an objection, it becomes an account stated.[52] Long acquiescence makes an account an account stated.[53] The receipt and retention of a bank pass-book, without objection thereto within a reasonable time, constitutes an account stated.[54] Three months' acquiescence is sufficient.[55] The semi-annual returns of a public administrator are not accounts stated.[56] The rendering of an account, without a view to settling the claim and adjusting the amount, will not raise a presumption of account stated, though the account is retained without objection.[57] The statement of an account is not conclusive, but throws upon the party claiming error the burden of proving it.[58] But if there have been mutual compromises, it will operate as an estoppel *in pais*.[59] Where accounts bear upon their face "audited and approved," and "certified to be correct," they become instruments of writing within the meaning of the statute, and are not barred by that portion of the statute of limitations applying to accounts.[60] An account between merchant and merchant, closed by cessation of mutual dealings, does not, therefore, become an account stated.[61]

An account stated alters the nature of the original indebtedness, and has the effect of a new promise,[62] and bears interest

50 Terry v. Sickles, 13 Cal. 427.

51 Lewis etc. v. Utah Construction Co., 10 Idaho, 214, 77 Pac. 336; Towsley v. Denison, 45 Barb. 490; Fleischner v. Kubli, 20 Or. 329, 25 Pac. 1086; Kent v. Highleyman, 28 Mo. App. 614; Eichel v. Sawyer, 44 Fed. 853; Martyn v. Arnold, 36 Fla. 446, 18 South. 791; Brodnax v. Steinhardt, 48 La. Ann. 682, 19 South. 572.

52 Freeland v. Heron, 7 Cranch, 147, 3 L. Ed. 297.

53 1 Story Eq. Jur., § 526; Schettler v. Smith, 34 N. Y. Super. Ct. (2 J. & Sp.) 17; Stenton v. Jerome, 54 N. Y. 480; Oberndorfer v. Moyer, 30 Utah, 325, 84 Pac. 1102; Shively v. Eureka etc. Co., 5 Cal. App. 236, 89 Pac. 1073; Visher v. Wilbur, 5 Cal App. 562, 90 Pac. 1065, 91 Pac. 412.

54 Nodine v. First Nat. Bank, 41 Or. 386, 68 Pac. 1109.

55 Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 985.

56 Estate of Hedrick, 127 Cal. 184, 59 Pac. 590.

57 Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878.

58 Massachusetts Life Ins. Co. v. Carpenter, 49 N. Y. 668.

59 Kock v. Bonitz, 4 Daly, 117.

60 Sannickson v. Brown, 5 Cal. 57.

61 Mandeville v. Wilson, 5 Cranch, 15, 3 L. Ed. 23.

62 Carey v. Philadelphia etc. Petroleum Co., 33 Cal. 694; Holmes v. De Camp, 1 Johns. 34, 3 Am. Dec.

from its date.[63] The rule in matters of account is applicable to a private corporate body engaged in trade, and conducting its affairs by officers and agents.[64] Where an account stated is assented to, either expressly or impliedly, it becomes a new contract, and an action upon it is not founded upon the original items, but upon the balance agreed to by the parties. But an account stated, in order to constitute a contract, should appear to be something more than a mere memorandum, and should show upon its face with clearness and certainty that it was intended tc be a final settlement up to date.[65] An allegation that one party made a statement of an account and delivered it to another, who made no objection to it, is not an allegation that an account was stated between them.[66] Where a partnership account erroneously included an individual debt of the outgoing partner, the remaining partner could not, by failing to object thereto, become personally liable for the other partner's debt, where he supposed the creditor recognized it as an individual and not a firm debt.[67] Although a paper offered in evidence for a particular purpose may be an account stated, yet if it has not been pleaded and relied upon by either party as such, it cannot control or limit the rights of the parties as an account stated.[68]

§ 4450. **The same—"Errors excepted."**—An account stated, in writing, in absence of fraud, error, or mistake in its execution, is conclusive between the parties.[69] An account in writing, examined and signed, will be deemed a stated account, notwithstanding it contains the phrase "errors excepted."[70] Accounts stated may be opened, and the whole account taken *de novo*, for gross mistake, in some cases; but only when the error affects all the items of the transaction.[71] And when a party goes into

293; Allen v. Stevens, 1 N. Y. Leg. Obs. 359.

63 De La Cuesta v. Montgomery, 144 Cal. 115, 77 Pac. 887; Florence etc. Co. v. Tennant, 32 Colo. 71, 75 Pac. 410.

64 Bradley v. Richardson, 2 Blatchf. 343, Fed. Cas. No. 1786.

65 Coffee v. Williams, 103 Cal. 550, 37 Pac. 504.

66 St. Louis etc. Bottling Co. v. Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 800.

67 National Cycle Co. v. San Diego Cycle Co., 135 Cal. 335, 67 Pac. 280.

68 Bump v. Cooper, 20 Or. 527, 26 Pac. 848.

69 Noyes v. Young, 32 Mont. 226, 79 Pac. 1063; Brown v. Guise (N. Mex.), 91 Pac. 716.

70 Branger v. Chevalier, 9 Cal. 353; Troup v. Haight, Hopk. 272.

71 Branger v. Chevalier, 9 Cal. 353; Hagar v. Thomson, 1 Black, 80, 17 L. Ed. 41.

particulars he is confined to those items improperly charged, and the remainder of the account must stand.[72]

§ 4451. Opening an account stated.—When an account is settled by the parties themselves, their adjustment is final and conclusive,[73] even as to the guarantor.[74] The account stated is waived, where an action is brought and defended as upon an original account.[75] It is not at all important that the account be made out by one party against the other. When a consignor rendered an account to the consignee, it was a stated account from the time the consignor demanded payment of the balance.[76] So where the agent presented the account.[77] The practice of opening accounts stated is not encouraged, and should only be done on clear proof of error or mistake.[78] But mistake[78a] or fraud is a sufficient ground to open an account stated.[79] While an account stated can be attacked for mistake, in cases in which other contracts can be so attacked, the mistake must be put in issue by the pleadings.[80] The rule that where there is an account stated the parties cannot go back and attack the original items of the account, unless upon proper averment of fraud or mistake, does not apply where the main issue is whether there was such a mistake.[81] The party objecting must clearly show that he has been misled by the fraud or mistake.[82] The effect of surcharging and falsifying an account is to leave it an account stated, except so far as it can be impugned.[83] An account cannot be reopened by one of the parties

72 Branger v. Chevalier, 9 Cal. 353; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463. See Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Devecmon v. Shaw, 69 Md. 199, 9 Am. St. Rep. 422, 14 Atl. 464.

73 Hagar v. Thomson, 1 Black, 80, 17 L. Ed. 41.

74 Bullock v. Boyd, 2 Edw. Ch. 293.

75 Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878.

76 Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093.

77 Willis v. Fernegan, 2 Atk. 251; Denton v. Shellard, 2 Ves. Sr. 239; Murray v. Toland, 3 Johns. Ch. 569.

78 Wilde v. Jenkins, 4 Paige, 481; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81.

78a St. Louis etc. Bottling Co. v. Colorado Nat. Bank, 8 Colo. 70, 5 Pac. 800.

79 2 Dana Ch. Pr. 764; Frankel v. Wathen, 58 Hun, 543, 12 N. Y. Supp. 591; Powell v. Heisler, 16 Or. 412, 19 Pac. 109; Weed v. Dyer, 53 Ark. 155, 13 S. W. 592; Samson v. Freedman, 102 N. Y. 699, 7 N. E. 419; Hawley v. Harran, 79 Wis. 379, 48 N. W. 676.

80 Hendy v. March, 75 Cal. 566, 17 Pac. 702. See Graham v. Harmon, 84 Cal. 181, 23 Pac. 1097.

81 Coffee v. Williams, 103 Cal. 550, 37 Pac. 504.

82 Harley v. Eleventh Ward Bank, 76 N. Y. 618.

83 Pit v. Cholmondeley, 2 Ves. Sr. 565; Perkins v. Hart, 11 Wheat. 237, 6 L. Ed. 463; Story Eq. Pl., § 801;

without proof of the items, and that some one or more of them ought not to have been allowed.[84] If the complaint is verified, and the answer does not charge fraud or mistake, evidence of overcharge is not admissible.[85]

This rule is founded upon the idea that when an account between parties is stated, with debit and credit sides, and the matter in controversy is stated therein, the presumption of law is that the account is correct, unless it is shown that fraud, omission, or mistake exists.[86] An account against the state, certified by the auditor, is conclusive on him only as to the correctness of the statements therein contained.[87]

§ 4452. **Erasure.**—An erasure in a settled account, not shown to have been made before its settlement, is sufficient to avoid it.[88] The presumption is that the alteration was made after execution.[89]

§ 4453. **Inspection of account.**—Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If such party refuse to obey such order, the court may exclude such books or papers, or assume that they are as the applicant alleges them to be, and also may punish for contempt.[90]

§ 4454. **Services.**—A complaint in an action of *assumpsit* to recover a specified sum on account of work and labor performed, and on account of goods, wares, and merchandise sold and delivered, is not subject to demurrer for uncertainty upon the ground that the complaint does not state how much of the sum

1 Story Eq. Jur., § 523; Bruen v. Hone, 2 Barb. 586; Bullock v. Boyd, 2 Edw. Ch. 293; Phillips v. Belden, 2 Edw. Ch. 1.

84 Sutphen v. Cushman, 35 Ill. 186.

85 Phillips v. Belden, 2 Edw. 1.

86 Carroll v. Paul, 16 Mo. 226.

87 State v. Hinkson, 7 Mo. 353.

88 Prevost v. Gratz, Pet. C. C. 364, Fed. Cas. No. 11406.

89 Id. But compare Malarin v. United States, 1 Wall. 282, 17 L. Ed. 594.

90 Cal. Code Civ. Proc., § 1000; Idaho Rev. Codes, § 4875; Mont. Rev. Codes, § 7138; Nev. Comp. Laws, § 3521; Or. B. & C. Codes, § 533; Utah Rev. Stats., §§ 3401, 3474, 3721, 3984-3988; Wash. Bal. Codes, § 6047; Wyo. Rev. Stats., § 3730.

sued for was due for work and labor, and how much for goods, wares, and merchandise.[91] Where suit is for attorney fees, all in relation to one subject-matter, the bill of particulars thereon need not place a valuation upon each item of the service.[92] A complaint on an account for services rendered a third person charging an original liability is sufficient.[93] An allegation in a complaint for services that the services were "of the agreed price and reasonable value," but which does not state that the plaintiff was employed by the defendant, or that he performed the services at the defendant's request, is insufficient to show a consideration for the defendant's promise to pay.[94]

§ 4455. **Time.**—In order to be sufficiently definite and certain, the complaint should show the nature and character of the claim, and the period within which it arose.[95] An allegation of an indebtedness of a date long prior to the commencement of the action is no evidence of an existing indebtedness upon the date of filing the complaint, and such allegation is valueless.[96]

§ 4456. **Author's services.**—A stronger case is required to raise an implied promise on the part of the publisher to pay for the services of the author than in the case of other services. We cannot, however, see any reason why a stronger case is required to raise an implied promise to pay on the part of publishers for services rendered them than for any other class of persons.[97]

§ 4457. **Verification of account.**—Under a code provision providing that the correctness of an account duly verified shall be taken as true, unless the denial be also verified, a stated account must be verified, and the petition must allege the correctness of the verified account attached. Verification of the petition in-

91 Farwell v. Murray, 104 Cal. 464, 38 Pac. 199. See Manning v. Dallas, 63 Cal. 420, 15 Pac. 34.

92 Moore v. Scharnikow, 48 Wash. 564, 94 Pac. 117; Ames v. Bell, 5 Cal. App. 1, 89 Pac. 619.

93 Wing v. Campbell, 15 Mo. 275.

94 Bassford v. Swift, 39 N. Y. Supp. 337.

95 Farcy v. Lee, 10 Abb. Pr. 143.

96 Fairchild v. King, 102 Cal. 320, 36 Pac. 649.

97 Donaldson v. Becket, 17 Parl. Hist. 990; judgment reported in 4 Burr. 2408; Thurlow arguendo in Tonson v. Collins, 1 W. Bl. 306; Yates arguendo, in Tonson v. Collins, 1 W. Bl. 333. This case was never decided. Beckford v. Hood, 7 T. R. 620, 627; Chappell v. Purday, 14 Mee. & W. 303; Jeffreys v. Boosey, 30 Eng. L. & Eq. 1; Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055, 11 Curtis' Decis. 233.

cluding a statement of the account is not sufficient.[98] The fact that a verified account sued on is not denied by a verified affidavit does not preclude defendant from setting up any defense which does not involve a denial of the reasonableness of the amounts charged or the correctness of the items. Defendant may show that plaintiff agreed to charge nothing, or that the account was paid.[99]

§ 4458. **Defense—Advances.**—In an action by a commission merchant to recover balance of an account, principally for advances, defendant set up an agreement not to sell the goods consigned below a certain price, and a violation by the plaintiff of such agreement, by which defendant was damaged for a greater amount than the sum sued for. The plea was insufficient for not stating when the agreement was made.[100]

§ 4459. **Defense—Adjustment and settlement.**—Adjustment and settlement of an account must be specially averred.[101] A breach of the contract for labor may be set up as a defense to an action on an account stated.[102] A verified account attached to the complaint may be admitted in evidence, if its correctness is not denied by answer under oath.[103] It is not proper to frame an answer, as responsive to a bill of particulars.[104]

§ 4460. **Defense—Denial of mistakes or errors.**—That there are no such mistakes or errors in the stating of the said account, in manner and form as the said plaintiff hath in his said petition alleged, is sufficient. On surcharging and falsifying an account stated, the mistake or error should be distinctly charged.[105] The items of an account stated which are overcharged must be specially pleaded.[106] The proper mode of raising an objection to the amount of the plaintiff's claim is by answer.[107]

98 Myers v. Presbyterian Church, 11 Okla. 544, 69 Pac. 874.

99 Lucas v. Board of Commissioners, 67 Kan. 418, 73 Pac. 56.

100 Grimes v. Reese, 30 Ga. 330.

101 Parker v. Lowell, 11 Gray, 353.

102 Gutshall v. Cooper, 37 Colo. 212, 86 Pac. 125, 6 L. R. A. (N. S.) 820.

103 Richardson v. Pierce (N. Mex.), 93 Pac. 715.

104 Scovell v. Howell, 2 Code Rep. 33; Kreiss v. Seligman, 8 Barb. 439.

105 Stoughton v. Lynch, 2 Johns. Ch. 209; Leaycraft v. Dempsey, 15 Wend. 83. See, also, Warner v. Myrick, 16 Minn. 91; Costin v. Baxter, 6 Ired. (41 N. C.) 197.

106 Terry v. Sickles, 13 Cal. 427.

107 Moran v. Anderson, 1 Abb. Pr. 288.

§ 4461. **Defense on information and belief.**—When the action is upon an account, and defendant in his answer avers, in the form of reasons for refusing payment when the account was presented to him before suit, that the principal portion was composed of items for printing done for clients, for which he never became personally bound, and that the portion for which he was personally liable "has, to the best of his knowledge and belief," been paid and satisfied, and therefore he pleads payment of the same, it was held that this is in substance a denial of indebtedness for a portion of the account, and a plea of payment for the balance; and that it is in effect an admission as to that balance of an original liability, and throws the burden of establishing payment upon the defendant.[108]

§ 4462. **Defense—Partnership account.**—A denial by one of the defendants in suit on a partnership account, stating that "he never was a copartner," is sufficient to form an issue.[109]

§ 4463. **Several defenses.**—In an action to recover many items of demand, defendant may plead one defense to some of the items and another defense to others.[110]

§ 4464. **Defense—Statute of limitations.**—To a suit on an account, defendant averred that each and every item of said account prior to the tenth day of March, 1859, is barred by time; and he pleads and relies upon the statute of the state of California, entitled "An act defining the time of commencing civil actions," approved April 22, 1850, in bar of any recovery in said action. It was held that this plea is fatally defective, because an averment of a conclusion of law; that a plea of the statute of limitations must aver the facts which bring the demand within the operation of the statute, as that the alleged cause of action has not accrued within certain designated years previous to filing the complaint.[111] Suit for recovery of a balance due upon a mutual, open, and current account, or upon an open book-account, is brought in time if within four years;[112] and upon an account

108 Caulfield v. Sanders, 17 Cal. 569.

109 Corning v. Haight, 1 Code Rep. 72.

110 Longworthy v. Knapp, 4 Abb. Pr. 115.

111 Caulfield v. Sanders, 17 Cal. 569.

112 Cal. Code Civ. Proc., § 337, as amended 1907.

or contract liability, not founded on a writing or an open book-account, if within two years.[113] To a suit on an account, the plea must aver the facts which bring the demand within the operation of the statute.[114] A defendant who claims the benefit of an act for the limitations of actions which applies only to a particular class of cases must plead it specially.[115] This defense should point to the time of filing the original complaint, and not an amended complaint.[116] The words "preceding the commencement of this action" are equivalent to the words "preceding the filing of the complaint."[117]

FORMS IN ACTIONS ON ACCOUNT.

§ 4465. Complaint for money due on account.

Form No. 1231.

[TITLE.]

The plaintiff complains of the defendant, and alleges:

I. That between the . . . day of . . . and the . . . day of . . . , 19.. , at . . . , the plaintiff sold and delivered to the defendant, at his request, certain goods, wares, and merchandise.

II. That the same were reasonably worth the sum of . . .dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4466. The same—Another form—Common count.

Form No. 1232.

The plaintiff complains of the defendant, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, upon an account of goods sold and delivered by the plaintiff to the defendant, at his request, at . . ., between the . . . day of . . ., and the . . . day of . . ., 19..

113 Cal. Code Civ. Proc., § 339, as amended 1907; Adams v. Patterson, 35 Cal. 122.

114 Caulfield v. Sanders, 17 Cal. 569; Lick v. Diaz, 30 Cal. 65. That plea must not state matters of law, see Boyd v. Blankman, 29 Cal. 20, 87 Am. Dec. 146.

115 Howell v. Rogers, 47 Cal. 293.

116 Lorenzana v. Camarillo, 45 Cal. 128.

117 Adams v. Patterson, 35 Cal. 122. For statutory form of pleading the statute of limitations, see Cal. Code Civ. Proc., § 458.

II. That the same became due and payable on the . . . day of . . ., 19. . , but the defendant has not paid the same, nor any part thereof. [If there have been payments, add "except the sum of . . . dollars."]

[DEMAND OF JUDGMENT.]

§ 4467. Complaint by assignee on account.

Form No. 1233.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at the city of . . ., the defendant was indebted to one E. F. in the sum of . . . dollars, on an account for money lent by said E. F. to said defendant, and for money paid, laid out, and expended by said E. F. to and for use of said defendant, and at his request.

II. That thereafter said E. F. assigned said indebtedness to this plaintiff, of which the defendant had due notice.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4468. Complaint on account stated.

Form No. 1234.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., an account was stated between the plaintiff and the defendant, and upon such statement a balance of . . . dollars was found due to the plaintiff from the defendant.

II. That the defendant agreed to pay to the plaintiff the said balance of . . . dollars.

III. That he has not paid the same.

[DEMAND OF JUDGMENT.]

§ 4469. Complaint to correct mistakes in account stated, and for judgment thereon.

Form No. 1235.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff and defendant, having had mutual dealings, afterwards, on the . . . day of . . ., 19. . , came to a

mutual accounting, upon which a statement of the said account was made in writing, of which a copy is annexed as a part of this complaint, whereby a balance of . . . dollars was found to be due from the plaintiff to the defendant [or, from the defendant to the plaintiff] on final adjustment.

II. That since the said statement of account the plaintiff has discovered errors and false charges [or, credits; or both] therein, of which he was wholly ignorant at the time of such settlement.

III. That in the statement of said account so settled he is charged [here state the items wrongfully charged, and show what is the error].

IV. That the following items, which ought to have been entered to his credit in said account, were wholly omitted therefrom, by mistake and oversight, to-wit: [Here set forth the items, with date, amount, etc.]

V. That the following items are erroneous in amount, in this, that the credit for . . . should have been of . . . dollars, instead of only . . . dollars. [State briefly the grounds why it should have been more.]

VI. That the said account ought to be corrected as above mentioned; and the balance thereon ought to be . . . dollars in favor of the plaintiff, instead of being . . . dollars in favor of the defendant.

VII. That as soon as the plaintiff discovered the said mistakes and errors, he called on the defendant, on the . . . day of . . ., 19.., and pointed the same out to him, and then requested the defendant to correct the same, and to restate the said account, with the mistakes and errors aforesaid corrected; but the defendant refused to do so, or to pay the plaintiff any part of said sum of . . . dollars due to him at the time said account was stated [or, to accept the sum of . . . dollars from the plaintiff in full payment of said account].

Wherefore, the plaintiff demands judgment that he may be allowed to prove the said errors and mistakes in the stating of said account, and that the same be restated; that judgment may be rendered against the defendant for the balance of . . . dollars due him on said corrected account, with interest thereon from the . . . day of . . ., 19.., with the costs of this action.

§ 4470. Complaint for general balance of account.

Form No. 1236.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, for the balance of an account for groceries sold and delivered by the plaintiff to defendant, and for services performed by the plaintiff for the defendant as an accountant, and for commissions of plaintiff on the sale for defendant of various articles of farm produce, and for moneys paid by plaintiff for defendant's use; the whole furnished, done, and performed at the request of the defendant, between the . . . day of . . . , 19.. , and the . . . day of . . . , 19.. ; that the whole amount and aggregate value of which items is . . . dollars, no part of which has been paid, except the sum of . . . dollars, the balance of account first aforesaid still being unpaid.

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4471. Complaint upon account of services.

Form No. 1237.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . . , 19.. , and the . . . day of . . . , 19.. , at the city of . . . , the plaintiff performed work, labor, and services [state the services] for the defendant at his request.

II. That the same were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4472. The same—Another form—Common count.

Form No. 1238.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars on an account for the work, labor, and services

in [state the service], performed at the request of the defendant at . . ., between the . . . day of . . ., 19.., and . . . day of . . ., 19..

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4473. Complaint for money overpaid, relying on erroneous account.

Form No. 1239.

[TITLE.]

The plaintiff complains, and alleges:

I. That prior to the . . . day of . . ., plaintiff and defendant had numerous business transactions together, and that defendant, on or about the . . . day of . . ., 19.., rendered an account thereof to the plaintiff, showing an indebtedness of plaintiff to the defendant in the sum of . . . dollars, a true copy of which account is attached hereto and marked "Exhibit A."

II. That the plaintiff, supposing said account to be correct and relying thereon, paid to the defendant said amount.

III. That said account was not correctly stated, but that the following items thereof were incorrect: [here specify erroneous items], whereby plaintiff was overcharged the sum of . . . dollars.

IV. That plaintiff, prior to the commencement of this action, demanded payment thereof from defendant, but that no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 4474. Complaint on account of services—By an architect.

Form No. 1240.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . . 19.., at . . ., the plaintiff performed work, labor, and services for the defendant, and at his request, as architect, in forming and drawing plans, and making estimates for, and superintending the erection of a row of buildings to be known as Cottage Row, in . . . street, in the city and county of San Francisco.

II. That the said services were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4475. The same—Another form—Common count.

Form No. 1241.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, on account of work, labor, and services as architect, in forming and drawing plans, and making estimates for, and superintending the erection of a row of buildings to be known as Cottage Row, in . . . street, in the city and county of San Francisco, performed at the request of the defendant between the . . . day of . . . , 19. . , and the . . . day of . . . , 19. .

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4476. The same—By a broker for commissions.

Form No. 1242.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . . , 19. . , and the . . . day of . . . , 19. . , the plaintiff performed services for the defendant, at his request, as broker, at the city and county of San Francisco, in the purchase [and sale] of [government bonds, state stock, negotiable securities, real estate, personal property, or otherwise].

II. That such services were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4477. The same—Another form—Common count.

Form No. 1243.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, on an account for services as broker in the purchase [and sale] of [government bonds, state stock, negoti-

able securities, real estate, personal property, or otherwise], performed at the request of the defendant, at the city and county of San Francisco, between the . . . day of . . ., 19.., and the . . . day of . . ., 19..

II. That the defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4478. **Complaint by carrier, against consignor, for freight.**

Form No. 1244.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . . , 19.., the plaintiff performed work, labor, and services for the defendant, at his request, in carrying in its vessel, the . . ., sundry goods and merchandise from . . . to . . .

II. That such services were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4479. **The same—Another form—Common count.**

Form No. 1245.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff to the amount of . . . dollars, on an account for work, labor, and services, in carrying in its vessel, the . . ., sundry goods and merchandise, from . . . to . . ., at the request of the defendant, between the . . . day of . . . , 19.., and the . . . day of . . . , 19..

II. That the defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4480. **The same—Against consignee.**

Form No. 1246.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., the plaintiff performed work, labor, and services

in carrying in its vessel, the . . ., sundry goods and merchandise, from . . . to . . ., which were consigned to the defendant and delivered by plaintiff at . . ., to the defendant, and by him accepted.

II. That such services were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4481. The same—Another form—Common count.

Form No. 1247.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff to the amount of . . . dollars, on account for work, labor, and services, in carrying in its vessel, the . . ., sundry goods and merchandise, from . . . to . . ., which were consigned to the defendant and delivered by plaintiff at . . . to the defendant, and by him accepted, between the . . . day of . . ., 19.., and the . . . day of . . ., 19..

II. That the defendant has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4482. Complaint by editor for services.

Form No. 1248.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., at the city and county of San Francisco, the plaintiff performed services for the defendant, at his request, as an editor, in conducting the newspaper of the defendant known as "The . . .," and in writing and preparing articles and paragraphs for the same.

II. That such services were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4483. The same—Another form—Common count.

Form No. 1249.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, on an account for services as an editor in conducting the newspaper of the defendant known as "The . . .," and in writing and preparing articles and paragraphs for the same, performed at the request of the defendant, at the city and county of San Francisco, between the . . . day of . . ., 19.. , and the . . . day of . . ., 19..

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4484. Complaint by author for editing and compiling book.

Form No. 1250.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.. , and the . . . day of . . ., 19.. , at the city and county of San Francisco, the plaintiff performed work, labor, and services for the defendant, at his request, in compiling and writing a certain book, entitled "The . . .," and in preparing the same for the press, and revising and correcting the proofs for the same.

II. That such services were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4485. The same—Another form—Common count.

Form No. 1251.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, on an account for work, labor, and services, in compiling and editing a certain book, entitled "The . . .," and in preparing the same for the press, and revising and correcting the proofs of the same, performed at the request of the defendant,

at the city and county of San Francisco, between the . . . day of . . ., 19. . , and the . . . day of . . ., 19. .

II. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4486. Complaint for services and materials furnished.

Form No. 1252.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19. . , and the . . . day of . . ., 19. . , at the city and county of San Francisco, the plaintiff performed work, labor, and services for the defendant, at his request, in [insert nature of work], and furnished materials to the defendant in and about the said work, on the like request.

II. That such services and materials were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4487. The same—Another form—Common count.

Form No. 1253.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, on an account for work, labor, and services of the plaintiff, performed at the request of the defendant, in [insert nature of work], and for materials furnished by the plaintiff in and about the said work, on the like request, between the . . . day of . . ., 19. . , and the . . . day of . . ., 19. . , at the city and county of San Francisco.

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4488. Complaint for tuition bills.

Form No. 1254.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19. . , and the . . . day of . . ., 19. . , at the city and county of San Francisco, the plain-

tiff, at the request of the defendant, performed work, labor, and services in instructing his children in various branches of learning, and furnished them with books, papers, and other things necessary in and about said work, at the like request, and provided them with board, lodging, and other necessaries.

II. That such services and materials furnished were reasonably worth the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4489. The same—Another form—Common count.

Form No. 1255.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, on an account for the work, labor, and services performed at the request of the defendant, in instructing his children in various useful branches of learning, and for books, papers, and other necessary things furnished by this plaintiff in and about said work, at the like request, and for the board, lodging and other necessaries for said children, provided by the plaintiff during said time, at the like request, between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., in the sum of . . . dollars.

II. That the defendant has not paid the same, nor any part thereof [except, etc.]

[DEMAND OF JUDGMENT.]

§ 4490. Demand for copy of account.

Form No. 1256.

[TITLE.]

Sir: You are hereby required to deliver to me, within five days after service hereof on you, a copy of [or, if complaint be verified, a verified copy] of the account alleged in the complaint in this action.

Dated . . ., 19..

G. H., Defendant's Attorney.

To E. F., Attorney for Plaintiff.

§ 4491. Copy of account or bill of particulars to be furnished.

Form No. 1257.

[TITLE.]

To G. H., Esq., Defendant's Attorney:

Take notice, that the within is a true copy of the account mentioned in the complaint herein [or, a true bill of particulars of the plaintiff's demand in this action], as demanded by you.

Dated . . ., 19.. E. F., Plaintiff's Attorney.

[If complaint be verified, attach verification to the account or bill as follows:]

[VENUE.]

A. B., being first duly sworn, says that he is the plaintiff in the above-entitled action, and that the foregoing is a correct account [or, bill of particulars] of the plaintiff's claim on which this action is brought, and that he verily believes it to be true.

[JURAT.] A. B.

§ 4492. Denial of errors in account stated.

Form No. 1258.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the account stated which is mentioned in the complaint is true and just [except as to, here specifying any admitted error], and that there are no errors or mistakes in the stating of the said account, as alleged [except as aforesaid].

§ 4493. Plea of an account.

Form No. 1259.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That after the said dealings in said complaint named, and before the commencement of this action, to-wit, on the . . . day of . . ., 19.., the said A. B. and C. D. came to a mutual accounting touching the several matters and things in said complaint mentioned.

II. That on the said accounting, there was found due from the said A. B. to the said C. D. . . . dollars, as a final balance upon said mutual dealing and matters between the said A. B. and C. D.

III. And the said C. D. avers that the said stated account is just and true.

Wherefore, he claims judgment against the plaintiff for said sum of . . . dollars, and interest from said . . . day of . . ., 19.., and costs.

§ 4494. Denial of mutual dealings.

Form No. 1260.

[TITLE.]

The defendant answers to the complaint, and alleges:

That there are no such mutual dealings and account between the said plaintiff and defendant, in manner and form as the said plaintiff has in his said petition alleged, [or at all].

§ 4495. Affidavit by plaintiff to move for reference of action involving long account.

Form No. 1261.

[TITLE.]

[VENUE.]

A. B., the plaintiff in the above-entitled action, being duly sworn, says:

That said action is brought to recover [here briefly designate nature of cause of action; as, for instance:] for goods, wares, and merchandise sold and delivered by plaintiff to defendant, at his request, at various times between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., as more fully appears from the complaint herein.

That issue was joined on [or, as of] the . . . day of . . . last, by the service of defendant's answer, setting up [here designate the defenses; e. g. thus:] payment as to part, and a counterclaim arising out of several items of services alleged to have been rendered by him to the plaintiff.

That the trial of the aforesaid issue will require the examination of a long account on the side of the plaintiff [or, defendant; or, both parties], consisting of at least . . . items of charges and [credits] of the aforesaid [goods and services] of various dates.

[JURAT.] A. B.

§ 4496. Judgment correcting an account stated.

Form No. 1262.

[TITLE.]

[Recitals of trial and verdict or findings.]

On motion of G. H., attorney for plaintiff,—

It is adjudged, that the account erroneously stated between the parties hereto on the . . . day of . . ., 19.., by which it appeared that the sum of . . . dollars was due the plaintiff from the defendant as a balance of account, be and the same is hereby corrected by adding to the charges against the defendant in said account the sum of . . . dollars [or otherwise state the charge according to the fact], making the correct balance due the plaintiff the sum of . . . dollars.

It is further adjudged, that the plaintiff recover of the defendant the sum of . . . dollars, being the balance justly due him on said account as corrected, together with the costs and disbursements of this action, taxed at . . . dollars, making in all the sum of . . . dollars.

By the Court: R. S., Clerk.

CHAPTER CXV.

ACTIONS ON AWARDS.

§ 4497. Essential allegations.—A complaint on an award must show that the arbitrators conformed to the submission and the powers of the arbitrators.[1] It was the rule at common law, that the plaintiff need not show the award on both sides, and if there be a condition precedent it need not be alleged.[2] But, under the code, performance of the conditions of an award must be pleaded, as well as in the case of a contract.[3] But if the arbitrators award that one of the parties shall pay to the other a certain sum, and also that the parties shall execute to each other mutual releases of all actions, etc., the tender of a release as provided by the award is not a condition precedent to the right to try an action to recover the money.[4] The award of money is absolute and unconditional, but the award of release is different; they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by him.[5] But where matters awarded to be done are independent, tender or demand before suit need not be averred.[6]

An award is not sufficiently pleaded as a defense where no written agreement for arbitration, no award filed with the clerk of the court, and no approval thereof by the court are alleged.[7] Where the award was required to be delivered to the parties an allegation that it was ready to be and was delivered to the plaintiff is not sufficient.[8] Notice of the award and demand need not be alleged, unless required by the terms of the submission.[9] This is not, however, the law in California. There

1 Gear v. Brocken, Burn. (Wis.) 88; Matthews v. Matthews, 2 Curtis C. C. 105, Fed. Cas. No. 9288.
2 McKinstry v. Solomons, 2 Johns. 57; Diblee v. Best, 11 Johns. 103.
3 Cole v. Blunt, 2 Bosw. 116.
4 Dudley v. Thomas, 23 Cal. 365.
5 Id.; Cole v. Blunt, 2 Bosw. 116.
6 Nichols v. Rensselaer Co., 22 Wend. 125.
7 Owen v. Casey, 48 Wash. 673, 94 Pac. 473.
8 Pratt v. Hackett, 6 Johns. 14.
9 Hodsden v. Horridge, 2 Saund. 62; Rowe v. Young, 2 Brod. & B. 233.

notice must be served on the opposite party before judgment is entered.[10]

§ 4498. **Form of submission—When must be in writing.**—In California, under section 1282 of the Code of Civil Procedure, the submission must be in writing. It may be stipulated in the submission that it be entered as an order of the superior court. When so entered it cannot be revoked without the consent of both parties, and the award may be enforced in the same manner as a judgment. If the submission is not made an order of court, it may be revoked at any time before the award is made.[11] The clerk must be authorized by the stipulation to make a note in his register, and he must in fact make it there; the mere authority without the act done is no more than the act done without the authority would be. Both these must concur, and in the absence of either there is no jurisdiction.[12] A stipulation that judgment in the district court may be rendered upon the award made in pursuance of the submission, without a stipulation that the submission shall be entered as a rule of the court, is not sufficient.[13] If the submission is not made a rule of court, an action may be maintained upon the award, as in the case of common-law arbitration. If the submission is not made a rule of court, it may be revoked by either party at any time before the award is made; but the party revoking is liable to an action for the costs and damages of the other party in preparing for and attending the arbitration.[14] In New York, an action may be maintained upon the award.[15] But a verbal award will not be valid, unless a verbal submission of the matters on which the award is made would be binding upon the parties.[16] If a submission is attempted to be made under the provisions of the statute, and the same is inoperative for failure to comply therewith, it is not valid as a common-law submission.[17] No rule of law forbids parties to a submission to arbitration to agree to abide by the decision of

10 See Code Civ. Proc., § 1286; Mahoney v. Spring Valley Water Works, 52 Cal. 159.

11 See Code Civ. Proc., § 1283.

12 Pieratt v. Kennedy, 43 Cal. 395; Ryan v. Dougherty, 30 Cal. 218. See Kettleman v. Treadway, 65 Cal. 505, 4 Pac. 506; California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855.

13 Fairchild v. Doten, 42 Cal. 128.

14 Code Civ. Proc., § 1290. See Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932.

15 Cope v. Gilbert, 4 Denio, 347; Deidrick v. Richley, 2 Hill, 271; Hays v. Hays, 23 Wend. 363.

16 French v. New, 28 N. Y. 147.

17 Inhabitants of Deerfield v. Arms, 20 Pick. 480, 32 Am. Dec. 228.

the arbitrators, selected by themselves, as to the matters in difference between them.[18] But a stipulation that neither party shall appeal from an award is not binding.[19]

§ 4499. **Who may make submission.**—Any person capable of contracting may submit to arbitration any controversy, except a question of title to real property in fee or for life.[19a] The statute is but an affirmance of the common law, and under it the parties have no higher rights than they might have asserted in a court of equity, in cases of fraud, accident, or mistake.[20] As the submission to arbitration is a contract, the party making the submission must have the power to contract with reference to the subject-matter in dispute. In general, an agent has no authority to submit to arbitration unless expressly or impliedly empowered by his principal.[21] But an agent authorized to prosecute a suit has authority to submit to a reference, under a rule of court.[22] And it is the practice throughout the Union for suits to be referred by consent of counsel, without special authority.[23] If, however, an unauthorized submission is ratified by the principal, he is bound thereby.[24]

§ 4500. **The same—Partners—Parties jointly interested.**—The great weight of authority is in support of the doctrine that the right to submit a partnership controversy to arbitration is not included within the ordinary course of partnership business, and consequently that one partner, unless expressly authorized, has no such power, so as to bind his copartner.[25] The partner who

18 Jensen v. Deep Creek Farm etc. Co., 27 Utah, 66, 74 Pac. 427.

19 Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

19a Cal. Code Civ. Proc., § 1281.

20 Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313; reaffirmed in Peachy v. Ritchie, 4 Cal. 205.

21 Trout v. Emmons, 29 Ill. 433, 81 Am. Dec. 326.

22 Buckland v. Conway, 16 Mass. 396.

23 Holker v. Parker, 7 Cranch, 436, 3 L. Ed. 396; Alexandria Canal Co. v. Swann, 5 How. 83, 12 L. Ed. 60. See Greene v. Darling, 5 Mason, 201, Fed. Cas. No. 5765.

24 Isaacs v. Beth Hamedash Soc., 1 Hilt. 469; Detroit v. Jackson, 1 Doug. 106; Memphis etc. R. R. Co. v. Scruggs, 50 Miss. 284; Furber v. Chamberlain, 29 N. H. 405; Perry v. Mulligan, 58 Ga. 479; Lowenstein v. McIntosh, 37 Barb. 251; Smith v. Sweeney, 35 N. Y. 291.

25 Jones v. Bailey, 5 Cal. 345; Buchanan v. Curry, 19 Johns. 137, 10 Am. Dec. 200; Eastman v. Burleigh, 2 N. H. 484; Southard v. Steele, 3 T. B. Mon. 435; Steiglitz v. Egginton, Holt, 141; Stead v. Salt, 3 Bing. 101; Adams v. Bankart, 1 Cromp. M. & R. 681; Karthaus v. Ferrer, 1 Pet. 222, 7 L. Ed. 121; Buchoz v. Grandjean, 1 Mich. 367; Backus v. Coyne, 35 Mich. 5; Harrington v. Higham, 13 Barb.

makes the submission is himself bound by it.[26] Persons jointly interested cannot in general bind each other by a submission to arbitration without express authority.[27]

§ 4501. **Who must make submission.**—Where parties to a contract agree therein that any disputes shall be submitted to arbitration, which awards shall be conclusive, one contractor cannot maintain an action on the contract, unless he has offered to arbitrate, or where he has refused to do so on notice from the other party.[28] Where a contract in reference to a party-wall provided for arbitration of disputes, and defendant obstructed the hallway with iron shutters, plaintiff may enjoin such action without first resorting to arbitration.[29]

§ 4502. **Election of remedy.**—Where the submission is by bond, the plaintiff has his election to sue on the bond or on the award, if it is merely for the payment of money; but if a collateral thing is awarded, the suit must be on the bond, as debt will lie for money only.[30] Where a sum of money is awarded, it is sufficient to set forth only so much of the award as to show a good cause of action.[31] It seems that a clause in a contract providing that in case any dispute should arise in regard to the same it should be settled by arbitrators is no bar to an action upon the contract.[32]

§ 4503. **Judgment upon award.**—Judgment may be entered on an award without an order of the court.[33] But the award shall be in writing, signed by the arbitrators, or a majority of them, and be delivered to the parties.[34] A judgment entered upon an award not supported by a valid statutory agreement of submission to

660; Onion v. Robinson, 15 Vt. 510; St. Martin v. Thrasher, 40 Vt. 460; Cal. Civ. Code, § 2430, subd. 6.

26 Jones v. Bailey, 5 Cal. 345; Karthaus v. Ferrer, 1 Pet. 222, 7 L. Ed. 121; Wood v. Shepherd, 2 Pat. & H. 442.

27 Eastman v. Burleigh, 2 N. H. 485; Smith v. Smith, 4 Rand. 95; Boyd's Heirs v. McGruder's Heirs, 2 Rob. (Va.) 761. See this subject discussed at length in note to Hutchins v. Johnson, 30 Am. Dec. 626.

28 Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374.

29 Winsor v. German Sav. etc. Soc., 31 Wash. 365, 72 Pac. 66. See, also, Williamson v. North Pacific Lumber Co., 42 Or. 153, 70 Pac. 387-532.

30 Hodsden v. Harridge, 2 Saund. 62.

31 1 Ld. Raym. 115.

32 Binsse v. Paige, 1 Keyes (N. Y.) 87.

33 Carsley v. Lindsay, 14 Cal. 390.

34 Cal. Code Civ. Proc., § 1286.

arbitration is absolutely void.[35] The court will not disturb an award unless some error complained of, whether of law or of fact, appear upon the face of the award.[36] If a judgment on an award of arbitrators is entered by the clerk, at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party cannot afterwards question its validity on the ground that it was irregularly entered.[37] An award which appears to determine all matters submitted to arbitration, and which shows upon its face that no further inquiry is necessary to ascertain the sum of money to be paid or any act to be done by either party in relation to the matters submitted, is sufficiently complete.[38]

§ 4504. Jurisdiction.—Where the court has no jurisdiction of a subject-matter, the arbitrators can have none.[39] And the award being void, the release of the action by one of the parties is also void, if filed in pursuance of the submission.[40] A court of equity may decree specific performance of an award.[41] This does not apply to real estate, as no arbitration or award can be made affecting the title to real property in California.[42] So in Utah; but a dispute as to the existence of any fact that might determine the rights of the parties to the land, without trying the legal title, may be submitted to arbitration.[43] Where a party receives the amount of a judgment under an award, it is a waiver on his part of all errors and misconduct on the part of the arbitrators.[44] One who has petitioned the court for judgment on an award, who has appeared and introduced evidence, cannot question the court's jurisdiction to act upon exceptions to the award.[45] A submission to arbitration of title to real estate, being prohibited by statute, is not merely voidable, but is void and incapable of ratification.[46] But where, under an agreement in

35 Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740.

36 Tyson v. Wells, 2 Cal. 122; overruled, as to the report of a referee, in Cappe v. Brizzolara, 19 Cal. 607.

37 Hoogs v. Morse, 31 Cal. 128.

38 Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92.

39 Williams v. Walton, 9 Cal. 142.

40 Muldrow v. Norris, 12 Cal. 331.

41 Whitney v. Stone, 23 Cal. 275.

42 Spencer v. Winselman, 42 Cal. 479.

43 Thygerson v. Whitbeck, 5 Utah, 406, 16 Pac. 403.

44 Hoogs v. Morse, 31 Cal. 128.

45 Waisner v. Waisner, 15 Wyo. 420, 123 Am. St. Rep. 1081, 89 Pac. 580.

46 Wiles v. Peck, 26 N. Y. 42.

writing, parties submit matters of difference relative to the partition of lands to the award of arbitrators, and an award is made thereunder, a specific performance of the award will be decreed.[47] So in New York, as to disputed boundaries,[48] and in Ohio.[49]

§ 4505. **Meeting of arbitrators.**—Where there are three arbitrators, all shall meet, but two of them may do any act which might be done by all.[50] The arbitrator must make his award within the time limited in the agreement.[51] An allegation that an award was made, imports that it was ready to be delivered.[52] They may select an umpire either before or after investigation, and may award costs. But after an award has been once made and delivered, they cannot amend the same without consent of the parties.[53] They shall be sworn, and a majority may determine any question.[54] Arbitrators have no common-law powers when appointed in the mode provided by statute.[55] Arbitrators may refuse to examine books not properly kept nor identified, nor actually offered in evidence, and not containing anything material to the controversy.[56]

§ 4506. **Publication.**—The arbitrator cannot "award" without "publishing" his award; and "publishing" is a technical phrase, merely implying that the arbitrator has finally disposed of the case.[57] And when published, any alteration whatever, without consent of the parties, will vitiate it.[58] Notice of the award need not be averred, unless required by the terms of the submission.[59] No demand need be alleged unless expressly required.[60]

§ 4507. **Revocation.**—An agreement to submit a matter to common-law arbitration is, both at law and in equity, revocable before the award is given,[61] and it cannot be made irrevocable by any

47 Whitney v. Stone, 23 Cal. 275.
48 Stout v. Woodward, 5 Hun, 340.
49 Hunt v. Guilford, 4 Ohio, 310.
50 Cal. Code Civ. Proc., § 1285; Glass Pendery Min. Co. v. Meyer Min. Co., 1 West Coast Rep. 290.
51 Ryan v. Dougherty, 30 Cal. 218
52 Munro v. Alaire, 2 Caines, 320.
53 Dudley v. Thomas, 23 Cal. 365.
54 Cal. Code Civ. Proc., § 1285.
55 Williams v. Walton, 9 Cal. 145.
56 Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.
57 Brooke v. Mitchell, 6 Mee. & W. 473.
58 Porter v. Scott, 7 Cal. 312; Dudley v. Thomas, 23 Cal. 365.
59 Hodsden v. Harridge, 2 Saund. 62, 6 Mee. & W. 474.
60 Rowe v. Young, 2 Brod. & B. 233.
61 8 Co. Rep. 81; Milne v. Gratrix,

agreement of the parties.[62] Otherwise, it seems, of a submission by rule of court.[63] An award is rendered without authority where one of the parties serves notice of revocation five days before the filing of the award;[64] but such revocation should not be allowed to a party in receipt of information as to what the award is going to be when filed.[65] After the arbitrators have been sworn, neither of the parties has the right to revoke the submission.[66]

§ 4508. **Submission.**—To constitute a submission to arbitration under the statute, so as to give the award the effect of a judgment, the statute must be pursued in the manner in which the submission is filed with the clerk;[67] and the clerk may enter judgment on the award in due time, without any order of the court.[68] And, by the statutes of California, the submission to arbitration shall be in writing, and may be to one or more persons.[69]

§ 4509. **Vacation of award.**—The court may, on motion, vacate an award—1. Where it was procured by fraud or corruption;[70] 2. Where the arbitrators were guilty of misconduct;[71] but the misconduct or error complained of must be of such a nature that the rights of the complaining party were prejudiced thereby, and particular facts showing such misconduct or error must be pleaded and proved; also, where the arbitrators omitted to consider a part of the matters submitted, and the court vacates the award on account thereof, the omission must be of matter set forth in the agreement and not mere omission to hear pertinent evidence.[72] The burden of showing a fatal omission is upon the party attack-

7 East, 607; Clapham v. Higham, 1 Bing. 89; King v. Joseph, 5 Taunt. 452.

62 Tobey v. County of Bristol, 3 Story C. C. 800, Fed. Cas. No. 14065.

63 Masterson v. Kidwell, 2 Cranch C. C. 669, Fed. Cas. No. 9269.

64 Jordan v. Lode, 34 Wash. 42, 74 Pac. 817.

65 Id.

66 Commissioners Montgomery County v. Carey, 1 Ohio St. 463; Pollock v. Hall, 4 Dall. 222, 1 L. Ed. 809; Haskell v. Whitney, 12 Mass. 47. See, as to revocation, Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207; California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855.

67 Heslep v. San Francisco, 4 Cal. 1; Carsley v. Lindsay, 14 Cal. 390.

68 See, also, Ryan v. Dougherty, 30 Cal. 218.

69 Cal. Code Civ. Proc., § 1282.

70 Cal. Code Civ. Proc., § 1287; Fire Assoc. v. Allesina, 49 Or. 316, 89 Pac. 960.

71 Cal. Code Civ. Proc., § 1287; Cohn v. Wemme, 47 Or. 146, 81 Pac. 981.

72 Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.

ing the conclusiveness of the award.[73] Admissions of an arbitrator made after the award is filed cannot be used to impeach the award.[74] 3. Where the arbitrators exceeded their powers.[75] Or it may modify or correct an award—1. Where there is a miscalculation in figures; 2. When part of the award is on matters not submitted; 3. When, if it had been the verdict of the jury, it could have been amended, or the imperfection disregarded.[76] As, where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside.[77] Where an award is objected to on the ground that it embraces matters not in fact submitted, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their duty.[78] An award may be good in part and bad in part,[79]—may be accepted in part and rejected in part, if divisible.[80]

§ 4510. **Valid awards.**—The rule is that arbitrators must pass upon all matters submitted;[81] and an award which clearly goes beyond the issues submitted is invalid, as a whole, where the matter *ultra vires* cannot be separated without violating the intent of the parties.[82] It seems, in New York, "that an arbitrator made an award" means a qualified arbitrator, and sufficiently imports that he was duly sworn, where an oath is required.[83] An award rendered upon fair arbitration, and for a long time concurred in, must be held to be conclusive.[84] "No award" implies no valid award.[85] An award settles forever all matters fairly within the meaning and intention of the submission.[86] An award bad in part may be enforced for the part that is good, if not attacked for

73 Jensen v. Deep Creek Farm etc. Co., 27 Utah, 66, 74 Pac. 427.

74 Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.

75 Cal. Code Civ. Proc., § 1287; Morris etc. Co. v. Salt Co., 58 N. Y. 667; Stockton etc. Agr. Works v. Glens Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

76 Cal. Code Civ. Proc., § 1288.

77 Pierson v. Norman, 2 Cal. 599; Jacob v. Ketcham, 37 Cal. 197.

78 Blair v. Wallace, 21 Cal. 317.

79 Williams v. Walton, 9 Cal. 146.

80 Waisner v. Waisner, 15 Wyo. 420, 123 Am. St. Rep. 1081, 89 Pac. 580.

81 Muldrow v. Norris, 12 Cal. 331; Porter v. Scott, 7 Cal. 312.

82 White v. Arthur, 59 Cal. 33.

83 Browning v. Wheeler, 24 Wend. 258, 35 Am. Dec. 617.

84 Jarvis v. Fountain Water Co., 5 Cal. 179; Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92; Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609; Wilson v. Wilson, 18 Colo. 615, 34 Pac. 175.

85 Dresser v. Stansfield, 14 Mee. & W. 822.

86 Brazill v. Isham, 12 N. Y. 15; Lowenstein v. McIntosh, 37 Barb. 251.

fraud, and the matter is divisible.[87] It must be certain and decisive as to the matters submitted, and thus avoid all further litigation. Unless it is final and conclusive as to matters submitted, it is not admissible in evidence.[88] Where parties submit generally all claims and controversies arising out of a lease of some sheep, and a suit thereon, it is the duty of the arbitrators to pass upon every point of difference;[89] but where the mutual claims are all for money, the award may be in a gross amount, without findings as to the separate claims.[90] In California, the rule that the statutory proceedings in cases of arbitration, being in derogation of the common law, must be strictly construed, has been abrogated by the code, and it is sufficient if there is a substantial compliance with the requirements of the statute. And if an award, though not good under the statute, is valid as a common-law award, a motion to set it aside is properly denied. But a submission of disputed matters to arbitration, under an agreement of submission which clearly shows an intention by the parties thereto to ignore nearly all of the material provisions of the statute relating to arbitrations, and which expressly repudiates any intention of following its requirements, or of availing themselves of the machinery of the court to assist the arbitrators, or correct any errors of the latter, is void as a statutory submission to arbitration, and an award thereon cannot be enforced as a judgment, although it may be good as a common-law award and as the basis of an action.[91] In the absence of statute, an award may be set aside for fraud, accident, or mistake, but it must be for fraud practiced upon the arbitrators, or for some accident or mistake by which they were deceived or misled.[92] And a party who with knowledge of all the material facts complies with the requirements of an award, or accepts the benefits thereof, is precluded from demanding that it be set aside.[93] An award will not be set aside upon the ground that the arbitrators consulted with a person not an arbitrator, if it appears that they acted on their own judgment

87 Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

88 Jacob v. Ketcham, 37 Cal. 197.

89 Jensen v. Deep Creek Farm etc. Co., 27 Utah, 66, 74 Pac. 427.

90 Id.

91 Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740.

92 Wilson v. Wilson, 18 Colo. 615, 34 Pac. 175.

93 Id.; Godfrey v. Knodle, 44 Ill. App. 638; Terry v. Moore, 22 N. Y. Supp. 785; Johnson v. Cochran, 81 Ga. 39, 12 Am. St. Rep. 294, 6 S. E. 809. See School District v. Sage, 13 Wash. 352, 43 Pac. 341.

in making their determination.[94] But an award made, not on their own judgment, but solely at the direction of one of the parties, is invalid.[95]

§ 4511. **Void award.**—Two arbitrators failing to agree chose a third, who, without examining the work to be passed upon, met with the other two. Plaintiff's appointee withdrew, and the others made the award. There having been no notice given to the parties of their meeting, and plaintiff not knowing that his appointee had withdrawn, the award was void.[96] But ordinarily an award made by the third arbitrator and one chosen by one of the parties is valid and binding.[97] An award is void for want of authority where one of the parties served notice of revocation of the arbitration five days before the award was filed.[98]

§ 4512. **Date of award.**—An award may be counted on as made at the time of its date, not at the time as extended by erasure or interlineation.[99] No time being specified by the agreement of submission nor by statute, mere delay in filing the award does not deprive the court of jurisdiction to enter judgment upon such award.[100]

§ 4513. **Appointment.**—An umpire may be appointed by parol, unless the submission require the appointment to be in writing.[101] When an umpire has been appointed, and has entered on the performance of his duty, the authority to decide is vested solely in him; the original powers of the arbitrators cease to exist.[102]

§ 4514. **Power to award.**—But where two arbitrators, unable to agree, appoint under the submission a third arbitrator, the power to make an award is vested in the three jointly. Wherever, therefore, the action is founded on an award, its true character,

94 Simons v. Mills, 80 Cal. 118, 22 Pac. 25.

95 Hartford Fire Ins. Co. v. Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

96 Slater v. La Grande Light etc. Co., 43 Or. 131, 72 Pac. 738.

97 Fish v. Vermillion, 70 Kan. 348, 78 Pac. 811.

98 Jordan v. Lode, 34 Wash. 42, 74 Pac. 817.

99 Tompkins v. Corwin, 9 Cow. 255.

100 Richards v. Smith, 33 Utah, 8, 91 Pac. 683.

101 Elmendorf v. Harris, 5 Wend. 516.

102 Underhill v. Van Cortlandt, 2 Johns. Ch. 339; Butler v. Mayor of New York, 1 Hill, 489; Mayor of New York v. Butler, 1 Barb. 325.

as the act of an umpire or of arbitrators, must be set forth in the complaint, in order that a defense adapted to its true character may be set up in the answer.[103] An action cannot be maintained upon an original cause of action submitted to arbitration, where the plaintiff retains the fruits of the award.[104]

§ 4515. Evidence.—The testimony of arbitrators in an action on their award may be used to show that they considered all matters submitted to them in making the award, and the transcript of testimony given before the arbitrators is admissible to show that all matters submitted were considered and adjudicated;[105] but the admissions of an arbitrator, made after he has filed his award are not admissible for the purpose of impeaching his award.[106]

FORMS IN ACTIONS ON AWARDS.

§ 4516. Complaint on award of arbitrators under common-law agreement of arbitration.

Form No. 1263.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., controversies existed between plaintiff and defendant concerning certain demands by the plaintiff against said defendant for services rendered by this plaintiff to said defendant, at his request, in drawing plans and specifications of a dwelling-house for defendant, which demands defendant disputed and refused to pay. [Or state other claims, according to the circumstances of the case.]

II. That for the purpose of putting an end to said controversies and differences, they then and there [by an agreement in writing] submitted themselves and said controversies to the award, arbitrament, and final determination of one E. F., an arbitrator, [or, E. F. and G. H., two arbitrators,] to arbitrate and determine concerning said disputes and controversies, and mutually promised each other to abide by and perform his award. [Or, they

103 Lyon v. Blossom, 4 Duer, 318.

104 Orvis v. Wells Fargo Co., 73 Fed. 110, 19 C. C. A. 382.

105 Jensen v. Deep Creek Farm etc. Co., 27 Utah, 66, 74 Pac. 427.

106 Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.

then and there, by an agreement in writing, a copy of which is hereto annexed and marked "Exhibit A," agreed to submit the same to the award of E. F.]

III. That thereafter the said arbitrator [or, the said arbitrators], having undertaken the arbitration, heard plaintiff and defendant, and on the . . . day of . . . , 19.. , at . . . , duly made and published [and where such notice is required by the submission, add: and notified the said parties of] his [or, their] award [in writing] of and concerning the matter so referred [which award bears date the . . . day of . . . , 19..]; and thereby he awarded and declared that, after due appearance before him on behalf of this plaintiff and said defendant, he found that said defendant was justly indebted to this plaintiff in the sum of . . . dollars for the services aforesaid. [Or otherwise, state substance of the award.]

[Or, where the award is in writing:] That thereafter said arbitrator [or, arbitrators], having undertaken the arbitration, duly made and published his [or, their] award in writing, of which the following is a copy. [Or, a copy of which is hereto annexed and marked "Exhibit B."]

IV. That plaintiff duly performed all the conditions thereof on his part, and [afterwards, and on or about the . . . day of . . . , 19.. , at . . .] gave notice of said award to the defendant, and demanded of him payment of said sum of . . . dollars.

V. That defendant then and ever since has refused to pay the same, and there is now due from defendant to plaintiff thereon the sum of . . . dollars, with interest from [etc.].

[DEMAND OF JUDGMENT.]

§ 4517. Complaint on an award of arbitrators—Common form.

Form No. 1264.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , disputes and differences existed between the plaintiff and defendant concerning [a demand of the plaintiff for labor and service rendered by him for the defendant at his request], and thereupon, on the day last aforesaid, the plaintiff and defendant agreed, in writing, to submit the same to the award of A. B. as an arbitrator between them, a copy of which said agreement and submission is hereunto annexed, marked "Exhibit A," and made part hereof.

II. That thereafter the said A. B. duly qualified as such arbitrator, and heard the plaintiff and the defendant touching their said matters of dispute, and thereafter, on the . . . day of . . ., 19.., at . . ., duly made and published his award, in writing, of and concerning the matters so referred, and thereby said arbitrator awarded and declared, that after due appearance before him on behalf of this plaintiff and said defendant, he found that the said defendant was justly indebted to this plaintiff in the sum of . . : dollars, for services aforesaid [or otherwise, according to the fact]; a copy of which said award is hereto attached, marked "Exhibit B," and made part hereof.

III. That the plaintiff duly performed all the conditions of said award on his part, and afterwards, and on or about the . . . day of . . ., 19.., at . . ., gave notice of said award to the defendant, and demanded of him payment of the said sum of . . . dollars, so awarded to the plaintiff as aforesaid.

IV. That the defendant has not paid the same, nor any part thereof, and there is now due from the defendant to the plaintiff thereon the sum of . . . dollars, with interest from the . . . day of . . ., 19..

[Demand of Judgment.]

§ 4518. Allegation of an enlargement of the time.

Form No. 1265.

[Title.]

That on the . . . day of . . ., 19.., the plaintiff and defendant, by agreement [in writing, of which a copy is hereto annexed], extended the time for making the award until the . . . day of . . ., 19..

§ 4519. Complaint on arbitration bond for refusal to comply with award.

Form No. 1266.

[Title.]

The plaintiff complains, and alleges:

I. That certain differences having arisen between the plaintiff and the defendant, in consideration thereof and in consideration of a like bond executed by this plaintiff to the defendant, the defendant heretofore made and delivered to the plaintiff a bond of arbitration, conditioned to abide the award of M. N. upon said

differences, of which bond a copy is hereto annexed as a part of this complaint, and marked "Exhibit A."

[II. That on the . . . day of . . ., 19.., or thereafter, and within the time limited for making the award, by agreement of plaintiff and the defendant the time of the making of the award was extended to the . . . day of . . ., 19...]

III. That the said arbitrator, having undertaken the arbitration on the . . . day of . . ., 19.., duly made and published his award in writing upon the matter submitted, ready to be delivered to the parties, or to such of them as should desire the same, and thereby awarded that the defendant should [here indicate briefly the provision which the defendant has disregarded], of which award a copy is hereto annexed, marked "Exhibit B," and made a part of this complaint.

IV. That the plaintiff duly performed all the conditions of said bond on his part to be performed [and on the . . . day of . . ., 19.., gave notice of said award to the defendant and tendered to him, etc., and demanded of him, etc.].

V. That the defendant has not [here allege breach, specifying the particular act or omission].

[DEMAND OF JUDGMENT.]

ANSWERS.

§ 4520. Invalidity of an award.

Form No. 1267.

[TITLE.]

The defendant answers to the complaint:

That by the terms of the agreement referred to in the complaint, the arbitrators were to hear the evidence and arguments of both parties at meetings called upon notice to both, but that they refused to hear the evidence offered by defendant, and failed and refused to give defendant notice of the said meetings, or any of them.

Wherefore, etc. [Judgment may be demanded, setting aside the award, if desired.]

§ 4521. Denial of award.

Form No. 1268.

That the said arbitrators [or umpire] did not make and publish any award [or the award alleged in the complaint].

[If defendant relies upon an irregularity in the award, or an excess of power on the part of the arbitrators, it is better to allege the act expressly.]

§ 4522. Denial of parol submission.

Form No. 1269.

That he did not agree or promise as alleged.

§ 4523. Denial of performance by plaintiff.

Form No. 1270.

That the defendant did not perform the award upon his part, but on the contrary omitted to [set forth his omission].

§ 4524. Denial of revocation by defendant.

Form No. 1271.

That he did not revoke the powers of the arbitrators, as alleged in the said complaint.

§ 4525. Performance by defendant.

Form No. 1272.

That the defendant duly performed the award on his part, and upon the . . . day of . . ., 19.., [state what was done].

§ 4526. Judgment upon award.

Form No. 1273.

[TITLE.]

At a term of the . . . court of the county of . . ., held on the . . . day of . . ., 19.., and on the . . . day of . . ., 19.., being a day of said term, the above-entitled matter having come on to be heard and the court having upon due notice and hearing confirmed [or, modified and corrected] the award of E. F. and G. H., the arbitrators in said matter, and having ordered judgment to be rendered upon the said award so confirmed [or, so modified and corrected]:

It is hereby adjudged and determined, [set forth the judgment rendered in accordance with the order, stating the relief granted as in ordinary judgments].

Dated this . . . day of . . ., 19..

By the Court: I. K., Clerk.

§ 4527. Notice of motion to confirm award.

Form No. 1274.

In the matter of the arbitration of certain controversies between A. B. and C. D.

To C. D., Esq.

Please take notice, that upon the award of E. F. and G. H., arbitrators, appointed by us in a certain agreement dated the . . . day of . . ., 19.., which said award was filed in the office of the clerk of the . . . court, on the . . . day of . . ., 19.., and upon the original agreement of arbitration attached to said award, as well as upon the evidence taken by said arbitrators and filed with said award [and upon the affidavit of W. X. and Y. Z., attached to this notice], the undersigned will move the said . . . court of . . . county, on the . . . day of . . ., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order confirming said award and directing judgment to be rendered in accordance with the terms thereof.

Dated . . ., 19.. A. B.

§ 4528. Notice of motion to modify award.

Form No. 1275.

[Title.]

To C. D., Esq.

Please take notice, that upon the award of E. F. and G. H., arbitrators, appointed by us in a certain agreement dated the . . . day of . . ., 19.., which said award was filed in the office of the clerk of the . . . court, on the . . . day of . . ., 19.., and upon the original agreement of arbitration attached to said award, as well as upon the evidence taken by said arbitrators and filed with said award [and upon the affidavit of W. X. and Y. Z., attached to this notice] the undersigned will move the said . . . court of . . . county, on the . . . day of . . ., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order modifying and correcting the said award in the following respects, to-wit: reducing the amount of said award from . . . dollars to . . . dollars [or otherwise, state specifically the particular modification which is desired in the award], and directing judgment to be entered upon said award as so modified and corrected. Said motion is based upon the

ground that the said arbitrators have made an evident miscalculation of figures in the said award. [Or otherwise, state the ground upon which the motion is based as may be provided by the particular statute.]

§ 4529. Order modifying award, and directing judgment as modified.

Form No. 1276.

[TITLE.]

The above-entitled matter having been brought to hearing before the court on the . . . day of . . ., 19.., upon the motion of A. B. to modify and correct the award of E. F. and G. H., the arbitrators in the above-entitled matter, which motion was based upon the said award and the agreement of arbitration and all papers filed with said award [as well as upon the affidavit of L. M. and N. O.]; after hearing C. D. in opposition to said motion [as well as the affidavits of P. Q. and R. S., filed in opposition thereto], the court being now fully advised in regard to said matter:

It is ordered, that the said award be and the same is hereby modified and corrected as follows: [Here state particularly the respects in which the award is modified and corrected.]

And it is further ordered, that judgment be rendered upon the said award as herein modified and corrected.

Dated this . . . day of . . ., 19..

By the Court: I. K., Judge.

CHAPTER CXVI.

GOODS SOLD AND DELIVERED.

§ 4530. Essential allegations—Amount due.—The failure to state the amounts due, severally, for goods and for money, in a confession of judgment, would be fatal.[1] The averment, "at his request," is not requisite in New York.[2] If the complaint alleges acceptance, it is not demurrable because it fails to show a delivery within the time agreed.[3]

A party must be presumed to know what was intended by his account, and, therefore, where a bill of sale is set forth *in hæc verba*, it remedies a defect in the description of the quantity of goods sold.[4]

§ 4531. Essential allegations—Implied promise.—The implied promise to pay is matter of law, and should not be pleaded.[5] Under a count for goods sold and delivered, the plaintiff may show that his chattels had been wrongfully converted by a sale of them by the defendant, who had received the money therefor, or he may waive the tort and sue for goods sold.[6] Section 743 of the Montana Code of Civil Procedure, providing that it is not necessary for a party to set forth in his pleading the items of the account therein alleged, but that he must deliver to the adverse party, after demand, a copy of the account, applies to actions on open, unsettled accounts, and not to actions on accounts stated.[7] Where, in an action against a bank, the answer alleged that from time to time defendant rendered to plaintiff itemized statements of the account, and that he made no objection thereto, but acquiesced thereto, and to each and every item thereof, and states the balance shown by such statements, such allegations are sufficient, after verdict, as allegations of an account stated.[8]

1 Cordier v. Schloss, 18 Cal. 576.

2 Acome v. American Min. Co., 11 How. Pr. 24; Glenny v. Hitchins, 4 How. Pr. 98; Victors v. Davis, 1 Dowl. & L. 986. See Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542.

3 Bedell v. Kowalsky, 99 Cal. 236, 33 Pac. 904. See Logan v. Apartment Assoc., 52 N. Y. St. Rep. 132.

4 Cochran v. Goodman, 3 Cal. 244.

5 Farron v. Sherwood, 17 N. Y. 227; Mayes v. Goldsmith, 58 Ind. 94.

6 Harpending v. Shoemaker, 37 Barb. 270.

7 Martin v. Heinze, 31 Mont. 68, 77 Pac. 427.

8 Nodine v. First Nat. Bank, 41 Or. 386, 68 Pac. 1109.

§ 4532. **Essential allegations—Common counts.**—A count in the ordinary form of counts in *indebitatus assumpsit* for goods sold and delivered is sufficient.[9] Thus an allegation that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action.[10] A complaint alleging that between specified days the plaintiffs sold and delivered to defendant, at his special instance and request, a large quantity of boots and shoes of a specified value, and that there is due and unpaid therefor a sum designated, which he promised to pay, but, though often requested by them, has wholly refused, is sufficient on demurrer.[11] But a declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued, whether on account of the defendant or that of another.[12] An averment that the defendant is indebted to the plaintiff on an account for goods sold and delivered in a specified sum, and that the defendant has not paid the same nor any part thereof, is equivalent to an averment that such indebtedness is due and unpaid, there being no averment as to time, terms, or circumstances of payment indicating the contrary.[13] It is not necessary to state where the goods were sold.[14] Where the plaintiff, under a contract by which the defendant was to execute to him a conveyance of certain land on delivery of a quantity of wheat, and afterwards rescinded the contract on account of failure of title, the correct form of pleading, under the code, in an action to recover the value of the wheat, is held to be the common count for goods sold and delivered, omitting all reference to the actual contract.[15] The code procedure has not changed the former rule of pleading, that a party who has fully performed a special contract on his part may count upon the implied *assumpsit* of the other party to pay him the stipulated price, and is not bound to declare specially on the agreement.[16]

9 Freeborn v. Glazer, 10 Cal. 337; Abadie v. Carrillo, 32 Cal. 172; Magee v. Kast, 49 Cal. 141; Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Higgins v. Germaine, 1 Mont. 230.

10 Abadie v. Carrillo, 32 Cal. 172.

11 Phillips v. Bartlett, 9 Bosw. 678.

12 Mershon v. Randall, 4 Cal. 324.

13 Wilcox v. Jamieson, 20 Colo. 158, 36 Pac. 902.

14 Behlow v. Shorb, 91 Cal. 141, 27 Pac. 546.

15 Ankeny v. Clark, 1 Wash. 549, 20 Pac. 583.

16 Higgins v. Newtown etc. R. R. Co., 66 N. Y. 604; Swan Mfg. Co. v. Electric Light Co., 46 N. Y. St. Rep. 535.

In a complaint in an action by several plaintiffs, to recover for goods sold and delivered, an allegation of partnership is not necessary, and an allegation of sale and delivery sufficiently implies that the goods belong to the plaintiffs.[17] That the plaintiff had purchased a quantity of goods from W. & P., then and there acting as agents of the defendant, is only another form of declaring that he had purchased from the defendant, and is good on demurrer. Where the complaint sets forth *in hæc verba* the bill of sale, it was held to remedy a defect in the description of the quantity of goods sold.[18]

§ 4533. **Balance of account for goods sold.**—Allegations of the complaint in reference to the transaction claimed to operate as payment are not material allegations requiring a denial, and are not, therefore, admitted by the failure of defendant to deny them.[19] In an action for the price of goods sold and delivered, an allegation that a further sum is due as interest does not introduce a separate cause of action or render the complaint ambiguous, unintelligible, or uncertain.[20]

§ 4534. **Nature of claim.**—The complaint should indicate the nature and character of the claim, and the period within which it arose.[21]

§ 4535. **Verification of account.**—Under the Oklahoma statute,[22] providing that the correctness of an account duly verified shall be taken as true, unless the denial be also verified, a stated account must be verified, and the petition must allege the correctness of the verified account attached. A verification of the petition which includes a statement of the account is not sufficient.[23] A verified account attached to a complaint is admissible in evidence to prove the debt when the answer does not, under oath, attack its correctness, and the original books of entry need not be produced.[24] The fact that a verified account sued on is not denied by a verified affidavit does not preclude defendant from interposing any defense pleaded which does not in-

17 Phillips v. Bartlett, 9 Bosw. 678.

18 Cochran v. Goodman, 3 Cal. 244.

19 Canfield v. Tobias, 21 Cal. 349.

20 Friend etc. Lumber Co. v. Miller, 67 Cal. 464, 8 Pac. 40.

21 Farcy v. Lee, 10 Abb. Pr. 143.

22 Stats. 1893, § 3986.

23 Myers v. First Presbyterian Church, 11 Okla. 544, 69 Pac. 874.

24 Richardson v. Pierce (N. Mex.), 93 Pac. 715.

volve a denial of the reasonableness of the amounts charged or the correctness of the items; but defendant may show that plaintiff agreed to charge nothing for the work, or that the account was paid.[25]

§ 4536. **Debt, when due.**—It is not necessary to specify any time at which the debt was to be paid.[26] A general promise is to be construed as a promise to pay immediately.[27] And if the promise was to pay at a certain time not yet elapsed, it is matter of defense.[28] But if a day was fixed, it will, if stated, furnish a day for the commencement of interest.[29] But the complaint is insufficient if it does not allege, either directly or indirectly, that the debt is due and unpaid.[30]

§ 4537. **Demand.**—No demand is necessary.[31] On the agreement to pay on request, though no request is necessary, a demand is necessary if the promisor be a surety.[32] But upon a state of facts in which a demand would be necessary if the plaintiff sued for damages for conversion, it is equally necessary where he sues upon the implied contract, waiving the tort.[33] The averment of the demand is proper, to fix the time of interest.[34]

§ 4538. **Gold coin.**—Where there is a verbal understanding that the price of the goods sold shall be payable in gold coin, it may be enforced, if, after the debt has accrued and suit has been commenced, one of the firm, in the firm name, makes a contract in writing to pay in gold coin, said contract dated before the sale of such goods, provided the complaint avers a contract to pay in gold made before the goods were sold.[35]

§ 4539. **Hæc verba.**—When the complaint sets forth *in hæc verba* the bill of the articles purchased, it is sufficient to inform

25 Lucas v. Board of Commissioners, 67 Kan. 418, 73 Pac. 56.

26 Peets v. Bratt, 6 Barb. 622; Gibbs v. Southam, 5 Barn. & Adol. 911.

27 Id.

28 Smith v. Holmes, 19 N. Y. 271.

29 Van Rensselaer v. Jewett, 2 N. Y. 140, 51 Am. Dec. 275.

30 Jaqua v. Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072. See, also, Musselman v. Wise, 84 Ind. 248.

31 Gibbs v. Southam, 5 Barn. & Adol. 911; Lake Ontario R. R. Co. v. Mason, 16 N. Y. 451.

32 Nelson v. Bostwick, 5 Hill, 37, 40 Am. Dec. 310; Douglass v. Rathbone, 5 Hill, 143.

33 Spoor v. Newell, 3 Hill, 307.

34 Beers v. Reynolds, 11 N. Y. 97. As to sufficient allegation of demand, see Frank v. Murray, 7 Mont. 4, 14 Pac. 654.

35 Meyer v. Kohn, 29 Cal. 278. See Cal. Code Civ. Proc., § 667.

the defendant with what he is charged, for he is presumed to know what is intended by his own account. And it was held to remedy a defect in the description of the quantity of goods sold.[36]

§ 4540. **Debt due.**—It is not necessary to show that the debt was due before the commencement of the action, nor even at the date of the complaint.[37]

§ 4541. **Promise.**—The promise to pay alleged in the common count in *assumpsit* was a mere conclusion of law from the facts stated, and need not be averred under the code, which requires only the facts to be stated.[38] From the indebtedness admitted, the law implies a promise to pay, and the denial of any express promise raises no issue.[39] The law implies a promise to pay so much as the goods are reasonably worth. This is, however, a matter of law, and should not be pleaded.[40]

§ 4542. **Part payment—How applied.**—If the debtor executes notes secured by mortgage to obtain further advances of merchandise, and the account ran on after execution of the notes, the payments subsequently made by such debtor may properly be credited on the account before on the notes, and that as against a subsequent creditor secured by mortgage upon the same property.[41]

§ 4543. **Demand, averment of.**—The object of averring a demand is simply to carry interest. It has been held in New York that where goods are purchased at a price fixed, and without fixing any term of credit, if, after reasonable time elapses, the account is presented and impliedly admitted, interest is properly chargeable from the time of the demand.[42]

§ 4544. **Good-will.**—Good-will of a trade is the probability that the business will continue in the future as in the past, adding to the profits of the concern, and contributing to the means of

36 Cochran v. Goodman, 3 Cal. 245.
37 Smith v. Holmes, 19 N. Y. 271.
38 Wilkins v. Stidger, 22 Cal. 232, 83 Am. Dec. 64.
39 Levinson v. Schwartz, 22 Cal. 229.
40 Farron v. Sherwood, 17 N. Y. 230.
41 Kelso v. Russell & Co., 33 Wash. 474, 74 Pac. 561.
42 Beers v. Reynolds, 11 N. Y. 97, 102; affirming 12 Barb. 288.

meeting its accruing engagements, and is an element to be considered in determining whether at a given date the parties conducting the business were solvent. It is a part of the partnership property, and adds to the value of property and stock, and will accompany the sale.[43] Plaintiff having bought certain horses of defendant, as also the "good-will" of a mercantile house in the matter of drayage, cannot sue to recover back the purchase money on the ground that such "good-will" is not vendible.[44]

§ 4545. **Delivery.**—When goods sold are delivered to a third person, for the exclusive use of such person, the plaintiff, in an action against the purchaser, is bound to aver delivery to the third party in the complaint. It is only as a conclusion of law that such a delivery amounts to a delivery to the purchaser.[45] But a variance in this respect may be disregarded if the defendant does not appear to have been misled.[46] In an action against two as partners, for goods sold and delivered to them at their instance and request, where the evidence is to the effect that they had merely undertaken to be responsible for the purchase of said goods by a certain corporation, the jury should be instructed to return a verdict for the defendants, if they find that the goods were sold to such corporation.[47] The concurrent or joint possession by seller and buyer is not sufficient to constitute a delivery to the buyer.[48] The mere transportation of the goods at the time and place is not a delivery in absence of the seller to receive the purchase price.[49] Ordinarily, a delivery to a carrier is delivery to the consignee.[50]

§ 4546. **Who liable.**—That person is liable to whom the creditor at the time gave the credit.[51] But if the credit is not given to the person making such agreement, his undertaking is collateral, and must be in writing.[52]

43 Bell v. Ellis, 33 Cal. 620.

44 Buckingham v. Waters, 14 Cal. 146.

45 Smith v. Leland, 2 Duer, 497.

46 Rogers v. Verona, 1 Bosw. 417; Briggs v. Evans, 1 E. D. Smith, 192.

47 Kelly v. Thompson, 5 Wash. 785, 32 Pac. 752.

48 Farmer v. Hughes, 38 Colo. 318, 88 Pac. 191.

49 Catlin v. Jones, 48 Or. 158, 85 Pac. 515.

50 Hill v. Fruita Merc. Co., 42 Colo. 491, 126 Am. St. Rep. 172, 94 Pac. 354.

51 Storr v. Scott, 6 Carr. & P. 241; Chitty on Contracts, 226; Story on Agency, 213, § 263; Smith on Mercantile Law, 212.

52 Dixon v. Frazee, 1 E. D. Smith, 32; Briggs v. Evans, 1 E. D. Smith, 192.

§ 4547. **Defense—Conclusion of law.**—If the complaint avers the sale and delivery to defendant of goods, and the value of the same, an answer which denies the indebtedness, but does not deny the facts, the sale and delivery, and amount of goods, does not raise an issue, as it only denies the legal conclusion resulting from the facts.[53]

§ 4548. **Defense—Conjunctive denials.**—Where the complaint verified avers that defendant is indebted to plaintiff for goods, wares, and merchandise sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, and the answer denies that the defendant is indebted in the sum of eight hundred and twenty-eight dollars and sixteen cents, the denial is insufficient.[54]

§ 4549. **Defense—Statute of limitations.**—When the complaint states a cause of action for goods sold and delivered, and a bill of items is annexed to the same as an exhibit, with the date of each item, an answer which refers to the exhibit, and avers that the last item only is within two years previous to the commencement of the action, and that, except as to the last item, "no action has accrued to said plaintiff by reason of the matter mentioned and set forth in said complaint at any time within two years next preceding the commencement of this action," is a good answer of the statute of limitations to all the items except the last one.[55] If suit is upon an open book-account, or mutual, open, and running account, the time is four instead of two years.[56]

§ 4550. **Set-off—Breach of warranty.**—The inferior quality of grain delivered and received cannot be shown upon a general denial, but must be specially pleaded.[57] That the goods came too late to be of ready sale is new matter, which defendant must plead and prove;[58] and upon such claim alone defendant cannot

53 Lightner v. Menzell, 35 Cal. 452; Curtis v. Richards, 9 Cal. 33; Wells v. McPike, 21 Cal. 215; Edson v. Dillaye, 8 How. Pr. 273; Flammer v. Kline, 9 How. Pr. 216; Drake v. Cockroft, 10 How. Pr. 377, 1 Abb. Pr. 203; California St. Tel. Co. v. Patterson, 1 Nev. 151.

54 Higgins v. Wortell, 18 Cal. 330; Woodworth v. Knowlton, 22 Cal. 164; Doll v. Good, 38 Cal. 287.

55 Adams v. Patterson, 35 Cal. 122.

56 Cal. Code Civ. Proc., § 337.

57 Grant v. Milam, 20 Okla. 672, 95 Pac. 424.

58 John Ainsfield Co. v. Rasmussen, 30 Utah, 453, 85 Pac. 1002.

prove a custom permitting the buyer at all times to inspect and reject the goods if not up to contract.[59]

§ 4551. **Defense—Accord and satisfaction.**—To a declaration for goods sold and delivered, claiming one hundred and twenty pounds, the defendant pleaded: 1. Never indebted; 2. "And for a further plea," that after the commencement of the suit, and after the last pleading, it was agreed that the plaintiff should accept from the defendant sixty pounds, in settlement of the debt sought to be recovered in the action; and the defendant paid, and plaintiff accepted, sixty pounds in satisfaction and discharge of said debt. On demurrer to the second plea, it was held that the plea, being pleaded generally, must be taken to be pleaded to the whole cause of action; and as it alleged the payment after action brought to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which the plaintiff might be entitled.[60]

§ 4552. **Defense—Credit not expired.**—In an action for goods sold an answer admitting the purchase of the goods, but averring that they were purchased on a credit not expired, is not a statement of new matter constituting a defense, but merely a special denial of the plaintiffs' allegation "that defendant is now indebted to the plaintiffs," a denial of the contract set up by the plaintiffs.[61]

§ 4553. **Sufficient answer.**—The complaint stated a cause of action for goods sold, and in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt, and alleged facts attending the transaction, which, if true, avoided its effect as payment, by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand, and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted on the pleadings, and plaintiff had judgment. It was held that the

59 Hill v. Fruita Merc. Co., 42 Colo. 491, 126 Am. St. Rep. 172, 94 Pac. 354.

60 Ash v. Pouppeville, L. R., 3 Q. B. 86.

61 Gilbert v. Cram, 12 How. Pr 455.

judgment was erroneous; that the allegations of the complaint in reference to the transaction claimed to operate as payment were not material allegations requiring a denial, and were not, therefore, admitted by the failure of defendant to deny them.[62]

§ 4554. **Husband and wife living apart.**—A wife who without cause, and against her husband's will, refuses to live with him cannot bind him for necessaries to a third party who knows that she is not living with her husband, and who sells to her without further inquiry.[63]

FORMS—GOODS SOLD AND DELIVERED.

§ 4555. Complaint for goods sold and delivered.

Form No. 1277.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.. [or between two dates, naming them], at . . ., the plaintiff sold and delivered to the defendant, at his request, certain goods, to-wit: [Describe the property sold briefly, at least as to its general character.]

II. [Allege the price agreed to be paid, or the reasonable value of the goods, as the case may be.]

III. That defendant has not paid the said sum, nor any part thereof, except [etc.].

[DEMAND OF JUDGMENT.]

§ 4556. The same—Another form—Common count.

Form No. 1278.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.. [or between two dates, naming them], at . . ., the defendant was indebted to the plaintiff in the sum of . . . dollars, on an account for goods [describe the property sold briefly, at least as to its general character] sold and delivered by the plaintiff to the defendant on the day aforesaid [or, between the dates aforesaid], at his request.

II. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

62 Canfield v. Tobias, 21 Cal. 349. Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297.

63 Brown v. Mudgett, 40 Vt. 68;

§ 4557. **The same—Short form.**

Form No. 1279.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.. [or between certain dates, naming them], the defendant was indebted to the plaintiff in the sum of . . . dollars, on an account for goods then sold and delivered by the plaintiff to the defendant at . . .

II. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4558. **The same—At a fixed price.**

Form No. 1280.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he sold and delivered to the defendant [fifty casks of sugar, or other goods, describing them].

II. That the defendant then promised to pay . . . dollars for the said goods [in gold coin of the United States].

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4559. **The same—At a reasonable price.**

Form No. 1281.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he sold and delivered to the defendant [describe the articles].

II. That the same were reasonably worth . . . dollars.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4560. **The same—On specified price and credit.**

Form No. 1282.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff sold and delivered to the defendant, at his request [describe articles], for the sum of . . . dollars.

II. That the defendant promised to pay therefor to the plaintiff the said sum of . . . dollars, on or before the . . . day of . . ., 19..

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4561. The same—By assignee for price of stock and fixtures of store and good-will, payable by installments.

Form No. 1283.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., one A. B. sold and delivered to the defendant the stock and fixtures of the grocery store, No. . . ., in . . . street, in . . ., the property of said A. B., and bargained, sold, and relinquished to the defendant the good-will of the business theretofore carried on by the said A. B.

II. That the defendant promised to pay to the said A. B. therefor the sum of . . . dollars, in five equal monthly installments, the first installment to be paid on the . . . day of . . ., 19.., and the remaining installments to be paid on the . . . day of each succeeding month, until all shall be paid.

III. That defendant has not paid the same, nor any part thereof.

IV. [Allege assignment to plaintiff.]

[DEMAND OF JUDGMENT.]

§ 4562. The same—By firm in which there is dormant partner, the price being agreed upon.

Form No. 1284.

[STATE AND COUNTY.] [COURT.]

A. B., J. H., and J. C. J., Plaintiffs.

v.

John Doe, Defendant.

The plaintiffs complain of the defendant, and allege:

I. That the plaintiffs are copartners in business in the city of San Francisco, under the firm name of B. & H., and that said plaintiff, J. C. J., is a dormant partner in said firm.

II. That on or about the . . . day of . . ., 19.., the said plaintiffs, in their firm name, sold and delivered to defendant a certain

quantity of merchandise, to-wit, dry goods, in the quantities and at and for the prices specified in the bill thereof, hereto annexed, marked "Exhibit A," and made part of this complaint, amounting to the sum of . . . dollars.

III. That defendant promised to pay the same at the expiration of four months from the said date of sale.

IV. That said time has elapsed, and said defendant has not paid the same or any part thereof.

[DEMAND OF JUDGMENT.]

§ 4563. The same—To third party at defendant's request, at fixed price.

Form No. 1285.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he sold to the defendant [two hundred bags of coffee], and, at the request of the defendant, delivered the same to one A. B.

II. That the defendant promised to pay to the plaintiff . . . dollars therefor.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4564. Complaint for goods sold, but not delivered—Price fixed.

Form No. 1286.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he sold to the defendant [all the potatoes then growing on his farm in . . .].

II. That defendant promised to pay plaintiff . . . dollars for the same.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4565. Complaint, avoiding defense of payment.

Form No. 1287.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . . in the . . ., township of the county of . . ., state of . . ., plaintiff sold and

delivered to the defendant certain goods, wares and merchandise consisting of [here describe articles].

II. That the same were reasonably worth the sum of . . . dollars.

III. That on the . . . day of . . ., 19.., at . . ., defendant passed to this plaintiff, as in payment of his indebtedness for said goods, the check of one G. H. upon the bank of . . ., which check defendant represented to this plaintiff to be good; but that, on the contrary, said G. H. then had no funds at the said bank, and his said check was worthless, as the defendant then well knew [or, was worthless, and although the same was duly presented for payment on the . . . day of . . ., 19.., it has never been paid, of which defendant had due notice], and the plaintiff now brings said check into court for cancellation.

[DEMAND OF JUDGMENT.]

§ 4566. Complaint, avoiding defense of unexpired credit.

Form No. 1288.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale on credit.]

II. That in order to induce the plaintiff to allow him credit upon such sale, the defendant then falsely and fraudulently represented himself to the plaintiff to be worth a large sum, to-wit . . . dollars, over and above all his just debts and liabilities, whereas in truth he was insolvent; and that the only credit given by the plaintiff to the defendant was solely induced by said false and fraudulent representations, and solely on the faith thereof.

[DEMAND OF JUDGMENT.]

§ 4567. Complaint for necessaries furnished to wife or children.

Form No. 1289.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., at . . ., plaintiff found and provided for one E. F., then the wife [or, infant son; or, infant daughter] of defendant, at the request of said E. F., necessaries for her use, to-wit: [describe same or refer to schedule attached], of the value of . . . dollars.

II. That on the . . . day of . . ., 19. . , plaintiff demanded payment therefor from defendant but no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 4568. Complaint against a fraudulent vendee.

Form No. 1290.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale, etc.]

II. That in order to induce plaintiff to make said sale and delivery, and with intent to defraud him of said goods, defendant then falsely and fraudulently represented himself to plaintiff to be worth a large sum, to-wit, . . . dollars, over and above all his just debts and liabilities, whereas in truth he was insolvent; and that induced by said false and fraudulent representations, and solely on the faith thereof, plaintiff made said sale and delivery.

III. That thereafter, and with such intent, said defendant removed said goods to . . . and is about to sell and dispose of the same.

IV. That defendant is insolvent, and, as plaintiff is informed and believes, a judgment against him will be unavailing and worthless if he is suffered to sell and dispose of said goods.

Wherefore, plaintiff demands judgment against said defendant for the sum of . . . dollars, with interest thereon from the said . . . day of . . ., 19. . , and that defendant and his agents be enjoined from selling, disposing of, removing, or in any wise interfering with said goods or any of them, until said judgment is fully satisfied.

§ 4569. Complaint of seller against buyer, for goods sold on trial and not returned.

Form No. 1291.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19. . , plaintiff delivered to defendant, at his special request, [describe goods delivered or refer to schedule annexed], upon the agreement that said defendant would make trial of the same, and if unsatisfactory return the same to plaintiff on or before the . . . day of . . .,

19.., and in case of failure to make such return to pay plaintiff therefor the sum of . . . dollars [or, the reasonable value thereof].

II. That defendant did not return the said goods to plaintiff before the date last named, and has not returned the same, and that no part of said sum of . . . dollars has been paid.

[DEMAND OF JUDGMENT.]

§ 4570. Answer—Controverting plaintiff's title.

Form No. 1292.

[TITLE.]

The defendant answers to the complaint:

That no part of the goods, wares, and merchandise in the complaint mentioned was the property of plaintiff when sold to defendant; but the same then was the property of one A. B., and who alone, and not the plaintiff, sold the same to this defendant.

§ 4571. Answer—Reducing value, and pleading payment.

Form No. 1293.

[TITLE.]

The defendant answers to the complaint:

I. That he promised to pay the plaintiff . . . dollars only, and no other or greater sum.

II. That he has paid the said sum to the plaintiff.

§ 4572. Answer—Agreement to take note in part payment.

Form No. 1294.

[TITLE.]

The defendant answers to the complaint:

I. That said goods were sold and delivered to said defendant by said plaintiff on an express agreement, by and between them, that said plaintiff should accept in payment therefor a promissory note for the sum of . . . dollars, drawn by this defendant, and dated on the . . . day of . . ., 19.., [with an approved indorser].

II. That on the . . . day of . . ., 19.., and before this action, the defendant tendered to the plaintiff such a note as above described, indorsed by one C. D., who was then and still is . . .

in good credit and ability, and an approved indorser, and is still ready and willing to deliver the same.

III. That the plaintiff refused to receive the same.

§ 4573. Answer—Articles furnished defendant's wife not necessary.

Form No. 1295.

[TITLE.]

The defendant answers to the complaint:

I. That the articles mentioned therein were not furnished to his said [wife, or child] with his consent.

II. That the same were not necessary for his [wife, or child].

§ 4574. Counterclaim by way of set-off against plaintiff's factor.

Form No. 1296.

[TITLE.]

The defendant, for a counterclaim herein, alleges:

I. That the goods mentioned in the complaint were, with the privity of the plaintiff, sold and delivered to the said defendant by one M. in his own name, as the sole owner, and as and for his own goods.

II. That said M. was in fact the agent and factor of the plaintiff in respect to said goods.

III. That the plaintiff did not appear, and was not known by the defendant at or before the time of the sale and delivery to be the owner of the goods, or in any way interested therein.

IV. That the defendant bought and accepted the goods of and from M. as the true and sole owner and seller; and that credit for the said goods was given to the defendant by the said M., and not by the said plaintiff.

V. That the said M. before and at the time of the sale and delivery of the said goods, was, and still is, indebted to the defendant for the following cause: [here state the cause of action relied on as a set-off], out of which said sum of money, so due to the defendant, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages, if any, in respect to the alleged matters complained of. [Or, if the cause of action in the complaint is admitted, say: sufficient to satisfy the sum so due to the plaintiff.]

[DEMAND OF JUDGMENT.]

§ 4575. Answer—Payment in part—Deficiency in goods, with counterclaim for excess.

Form No. 1297.

[TITLE.]

Answering plaintiffs' complaint, defendant denies and alleges as follows:

I. For a counterclaim, the defendant alleges that the plaintiffs have brought this action, as defendant is informed and believes, to recover a balance claimed to be due for mirrors and other articles furnished to, and for work and labor done for, this defendant by the plaintiffs, on various days between the . . . day of . . . , 19.. , and the . . . day of . . . , 19.. ; that the total amount of the account of said mirrors and other articles, and said work and labor, as made out and presented by the plaintiffs, was the sum of . . . dollars.

II. That the defendant paid to the plaintiffs from time to time various sums of money on account of said mirrors and other articles, and work and labor, amounting in all to the sum of . . . dollars, and redelivered to said agent, certain articles, to-wit [describe the articles], of the value of . . . dollars.

III. That it was agreed between this defendant and the plaintiffs that all mirrors furnished to the defendant should be perfect and true mirrors, and in every way satisfactory to the defendant; and that if any of them upon trial should prove to be untrue or imperfect, the same should be taken back by the plaintiffs, and others substituted in their stead.

IV. That among the articles furnished by the plaintiffs to this defendant under said agreement, and included in said account was one pier-glass, three mantel mirrors, and four gilt cornices, which were charged in gross in said account, at the price of . . . dollars. That the said three mantel mirrors above mentioned proved, upon examination and trial, to be untrue and imperfect; that they were entirely unsatisfactory to this defendant; that he promptly notified the plaintiffs of the deficient and unsatisfactory quality and character of said mirrors, and requested them to take them away, and replace them with true and perfect mirrors; but they have never complied with the request of this defendant in this regard. That the defendant has at all times been, and still is, ready to redeliver said mirrors to said plaintiffs. That the same, if true, perfect and satisfactory, would have been worth the sum of . . . dollars, at the price that such mirrors were to

have been furnished, under the agreement between the plaintiffs and this defendant; but that they were worth at least . . . dollars less, on account of their deficient character. And the defendant claims that the deficiency in value of said mirrors, to-wit, the sum of . . . dollars, should be deducted from said account.

Wherefore, the defendant demands that the said sum of . . . dollars be allowed and adjudged as due this defendant upon this counterclaim, and that he have judgment against the plaintiffs for the excess thereof over and above the plaintiffs' claim herein, and that he recover the costs of this action.

CHAPTER CXVII.

ON CONTRACT FOR SALE OF CHATTELS.

§ 4576. Delivery—Constructive. — A statement of circumstances constituting a constructive delivery as equivalent to an actual delivery should be unequivocal.[1] A delivery to the purchaser of a city weigher's certificate of sugar lying on the wharf is a sufficient delivery.[2] The delivery of the export entry is not a delivery of the article sold.[3] Mere delivery of a bill of parcels is not sufficient.[4] The delivery of an order on the custom-house, when the buyer fraudulently intends not to pay, knowing his inability to do so, is no delivery.[5] The delivery, with indorsement, of a shipping broker's acknowledgment of the receipt of merchandise to be transported, drawn in the form of a bill of lading, but not signed by the carrier, is sufficient to constitute a constructive delivery of merchandise to one who made advances upon the faith of it.[6] An order on the depositary of goods sold, given by the vendor to the vendee, constitutes a delivery as between themselves.[7] The transfer of warehouse receipts operates as a constructive delivery of the goods.[8] Where other machinery is included, and the time for delivery extended by subsequent agreement, a delivery of all within the time extended prevents the vendee from recovering damages for delay in delivery of the machinery first contracted for.[9] The acts of the parties may constitute a delivery at a different time and place to that agreed upon in the contract for the sale.[10] Delivery to one member of a partnership is sufficient.[11]

1 Bailey v. Ogden, 3 Johns. 399, 3 Am. Dec. 509.

2 Glasgow v. Nicholson, 25 Mo. 29.

3 Johnson v. Smith, Anth. N. P. 81.

4 Smith v. Mason, Anth. N. P. 225.

5 Ives v. Polak, 14 How. Pr. 411.

6 Reed v. Proprietors etc., 8 How. 284, 12 L. Ed. 1077; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290; Rawls v. Deshler, 28 How. Pr. 66. As to delivery to common carrier, see Commonwealth v. Fleming, 130 Pa. St. 138, 17 Am. St. Rep. 763, 18 Atl. 622, 5 L. R. A. 470; Kessler v. Smith, 42 Minn. 494, 44 N. W. 794.

7 Sigerson v. Harker, 15 Mo. 101.

8 Burton v. Curyea, 40 Ill. 320, 89 Am. Dec. 350.

9 Washington Iron Works v. McNaught, 35 Wash. 10, 76 Pac. 301.

10 La Vie v. Tooze, 46 Or. 206, 79 Pac. 413.

11 Blumenthal v. Greenberg, 130 Cal. 384, 62 Pac. 599.

§ 4577. **Delivery of less quantity.**—If a vendor delivers a less quantity of goods than he contracted to deliver, the vendee is at liberty to refuse to accept, and if he accepts a part, he may return that, and refuse to accept less than the whole, but having received and retained a part, he cannot refuse to pay for the part received;[12] but, in Washington, the rule seems to be that the vendee must rely upon an action for damages.[13] If plaintiff fails to accept and pay for part of the fruit properly delivered, he has no recovery for failure of the seller to make further deliveries.[14]

§ 4578. **Delivery—In general.**—The location of the goods when sold is the presumed place of delivery.[15] Selecting goods, and putting them aside in the seller's shop, is held to be sufficient delivery.[16] The delivery of the keys of a warehouse in which goods sold are deposited is a sufficient delivery.[17] Merely taking samples does not amount to a delivery.[18] There can be no delivery so long as anything remains to be done by the seller to ascertain the quantity or quality of the goods,[19] or so long as anything remains to be done by either party to ascertain the price.[20] Cumbersome and heavy articles may be delivered without actual removal. Delivering a schedule, followed by an agreement on the part of the buyer with the depositary for keeping charge of the property, is sufficient.[21] On agreement to sell f. o. b. cars at A., examination and acceptance to be made at time of delivery, the examination and acceptance should precede the delivery.[22] The possession of the vendee must be sufficient to give notice to the usual customers of the vendor that the goods have changed hands, and that the title has passed out of the vendor.[23] But a complaint alleging a sale of the plaintiff's right, title, and interest

12 Polhemus v. Heiman, 45 Cal. 573; Shields v. Pettee, 2 Sandf. 262.

13 Hulet v. Achey, 39 Wash. 91, 80 Pac. 1105.

14 Wood, Curtis & Co. v. Scurich, 5 Cal. App. 252, 90 Pac. 51.

15 Drumm-Flato Com. Co. v. Edmisson, 17 Okla. 344, 87 Pac. 311.

16 Brewer v. Salisbury, 9 Barb. 511.

17 Wilkes v. Ferris, 5 Johns. 335, 4 Am. Dec. 364; Gray v. Davis, 10 N. Y. 285; Sharp v. Carroll, 66 Wis. 62, 27 N. W. 832.

18 Johnson v. Smith, Anth. N. P. 81; Carver v. Lane, 4 E. D. Smith, 168.

19 Cunningham v. Ashbrook, 20 Mo. 553; Outwater v. Dodge, 7 Cow. 85; Caruthers v. McGarvey, 41 Cal. 15.

20 Ward v. Shaw, 7 Wend. 404.

21 Dixon v. Buck, 42 Barb. 70.

22 Armsby Co. v. Blum, 137 Cal. 152, 70 Pac. 669.

23 Herr v. Denver etc. Co., 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641.

in certain chattels, and a taking possession by the defendant, is sufficient, without alleging what interest the plaintiff owned.[24] And where the complaint in an action for the price of logs alleges that the defendant took possession of them, the complaint is sufficient, although other allegations may show that the plaintiff was not in the actual possession of the logs at the time of sale.[25] A delivery upon different freight-rates than that agreed upon between the purchaser and seller need not be accepted by the purchaser.[26]

§ 4579. **Delivery, how alleged.**—Tender and refusal of goods on the part of the principals is equivalent to delivery, and may be specially averred.[27] A performance of all the conditions on plaintiff's part may be alleged. A complaint alleging the execution of a contract for the sale of certain amount of goods at an agreed price, the breach thereof by the vendor by failure to deliver part of the goods, and the damages sustained because compelled to purchase the goods at a higher price, is a sufficient statement of a cause of action.[28]

§ 4580. **Growing crop, delivery and sale of.**—A growing crop, until ready for the harvest, cannot by itself become the object of a delivery, and can only be delivered into the possession of the vendee by delivering to him the possession of the land also of which it is a part.[29] Growing crops are not unlike ships and cargoes at sea in respect to their delivery, of which delivery cannot be made until they reach port. If delivery be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers.[30] Crops are not subject to manual delivery until they are harvested, and therefore, until harvested, they are not in the possession or under the control of the vendor, within the meaning of the statute of frauds.[31] On

24 Duzan v. Meserve, 24 Or. 523, 34 Pac. 548.

25 Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

26 Withers v. Moore, 140 Cal. 591, 74 Pac. 159.

27 Kemble v. Wallis, 10 Wend. 374.

28 Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564.

29 Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340.

30 Joy v. Sears, 9 Pick. 4; Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253; Buffington v. Curtis, 15 Mass. 528, 8 Am. Dec. 115.

31 Bours v. Webster, 6 Cal. 660; Visher v. Webster, 13 Cal. 58; Pacheco v. Hunsacker, 14 Cal. 120; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Robbins v. Oldham, 1 Duval, 28; cited in Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340.

a sale of a crop of fruit of a future season, the title does not pass in the absence of circumstances showing a contrary intention, and the transaction is regarded an agreement to sell, as distinguished from a sale.[32] A growing crop, while growing, and until ready for the harvest, is also unaffected by the fifteenth section of the statute in relation to the sale of goods and chattels in the possession and under the control of the vendor.[33] Contracts for the sale of growing periodical crops are not within the statute of frauds, and therefore need not be made in writing.[34] So a contract to deliver corn not yet gathered or husked, as it requires labor to be expended on the subject-matter to prepare it for delivery, is not within the statute of frauds.[35] It is not the policy of the law to interdict sales of growing crops by declaring them absolutely fraudulent, on the mere ground that the seller retains, as he must necessarily do, the possession of the property until it shall become susceptible of actual delivery.[36]

§ 4581. **Delivery by and liability of carrier.**—If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions, or, in the absence of special directions, if he uses ordinary care in forwarding the thing, it is at the risk of the buyer.[37] Upon demand by the vendor, while the right of stoppage *in transitu* continues, the carrier will become liable for the conversion of the goods, if he declines to redeliver them to the vendor, or delivers them to the vendee.[38] And a notice, without demand, to redeliver, is sufficient to charge the carrier, if he is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*.[39] And notice to the agent of the car-

32 Blackwood v. Cutting Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248. Compare Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 21 Am. St. Rep. 63, 25 Pac. 52, 10 L. R. A. 369.

33 Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340.

34 Id.; citing Marshall v. Ferguson, 23 Cal. 66.

35 Rentch v. Long, 27 Md. 188. See Stephens v. Santee, 51 Barb. 532.

36 Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; citing Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442; Chaffin v. Doub, 14 Cal. 384.

37 Cal. Civ. Code, § 1757.

38 Reynolds v. Boston etc. R. R. Co., 43 N. H. 580; Markwald v. His Creditors, 7 Cal. 213; Blackman v. Pierce, 23 Cal. 508; O'Neil v. Garrett, 6 Iowa, 480; Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338.

39 Reynolds v. Boston etc. R. R. Co., 43 N. H. 580; Litt v. Cowley, 7 Taunt. 169; Whitehead v. Anderson, 9 Mee. & W. 518; Bell v. Moss, 5 Whart. 189; Phelps v. Comber, L. R.,

rier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier.[40]

§ 4582. **Ship and cargo, delivery of.**—If the delivery of a ship and cargo be made within a reasonable time after reaching port, the sale is good as against creditors and subsequent purchasers.[41]

§ 4583. **Rescission of contract—Partial rescission.**—To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties.[42] To constitute an actual rescission of the contract, a redelivery of the goods is necessary,[43] unless a tender thereof is excused by word or acts of the vendee.[44] But where a party does not seek to rescind the contract, but relies on an express condition therein for a return of the property, an action of claim and delivery may be maintained, without an offer to return the payments made.[45] The vendor may rescind the sale, refuse to deliver the balance, and recover the amount due for the fruit already delivered, if the vendee does not pay according to contract, or, in absence of specified manner, then according to custom.[46] Where M. sold B. eight bags of wool, separately marked and kept as one lot of a particular kind, at one dollar a pound, by one bill of parcels, B. having first opened some of the bags, but part of the wool in one bag was of a different kind, and B., without returning the bag, sent back the contents, which M. refused to receive, it was held that B. could not partially rescind the contract, and that a custom in such cases to return the bale found different was inadmissible, the bag not having been returned; but that B., on proving a warranty

26 Ch. Div. 755, 29 Ch. Div. 813; Allen v. Maine Cent. R. R. Co., 79 Me. 327, 1 Am. St. Rep. 310, 9 Atl. 895.

40 Bierce v. Red Bluff Hotel Co., 31 Cal. 160; cited in Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338.

41 Joy v. Sears, 9 Pick. 4; Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253; Buffington v. Curtis, 15 Mass. 528, 8 Am. Dec. 115.

42 Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Christy v. Cummins, 3 McLean, 386, Fed. Cas. No. 2708; Henckley v. Hendrickson, 5 McLean, 170, Fed. Cas. No. 6348; Garland v. Bowling, Hempst. 710, Fed. Cas. No. 5242.

43 Miller v. Smith, 1 Mason, 437, Fed. Cas. No. 9590; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Whitworth v. Thomas, 83 Ala. 308, 3 Am. St. Rep. 725, 3 South. 781; Richardson v. Levi, 69 Hun, 432, 22 N. Y. Supp. 352.

44 Pierce v. Lukens, 144 Cal. 397, 77 Pac. 996.

45 Dodge v. Carter, 140 Cal. 663, 74 Pac. 292.

46 Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110.

and breach, could recoup the difference between the actual value and the value if it had corresponded to the warrant.[47]

§ 4584. **Sales defined—Void sales.** — A contract to deliver twenty sheep in four years for ten delivered now is a sale, and not a bailment.[48] The delivery, by a debtor to his creditor, of property, the value of which was to be applied upon the debt in good faith, is a sale. If a standard or criterion is agreed upon by which the value should be fixed, and the amount realized by that criterion was the amount to be applied in part satisfaction of the debt, that is fixing the price sufficiently to make the sale valid.[49] To constitute a valid sale of a chattel so as to change the property therein, an agreement as to price and delivery of the chattel is requisite, except in case of a vessel at sea, when the transfer is effected by the bill of sale;[50] and also of growing crops. A valid sale may be made of personal goods which are out of possession, and the sale will be of the thing itself, and not of a chose in action.[51] A sale in violation of a statutory prohibition is void, and no action can be maintained upon it. So of a sale contravening a license law.[52] When the substance of the thing sold is not in existence at the time of the sale, such sale is void.[53]

§ 4585. **Statute of frauds.**—A contract for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars is invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent, or unless the buyer accept or receive part of such goods or chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase

47 Morse v. Brackett, 98 Mass. 205.

48 Bartlett v. Wheeler, 44 Barb. 162. For distinction between sale and exchange explained, see Preston v. Keene, 14 Pet. 133, 10 L. Ed. 387. As to distinction between sale and bailment, see Chickering v. Bastress, 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; Forrest v. Nelson, 108 Pa. St. 481.

49 Dixon v. Buck, 42 Barb. 70.

50 Harper v. Dougherty, 2 Cranch C. C. 284, Fed. Cas. No. 6087. See, also, Love v. State, 78 Ga. 66, 6 Am. St. Rep. 234, 3 S. E. 893; Nance v. Metcalf, 19 Mo. App. 183.

51 The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12342.

52 Best v. Bauder, 29 How. Pr. 489.

53 Bertram v. Lyon, 1 McAll. 53, Fed. Cas. No. 1362; affirmed 20 How. 150, 15 L. Ed. 847. But see Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713; Lester v. Buel, 49 Ohio St. 240, 34 Am. St. Rep. 556, 30 N. E. 821.

money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of his sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser, and the person on whose account the sale is made, is a sufficient memorandum.[54] In determining whether the statute of frauds applied to a sale of goods, delivered to one person at the request of another, the true test is whether there is any liability of the vendee to the vendor; for if there is, then the promise of the guarantor is collateral, and must be in writing. Where the sale was entered on the vendor's book as "Sold A. B.; C. D. security," and the bill was made out thus: "A. B. (through C. D.) bought," etc., and it was shown that the vendors had urged C. D. to get security from A. B., and offered to pay him for so doing, it was held that C. D. could not be regarded as the principal debtor.[55]

§ 4586. **Stoppage in transitu.**—This is a right which the vendor, in goods sold upon credit, has to recall them or retake them upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired *bona fide* rights in them. And it continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a *bona fide* right to them.[56] A consignor of property *in transitu* has a right to direct a change in its destination, and its delivery to a different consignee.[57] A vendor who had constructively delivered iron lying at his furnace, by pointing it out to the vendee and charging it to him in his books, receiving the vendee's notes for the same, may retain the same for the price, if, while it is still in his custody, and said notes are unpaid, the vendee becomes insolvent.[58]

§ 4587. **Measure of damages.**—In an action against a purchaser for not receiving goods according to contract, the rule

54 Cal. Civ. Code, §§1624, 1739. See Jamison v. Simon, 68 Cal. 17, 8 Pac. 502; McMenomy v. Talbot, 84 Cal. 279, 23 Pac. 1099.

55 Read v. Ladd, 1 Edm. 100.

56 Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338; Harris v. Tenney, 85 Tex. 254, 34 Am. St. Rep. 796, 20 S. W. 82; Corbitt v. Salem Gas Light Co., 6 Or. 405, 25 Am. Rep. 541.

57 Strahorn v. Union Stock Yard etc. Co., 43 Ill. 424, 92 Am. Dec. 142.

58 Thompson v. Baltimore etc. R. R. Co., 28 Md. 396.

of damages is the difference between the contract price and the market value at the time of the breach of the contract.[59] And such a damage is that which would inevitably follow a breach, and therefore special damages need not be alleged in order to recover such sum.[60] Recovery cannot be had for failure to deliver a certain quantity of fruit off certain land, when the quantity was not grown on the land.[61]

§ 4588. **Tender.**—The refusal of a buyer to take the goods which he has contracted to buy dispenses with any necessity on the part of the seller to make a tender of them.[62] Under a contract for the sale and delivery of oats "within thirty days," the obligation to receive is as strong as the obligation to deliver. And the contractor is not bound to deliver after the contract has expired; but if he does, it will be at the contract price.[63] A complaint on a contract in which the defendant agrees to purchase a given quantity of hay, then in a stack, from the plaintiff, and pay a fixed sum therefor at a fixed time, and the hay to be weighed at the stack, should aver, if the hay has not all been delivered, a readiness or offer on the part of the plaintiff to deliver.[64] Before an action can be maintained for defendant's failure to accept and pay for property which he agreed to purchase at a future time a tender of the property and demand of payment must be made.[65] A tender of warehouse receipts for grain issued by responsible parties is a sufficient tender of the grain in Chicago, unless objected to by the other party at the time.[66]

§ 4589. **Tender waived.**—After a sale at buyer's option, within a certain time, notice by the buyer before the time has expired that he will not accept goods within or at the end of such time, waives a tender by the seller.[67] Levy of an attachment upon the

59 Haskell v. McHenry, 4 Cal. 411; Bigelow v. Legg, 102 N. Y. 652, 6 N. E. 107; Kadish v. Young, 108 Ill. 170, 48 Am. Rep. 548.

60 Bussard & Robson v. Hibler, 42 Or. 500, 71 Pac. 642.

61 Ontario Deciduous Fruit Growers' Assoc. v. Cutting Fruit Co., 134 Cal. 21, 86 Am. St. Rep. 231, 66 Pac. 28, 53 L. R. A. 681.

62 Calhoun v. Vechio, 3 Wash. C. C. 165, Fed. Cas. No. 2310.

63 Gibbons v. United States, 2 Court Cl. Rep. (Nott & H.) 421.

64 Barron v. Frink, 30 Cal. 486.

65 Hagar v. King, 38 Barb. 200.

66 McPherson v. Gale, 40 Ill. 368.

67 McPherson v. Walker, 40 Ill. 371. See White v. Dobson, 17 Gratt. 262; Millingar v. Daly, 56 Pa. St. 245. See House v. Beak, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065.

goods in possession of the seller may be sufficient excuse for their non-delivery according to the contract of sale.[68]

§ 4590. **Tender and demand.**—Under a contract for the purchase of goods, where the right of property is not passed by the contract, the buyer is not bound to accept the articles when tendered, unless they correspond in quality with what was bargained for.[69] The contract is entire, and calls for an entire performance.[70]

§ 4591. **Acceptance.**—There must be an acceptance as well as a delivery to take the thing out of the statute; but the acceptance may be by agent of the buyer.[71] But the acceptance of a mere shop-boy is not sufficient.[72] An acceptance of goods bearing a name different from the one used in the sale note by a subvendee of part of goods sold does not conclude the vendee as to the whole contract.[73] Selling a part of the goods, even before discovering them to be unsuitable for the purpose for which ordered, is an acceptance of them.[74] In the absence of fraud or breach of warranty, the buyer cannot, after acceptance without protest, claim that the goods were damaged when delivered.[75] Once having accepted the goods or materials, the purchaser is liable for their value.[76]

§ 4592. **Alternative.**—A contract in the alternative should be so set forth.[77] And an averment of demand of one of two things, when the option of the defendant was in the alternative, is not sufficient.[78]

68 La Follett v. Mitchell, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916.

69 Addison on Contracts, 238; Reimers v. Ridner, 17 Abb. Pr. 292.

70 Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183. See, also, Polhemus v. Heiman, 45 Cal. 573.

71 Outwater v. Dodge, 6 Wend. 397.

72 Smith v. Mason, Anth. N. P. 225.

73 Flint v. Lyon, 4 Cal. 17. See, as to sufficiency of acceptance, Billin v. Henkel, 9 Colo. 394, 13 Pac. 420; In re Hoover, 33 Hun, 553; Roman v. Bressler, 32 Neb. 240, 49 N. W. 368; Gano v. Chicago etc. R. R. Co., 66 Wis. 1, 27 N. W. 628, 838.

74 Lenz v. Blake-McFall Co., 44 Or. 569, 76 Pac. 356.

75 Browning v. McNear, 145 Cal. 272, 78 Pac. 722.

76 Childs Lumber Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. 373.

77 Hatch v. Adams, 8 Cow. 35; Stone v. Knowlton, 3 Wend. 374; People v. Tilton, 13 Wend. 597.

78 Lutweller v. Linnell, 12 Barb. 512.

§ 4593. Conditional sales.—A vendor of goods, which he delivers, but the title to which is to remain in him until they are paid for, may recover them in the hands of a *bona fide* purchaser from the vendee.[79] In a conditional sale, the right of the seller to take possession after a default and sell the property may be defeated by performance, or an offer or tender of performance, by the purchaser, and a sufficient tender gives the buyer a right to the property.[80] So he may recover the value of the goods less the amount of purchase money unpaid at the time of the tender, and the necessary expenses of the vendor in removing and taking care of them.[81] The question as to whether a sale is conditional or not is governed by the law of the place where the contract was made;[82] and the vendor in a conditional sale may follow the property into another state and enforce his lien against subsequent *bona fide* purchasers for value.[83]

§ 4594. Rights of vendor.—If the vendor, upon default of the vendee, may at his option rescind the contract, he may take possession and resell the property; but this involves no forfeiture of the amount already paid.[84] The seller becomes, on refusal to accept, the agent of the buyer, with power to sell.[85]

§ 4595. Conditional sale—Rights of seller.—The seller on condition, retaining title, but delivering possession, cannot upon default of the purchaser have an attachment against property of the purchaser until the property sold is exhausted.[86] The buyer has no attachable interest until payment is made of the

79 Varmlee v. Catherwood, 36 Mo. 479; Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Studebaker Bros. Co. v. Mau, 13 Wyo. 358, 80 Pac. 151; Kidder v. Wittler-Corbin Machinery Co., 38 Wash. 179, 80 Pac. 301; Herring-Hall-Marvin Co. v. Smith, 43 Or. 315, 72 Pac. 704, 73 Pac. 340; Freed Furniture etc. Co. v. Sorenson, 28 Utah, 419, 107 Am. St. Rep. 731, 79 Pac. 564; Barton v. Groseclose, 11 Idaho, 227, 81 Pac. 623.

80 Hutchings v. Munger, 41 Barb. 396; Miller v. Steen, 30 Cal. 403, 89 Am. Dec. 124; cited in 34 Cal. 144, 89 Am. Dec. 124.

81 Miller v. Steen, 34 Cal. 144, 89 Am. Dec. 124. As to complaint in action for breach of conditional agreement to buy wheat at plaintiff's option, see Berry v. Kowalsky, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

82 Studebaker Bros. Co. v. Mau, 13 Wyo. 358, 80 Pac. 151.

83 Studebaker Bros. Co. v. Mau, 13 Wyo. 358, 14 Wyo. 68, 80 Pac. 151, 82 Pac. 2.

84 Miller v. Steen, 30 Cal. 407, 89 Am. Dec. 124; Schneider v. Oregon Pacific R. R. Co., 20 Or. 172, 25 Pac. 391.

85 Sands v. Taylor, 5 Johns. 395, 4 Am. Dec. 374.

86 Barton v. Groseclose, 11 Idaho, 227, 81 Pac. 623.

purchase price.[87] If the seller retakes the property only after the purchaser has abandoned it, he may sue for the balance of the purchase price, after deducting a reasonable value for the property retaken.[88] He can have no recovery on account of a default due to his own actions, such as failure to furnish good title.[89]

§ 4596. **Waiver of condition.**—There may be an absolute agreement on the part of the seller to sell, and a conditional purchase by the buyer, who may, at his own option, waive the condition and make it absolute on both parties.[90]

§ 4597. **Recording of conditional sales.**—The statutes of the various states vary in reference to the recording of notice of conditional sales, and the effect of such recordation. In California, a sale of personal property by which possession remains in the seller is conclusively presumed to be fraudulent and void against his creditors; provided, however, that wines in cellars may be transferred by a written instrument, certified, verified, and recorded the same as chattel mortgages, and provided, also, that stocks of goods may be sold if a five days' verified notice of the sale is given by recording the notice in the office of county recorder of the county wherein the stock of goods is located.[91] This section does not apply to a sale of exempt property. In Oklahoma, constructive notice of a conditional sale is given by recording the contract of such sale, which contract need not be witnessed or acknowledged.[92] In Washington, a conditional sale is made absolute as to purchasers and subsequent creditors in good faith, unless a memorandum of the sale is, within ten days after possession is taken, filed in the county recorder's office of the county of the vendee's residence at the time of taking possession.[93]

§ 4598. **Right of resale.**—Where the buyer wrongfully refuses to receive and pay for the goods sold, the seller has the right, as

87 McIver v. Williamson etc. Co., 19 Okla. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696.

88 Jones v. Reynolds, 45 Wash. 371, 88 Pac. 577.

89 Gennelle v. Boulais, 48 Wash. 310, 93 Pac. 421.

90 Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147.

91 Cal. Civ. Code, § 3440.

92 Shafer v. National Cash Register Co., 16 Okla. 117, 82 Pac. 646; S. Twitchell Co. v. First Nat. Bank, 18 Okla. 375, 90 Pac. 14.

93 Wash. Sess. Laws, 1903, p. 6, ch. 6, § 1; Wittler etc. Co. v. Martin, 47 Wash. 123, 91 Pac. 629.

soon as he can with due regard to the interest of the buyer, and after giving him notice of his intention to resell, to sell the goods, and to recover the difference between the agreed price and the sum realized at the sale, together with expenses, from the buyer.[94] The buyer is not entitled to specific notice of the time and place of the resale. But he must dispose of the goods in good faith.[95]

An averment in a complaint for breach of contract to buy goods held in pledge by a third person, that the defendant was indulged for over a year longer than his original agreement allowed him in which to pay for and receive the goods, is a sufficient averment that a reasonable time was given to comply with the contract before resale of the goods pledged by the pledgee.[96]

§ 4599. **Breach of contract.**—If one contracts to make merchantable lumber for another, and the other takes away unmerchantable lumber, contrary to the wish and orders of the maker, this is not a breach of the contract on the part of the maker.[97]

The damage for breach of agreement to pay for personal property sold is the contract price;[98] for breach of agreement to sell, the excess of the value to the buyer over the contract price; and in case of full payment and non-delivery, the damage is the same as in case of conversion.[99]

§ 4600. **Manufacturing goods.**—A contract to deliver goods, to be manufactured by the party agreeing to deliver, is not an agreement for the sale of goods within the statute.[100] So flour, contracted to be manufactured and delivered, is not within the statute.[101] One who sells or agrees to sell an article of his own

94 Maclean v. Dunn, 4 Bingh. 722.

95 Bogart v. O'Regan, 1 E. D. Smith, 590; McEachron v. Randles, 34 Barb. 301. This has been disapproved in Ingram v. Matthien, 3 Mo. 209. See Cal. Civ. Code, § 1749.

96 Habenicht v. Lissak, 77 Cal. 140, 19 Pac. 260.

97 Hale v. Trout, 35 Cal. 229.

98 Cal. Civ. Code, § 3310.

99 Cal. Civ. Code, §§ 3308, 3309.

100 Crookshank v. Burrell, 18 Johns. 58, 9 Am. Dec. 187; Sewall v. Fitch, 8 Cow. 215; Courtwright v. Stewart, 19 Barb. 455; Donovan v. Wilson, 26 Barb. 138; Parker v. Schenck, 28 Barb. 38; Robertson v. Vaughan, 5 Sandf. 1; Warren Chemical etc. Co. v. Holbrook, 118 N. Y. 586, 16 Am. St. Rep. 788, 23 N. E. 908. Contra, Pratt v. Miller, 109 Mo. 78, 32 Am. St. Rep. 656, 18 S. W. 965.

101 Bronson v. Wiman, 10 Barb. 406; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619.

manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.[102]

§ 4601. **Causes of action.**—Where the person ordering the goods refuses to take them when made, it has been held that the maker may deliver to a third party, with notice to the defendant, and sue for goods sold.[103]

§ 4602. **Materials found.**—It has been held that the plaintiff cannot, on an account for goods sold, recover merely upon proof of materials found by him, and used in services rendered.[104]

§ 4603. **Title to property.**—Where the plaintiff sold a number of bales of drillings to A., for the purpose of making sacks, deliverable to A., as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking them as fast as he should pay, it was held that the title rested in A., and plaintiff had no lien thereon, or on the sacks, until delivered to him.[105] Where title does not pass until a number of payments are made, default of the vendee of itself does not make a forfeiture of the purchase price already paid.[106]

§ 4604. **Acceptance.**—The acceptance of the property precludes an action by the buyer against the seller for damages on the ground that the articles actually furnished do not correspond with the contract.[107] The buyer, by retaining the property without notice to the seller, waives all remedy upon the contract for any breach of an obligation implied by law; e. g. the obligation to deliver an article of merchantable quality.[108] But the buyer does not lose his rights arising from a breach of warranty by accepting and using a portion of the goods, if it was agreed at

102 Cal. Civ. Code, § 1769; Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311.

103 Bement v. Smith, 15 Wend. 493.

104 Cottrell v. Appsey, 6 Taunt. 322.

105 Hewlett v. Flint, 7 Cal. 264.

106 Shafer v. Russel, 28 Utah, 444, 79 Pac. 559.

107 Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; Fitch v. Carpenter, 43 Barb. 40.

108 Fisher v. Samuda, 1 Camp. 190; Milner v. Tucker, 1 Car. & P. 15; Halliday v. McDougall, 20 Wend. 81; Hargous v. Stone, 5 N. Y. 73; Shields v. Pettee, 2 Sandf. 262; Howard v. Hoey, 23 Wend. 350, 35 Am.

the time of such acceptance that the rights of the parties were not to be affected thereby.[109]

§ 4605. **Agent, purchase from.**—An allegation that the goods were purchased of A., the agent then and there acting for defendant, is sufficiently certain to prevent any misapprehension of its meaning, and is the same as if the allegation was of the purchase from defendant.[110]

§ 4606. **Action by assignee.**—Where plaintiff contracted for the delivery of a quantity of lumber after a certain time, and on three days' notice, and assigned the contract to another, the delivery and payment were concurrent acts.[111] In case of an assignment by the buyer, the demand of performance of a condition precedent on the part of the vendor must be made upon the vendor, and not alone upon the assignor.[112] Where a party who has purchased goods by fraudulent representations assigns them in payment of a pre-existing debt to one who takes them *bona fide*, without notice of the fraud, the latter acquires a good title as against the original vendor.[113] But in California it has been held that a sale of personal property passes to the purchaser only such title as the vendor had.[114]

§ 4607. **Condition precedent.**—Where defendants stipulated to sell plaintiff certain merchandise "shipped" from Batavia, and the parties agreed that the contract should be binding until the arrival of the ship, its arrival is a condition precedent, which must be shown before either party can maintain an action.[115]

§ 4608. **Damage.**—In an action for not delivering the thing sold, the measure of damages is the value at the time of the

Dec. 572; 1 Stark. 477; 2 Kent, 480; 1 Parsons on Contracts, 475; Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305.

109 Blackwood v. Cutting Packing Co., 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248.

110 Cochran v. Goodman, 3 Cal. 244.

111 Fruit v. Phelps, 4 Cal. 282.

112 Dustan v. McAndrew, 10 Bosw. 130.

113 Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Woolridge v. Thiele, 55 Ark. 45, 17 S. W. 340.

114 See Robinson v. Haas, 40 Cal. 474. See, also, Eaton v. Davidson, 46 Ohio St. 355, 21 N. E. 442; Sleeper v. Davis, 64 N. H. 59, 10 Am. St. Rep. 377, 6 Atl. 201; Stevens v. Brennan, 79 N. Y. 254.

115 Middleton v. Ballingall, 1 Cal. 446; Russell v. Nicoll, 3 Wend. 112, 20 Am. Dec. 670; Shields v. Pettie, 4 N. Y. 122; Benedict v. Field, 16 N. Y. 595.

breach.[116] If the court finds that goods rejected by the buyer were in fact sound and merchantable, the buyer cannot recover damages for money expended in examining the goods.[117]

§ 4609. **Delivery—Time.**—If a contract or order under which goods are to be furnished does not specify any time at which they are to be delivered, the law implies a contract that they should be delivered in a reasonable time; and no evidence will be admissible to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument.[118] Time is not of the essence of a contract of sale where the seller does not give any assurance of delivery on the date he says he may be able to deliver.[119] By rushing to completion an iron safe partly made, and shipping same in nineteen days, the seller substantially complies with an order to ship "as soon as possible."[120] Allegation of delivery within a reasonable time is essential.[121]

§ 4610. **Demand, averment of.**—A complaint alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same and refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of contract or guaranty. The true point at issue is, whether the defendant undertook to deliver. From the nature of the sale it operated as a delivery. There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty.[122]

§ 4611. **Executory agreements.**—Executory agreements for the sale of goods are within the statute, as well as other contracts.[123]

116 Hopkins v. Lee, 6 Wheat. 109, 5 L. Ed. 218; Blydenburgh v. Welsh, 1 Bald. 331, Fed. Cas. No. 1583; Shepherd v. Hampton, 3 Wheat. 200, 4 L. Ed. 369; Belden v. Krom, 34 Wash. 184, 75 Pac. 636.

117 Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162.

118 Cocker v. Franklin Mfg. Co., 3 Sumn. 530, Fed. Cas. No. 2932. See Terwilliger v. Knapp, 2 E. D. Smith, 86.

119 Montgomery v. Thomson, 152 Cal. 319, 92 Pac. 866.

120 Victor Safe etc. Co. v. O'Neil, 48 Wash. 176, 93 Pac. 214.

121 Pope v. Terre Haute etc. Mfg. Co., 107 N. Y. 61, 13 N. E. 592.

122 Dabovich v. Emeric, 7 Cal. 209.

123 Bennett v. Hull, 10 Johns. 364.

A contract for the sale and delivery, if so completed as to be valid in the state where made, will be enforced in Missouri.[124]

§ 4612. **Fraudulent sales.**—Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed to be fraudulent and void as against creditors of the vendor, if he remains in possession. This provision does not apply to wines in wineries and cellars, in which case the contract of sale must be recorded. In case of the sale of a stock in trade, notice must be given for at least five days of the intended sale, the names and addresses of the parties, a general statement of the character of the property, and the date when and the place where the purchase price is to be paid.[125]

§ 4613. **Sale void for fraud.**—No title passes to the buyer in case of sale of personal property secured by fraud.[126] Misrepresentations as to quality and value are no defense, if by an inspection the buyer can learn the truth or falsity thereof.[127] Drunkenness is no ground for avoiding a contract of sale, unless there is a gross inequality in the values exchanged.[128] It is an actual fraud, under the California statute,[129] for a party to a contract to make statements knowingly untrue, or to make statements which he believes to be true, in a manner not warranted by his information. The intent which is an element of the fraud is the intent to induce another to enter into the contract, and not the intent to deceive.[130] A seller may repudiate a complicated written contract which he has signed without reading, and upon the misrepresentation of the buyer, whom he had good reasons to trust, to explain the contract fully and correctly.[131]

§ 4614. **Illegality of contract pleaded.**—Illegality on account of failure of consideration, or of violation of a statute, or of

124 Houghtaling v. Ball, 20 Mo. 563.

125 Cal. Civ. Code, § 3440.

126 Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

127 Jones v. Reynolds, 45 Wash. 371, 88 Pac. 577.

128 Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

129 Civ. Code, § 1572, subds. 1, 2.

130 Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011.

131 Lilienthal v. Herren, 42 Wash. 209, 84 Pac. 829; Robinson v. Roberts, 20 Okla. 787, 95 Pac. 246.

public policy, must be specially pleaded in defense, unless the same appears from the complaint itself.[132] A sale procured by fraud passes no title, unless the sale is knowingly ratified, positively or by delayed repudiation.[133] A bill of sale may be canceled if the seller was so intoxicated he was unable to knowingly execute the same.[134]

§ 4615. **Memorandum.**—An agreement of sale signed only by the seller, but delivered to and accepted by the buyer, will sustain the buyer's action for non-delivery.[135] The memorandum of a clerk of a seller, of sales made by him at auction, is sufficient to bind the purchaser.[136] In case of sale by samples, the memorandum should so state and designate the samples.[137] Under a statute requiring the memorandum to be signed by the parties to be charged thereby, a contract of sale is not binding upon the seller, unless signed by the buyer also.[138]

§ 4616. **Offer to perform.**—The averments in a declaration that the "plaintiff was ready and willing" to receive goods, and pay for them on delivery and shipment, are material, and necessary to be proved.[139]

§ 4617. **Several causes of action.**—A complaint which states the facts of the case in ordinary and concise language is not demurrable because such statement shows that the plaintiff is entitled to recover upon two different legal grounds.[140] But it has been held that the purchaser of a chattel cannot, in the same action, seek delivery of possession of it and damages for the non-delivery, the one being an action for a tort, the other upon contract.[141]

132 Miller v. Donovan, 11 Idaho, 545, 83 Pac. 608.

133 Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

134 Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066.

135 Egerton v. Mathews, 6 East, 307; Tisdale v. Harris, 20 Pick. 9; Stevewright v. Archibald, 17 Q. B. 103.

136 Frost v. Hill, 3 Wend. 386.

137 Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 Pac. 319.

138 Justice v. Lang, 30 How. Pr. 425. See, as to sufficiency of memorandum, Austrian & Co. v. Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841.

139 Robison v. Tyson, 46 Pa. St. 286.

140 Mills v. Barney, 22 Cal. 240.

141 Furniss v. Brown, 8 How. Pr. 59; Maxwell v. Farnam, 7 How. Pr. 236.

§ 4618. **Tender.**—Where a party contracts for a quantity of wheat to be delivered on demand, and paid for on delivery, in an action for non-delivery it is unnecessary for plaintiffs to aver and prove a tender of the purchase money at the time of demand or before suit.[142]

§ 4619. **Warehouseman.**—A complaint against a warehouseman which does not allege that the goods belonged to the plaintiff, or that defendant was under an obligation to deliver them to him, is bad.[143]

§ 4620. **Offer and tender.**—In an action on a contract where neither time nor place of delivery was fixed, the plaintiff must aver an offer or tender of performance on his part,[144] and an offer to pay on delivery.[145] Where goods are to be delivered at one of two places, at the option of the seller, he is bound to give the buyer notice of the place selected.[146]

§ 4621. **Time.**—Where no time of payment and no time of delivery are agreed upon, payment and delivery are concurrent acts, and neither can maintain an action without showing a readiness and willingness to perform on his part.[147]

§ 4622. **Place.**—In actions on contracts in which both time and place were fixed, it is sufficient to aver a readiness at the place appointed to receive and to pay.[148] And such an averment is essential.[149]

§ 4623. **Tender on demand.**—It need not be alleged that a tender was made upon demand. The plaintiff must allege that he was ready and willing to pay for the goods without a tender,[150] even where his obligation depends on an act of the

142 Crosby v. Watkins, 12 Cal. 85.

143 Thurber v. Jones, 14 Wis. 16.

144 Lester v. Jewett, 11 N. Y. 453.

145 Smith v. Wright, 1 Abb. Pr. 243; Simmons v. Green, 35 Ohio St. 104.

146 Rogers v. Van Hoesen, 12 Johns. 221.

147 Stum v. Hadrich, 7 Cal. App. 241, 94 Pac. 82; Diem v. Koblitz, 49 Ohio St. 41, 34 Am. St. Rep. 531, 29 N. E. 1124.

148 Vail v. Rice, 5 N. Y. 155; Clarke v. Dales, 20 Barb. 42. See Dunham v. Pettee, 8 N. Y. 508.

149 Clarke v. Dales, 20 Barb. 42.

150 Coonley v. Anderson, 1 Hill, 519; Vail v. Rice, 5 N. Y. 155; Bronson v. Wiman, 8 N. Y. 182. Compare Chapin v. Potter, 1 Hilt. 366.

defendant to be done at the same time.[151] Readiness to receive and to pay according to the terms of the agreement, and that defendant had notice of such readiness, is sufficient without tender.[152] It is sufficient to aver that he had been at all times ready to receive and to pay.[153]

§ 4624. **Tender of performance.**—A tender of performance will be necessary in contracts for the purchase of a thing at a future day named, and at a specified price, and an averment of readiness and willingness will not suffice.[154]

§ 4625. **Payment.**—The giving of a promissory note, upon a purchase of goods, is not a sufficient payment to take the contract of sale out of the statute of frauds.[155] Part payment, to take the contract of sale out of the statute, must be made at the very time of making the contract. A payment the next day, though accepted on account, will not suffice.[156]

§ 4626. **Rescission by vendor.**—To enable the vendor to rescind the sale, he must offer to return the notes given for the goods.[157] The right to rescind may be waived by acting as though the contract was still in force.[158] If the contract be rescinded, the vendee is entitled to recover the money paid. If the contract is not rescinded, the vendees are entitled to possession on payment of the full amount due. The party rescinding must put the other party in *statu quo*.[159] Where A. has made a payment in advance on a contract to purchase stock of B., which B. refuses or fails to deliver, and A. notifies B. that he claims the right to rescind the contract, and claims repayment of the money paid, the notice does not affect his right to maintain an action for damages on the contract.[160] The refusal of the buyer to accept part of the cattle sold, when they actually comply with the

151 White v. Demilt, 2 Hall, 436.

152 2 Chit. Pl. 327; Rawson v. Johnson, 1 East, 203.

153 Porter v. Rose, 12 Johns. 209, 7 Am. Dec. 306.

154 Lester v. Jewett, 11 N. Y. 453; Smith v. Wright, 1 Abb. Pr. 243. Compare Coonley v. Anderson, 1 Hill, 519.

155 Ireland v. Johnson, 18 Abb. Pr. 392.

156 Bissell v. Balcolm, 40 Barb. 98; Allen v. Aguira, 5 N. Y. Leg. Obs. 380; Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65.

157 Coghill v. Boring, 15 Cal. 213; Jones v. Anderson, 82 Ala. 302, 2 South. 911; Cahn v. Reid, 18 Mo. App. 115.

158 Bernard v. Sloan, 2 Cal. App. 737, 84 Pac. 232.

159 Miller v. Steen, 30 Cal. 407, 89 Am. Dec. 124.

160 Jones v. Post, 6 Cal. 102.

contract of sale, makes him liable in damages for breach of the contract, but does not warrant the seller in rescinding the sale.[161] It must appear from the complaint that a reasonable time was allowed in which to deliver.[162]

§ 4627. **Law of place.**—If a contract for the sale and assignment of certificates of stock of a corporation is entered into in one state, but the certificates are afterwards delivered in another state, the legality of the sale and assignment is to be tested by the laws of the latter state.[163] As to whether a contract is a mortgage or a conditional sale, the law of the place of execution of the contract will govern.[164]

§ 4628. **Damages by way of recoupment.**—Damages sustained by a vendee of goods, by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and, in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer.[165] If the purchaser of goods claims a breach of warranty, he can have a counterclaim for only such damages as result from the breach.[166]

§ 4629. **Disclaimer.**—It is not a sufficient objection to the plea that it omits a disclaimer of the contract and a proffer to return the property. If the defendant looked only to a mitigation of damages, he was not bound to do either, and therefore was not bound to make such an averment in his plea.[167]

§ 4630. **Estoppels.**—A party retaining goods delivered under an executory contract, without objection, was held estopped from afterwards denying their value.[168] A transaction imbued with the fatal infirmity of being in violation of law cannot be purged of its infirmity by means of an estoppel.[169]

161 Hanley Co. v. Combs, 48 Or. 409, 87 Pac. 143.

162 Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969.

163 Dow v. Gould & Curry S. M. Co., 31 Cal. 629.

164 Studebaker Bros. Co. v. Mau, 13 Wyo. 358, 80 Pac. 151.

165 Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288.

166 Lenz v. Blake-McFall Co., 44 Or. 569, 76 Pac. 356.

167 Withers v. Greene, 9 How. 214, 13 L. Ed. 109.

168 Fisher v. Merwin, 1 Daly, 234.

169 Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

§ 4631. **Insufficient answer.**—If the complaint avers the sale and delivery to defendant of goods, and the value of the same, an answer which denies the indebtedness, but does not deny the facts of the sale and delivery and amount of goods, does not raise an issue, as it only denies the legal conclusion resulting from the facts.[170]

§ 4632. **Tender.**—A tender of warehouse receipts for grain, issued by responsible parties, is a sufficient tender of the grain in Chicago, unless objected to by the other party at the time.[171] After a sale at buyer's option within a certain time, notice by the buyer before the time has expired that he will not accept the goods within or at the end of such time waives a tender by the seller.[172] A plea to an action on a bond to deliver goods at a certain time and place should state that the defendant was at the place appointed, in person or by his agent, ready to deliver, etc.[173] After sale, and before delivery, the seller has the right and obligations of a depositary for hire, except that he must keep the property without charge until the buyer has had a reasonable opportunity to remove it.[174]

§ 4633. **Pleading illegal contract.**—The illegality of a contract of sale must be pleaded, or proof thereof cannot be made, unless the illegality or failure of consideration appears from the complaint itself.[175]

§ 4634. **Defect in quality.**—Where a seller at the time of the sale agrees that if the goods when delivered are inferior to the sample they may be exchanged, it is a conditional sale, and the inferiority of the goods is no defense to an action for the price.[176] A defect of quality in goods sold does not, in the absence of fraud or warranty, constitute a defense to the note given for the price, or any part of it. This rule applied where the note was that of a third party.[177] Suit was had on a note for the purchase of land. The answer set up that the note was given for the land, fencing, and building materials; that plain-

170 Lightner v. Menzel, 35 Cal. 452.

171 McPherson v. Gale, 40 Ill. 368.

172 McPherson v. Walker, 40 Ill. 371. See White v. Dobson, 17 Gratt. (Va.) 262; Millingar v. Daly, 56 Pa. St. 245.

173 Savary v. Goe, 3 Wash. C. C. 140, Fed. Cas. No. 12388.

174 Cal. Civ. Code, § 1748.

175 Miller v. Donovan, 11 Idaho, 545, 83 Pac. 608.

176 Fisher v. Merwin, 1 Daly, 234.

177 Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355, 4 Bosw. 36, 82 Am. Dec. 355; Delano v. Rawson, 10 Bosw. 286.

tiff falsely represented that there was building material for building a barn; that this material was so insufficient in quantity that it cost six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good. It was held that defendant, having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to fences, they being in this case part of the freehold; and it was further held that a special demurrer being put into the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for lumber, but for the value of lumber contracted for and not delivered, and this at the time of contracting.[178]

§ 4635. **Executing contracts.** — Where defendants order of plaintiffs goods of a certain description, which were to be procured by plaintiffs from abroad, and the goods delivered did not answer the order, it was held that the doctrine of *caveat emptor* had no application, the contract being executory, and defendants might recoup from the price of the goods their damages for the defect in quality, although no fraud was charged against plaintiffs.[179] If a drove of pigs are sold, with warranty that they are sound, and some of them have an infectious disease at the time of the sale, and others take it afterwards, the purchaser may recoup the damages so caused, as well after the sale as before, when sued for the price.[180] The agreement may specify a certain time after receipt of the goods when the purchaser cannot set up the claim of breach of warranty;[181] but the test of machinery purchased may be made in a different manner from that prescribed in the agreement of sale.[182]

The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time;[183] and in case the warranty is as to a special purpose, the loss incurred by the effort in good faith to use the thing for that purpose may be received in addition.[184]

178 Kinney v. Osborne, 14 Cal. 112.
179 Renaud v. Peck, 2 Hilt. 137.
180 Bradley v. Rea, 14 Allen, 20.
181 Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421.
182 Kinnard Press Co. v. Stanley, 70 Kan. 770, 79 Pac. 661.
183 Cal. Civ. Code, § 3313.
184 Cal. Civ. Code, § 3314.

FORMS—CONTRACTS FOR SALE OF CHATTELS.

§ 4636. Complaint of seller against purchaser for refusing to receive and pay for goods.

Form No. 1298.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant entered into an agreement in substance as follows: [State the agreement.]

II. That the plaintiff duly performed all the conditions of said contract on his part, and was on the . . . day of . . ., 19.., at . . . [the day and place of delivery], ready and willing to deliver said property, and tendered the same to the defendant.

III. That defendant refused to accept said goods, or pay for them, pursuant to said agreement, to the damage of the plaintiff in the amount of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4637. The same—On contract made by broker.

Form No. 1299.

[TITLE.]

The plaintiffs complain, and allege:

I. That on the . . . day of . . ., 19.., the plaintiffs and defendants entered into an agreement by the hand of A. B., a broker duly authorized to make the same, both on behalf of the plaintiffs and of the defendants, of which the following is a copy: [Copy it.]

II. That at the time of making said contract, the defendants paid to the plaintiffs the sum of . . . dollars stated therein.

III. That the plaintiffs were at all times, within said . . . days, ready and willing to comply with the terms of said contract on their part, and within the . . . days mentioned in said contract, to-wit, on the . . . day of . . ., 19.., at . . ., they tendered the said property to the defendants and demanded payment of the balances of the price thereof.

IV. That the defendants refused to receive said property, or pay the balance of the price therefor.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4638. The same—On promise to pay by good bill of exchange.

Form No. 1300.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant mutually agreed with each other as follows: The plaintiff agreed to sell and deliver to the defendant forty tons of iron, at the price of . . . per hundredweight on the . . . day of . . ., 19.., at . . ., and the defendant then promised the plaintiff to pay him for said iron, by a bill of exchange at three months' date on delivery of said iron, and that such bill should be satisfactory to the plaintiff.

II. That afterwards, on the . . . day of . . ., 19.., at . . ., the plaintiff delivered the said quantity of iron to the defendant, upon the terms aforesaid, amounting to . . . dollars.

III. That the plaintiff, on the . . . day of . . ., 19.., at . . ., demanded of the defendant payment of the price of said iron, by such bill of exchange, and was then, and ever since has been, ready and willing to take the same.

IV. That the defendant has not paid the plaintiff the price of the iron by a bill of exchange payable in three months from the date thereof, which was satisfactory to the plaintiff, or otherwise according to said agreement.

[DEMAND OF JUDGMENT.]

§ 4639. The same—For not returning goods, or paying for them in reasonable time.

Form No. 1301.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff, at the request of the defendant, delivered to him [describe the property], of the value of . . . dollars, upon the condition and consideration that the defendant would purchase the same for . . . dollars, or return the same to the plaintiff within a reasonable time, which the defendant then and there agreed to do.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That a reasonable time for the defendant to purchase and pay for said goods, or to return the same to the plaintiff, has elasped before the commencement of this action.

IV. That the defendant has not paid for said goods, nor has he returned the same to the plaintiff.

[DEMAND OF JUDGMENT.]

§ 4640. The same—For not giving security according to conditions of sale at public auction, the credit not having expired.

Form No. 1302.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff caused to be put up and exposed for sale by public auction, in lots, certain goods and chattels, one of the said lots being a certain carriage, subject to the following terms, to-wit: that the highest bidder should be the purchaser, and that the purchaser should be allowed seven months' credit for the payment of the price, after giving such security as should be approved of by A. B. on the part of the plaintiff; or that such purchaser should, at his election, pay down the purchase price at the time of the sale, and in that event that . . . per cent should be deducted, by way of discount, from the amount of the purchase money, of all of which said terms the defendant, at the time of the sale, had notice.

II. That at the said sale the defendant was the highest bidder for, and was declared to be the purchaser of, the said carriage, subject to said terms of sale, for . . . dollars.

III. That the plaintiff then delivered the carriage to the defendant, as such purchaser, and was then, and has ever since been, ready and willing to perform the said contract on his part.

IV. That the defendant has not, although then requested by the plaintiffs, paid any part of the said sum of . . . dollars, nor has he given any security for the same, according to the said terms of sale.

[DEMAND OF JUDGMENT.]

§ 4641. The same—For a deficiency on a resale.

Form No. 1303.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he put up at auction, at the . . . house of . . ., city of . . ., in this state, sundry [articles of merchandise], subject to the condition that all goods not paid for and removed by the purchaser thereof

within [ten days] after the sale, should be resold at auction on his account, of which condition the defendant had notice.

II. That the defendant purchased [two hundred barrels of flour] at the said auction, at the price of . . . dollars.

III. That the plaintiff was ready and willing to deliver the same to defendant on the said day, and for [ten days] thereafter, and on [etc.], offered to do so, and demanded payment therefor.

IV. That the defendant did not take away or otherwise receive the said goods purchased by him, nor pay for them or any of them within [ten days] after the sale, nor afterward.

V. That on the . . . day of . . ., 19.., at . . ., having first given the defendant reasonable notice of the time and place of resale, the plaintiff resold the said [two hundred barrels of flour], on account of the defendant, by public auction, for . . . dollars.

VI. That the expenses attendant upon such resale amounted to . . . dollars.

VII. That defendant has not paid the deficiency thus arising, amounting to . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4642. Complaint by manufacturer for goods made at defendant's request and not accepted.

Form No. 1304.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant agreed with the plaintiff that the plaintiff should make for him [ten casks], and that defendant should receive for the same, upon delivery thereof . . . dollars.

II. That the plaintiff made the said casks, and on the . . . day of . . ., 19.., offered to deliver the same to defendant and has ever since been ready and willing to do so.

III. That defendant has not paid for the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4643. Complaint for breach of promise, by purchaser of good-will, not to carry on rival trade.

Form No. 1305.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore the defendant carried on the business of

. . ., at . . .; and on or about the . . . day of . . ., 19.., in consideration that the plaintiff would purchase from him his store and goods therein, for the sum of . . . dollars, and the good-will of the said business for the sum of . . . dollars, the defendant agreed with the plaintiff that he would not at any time thereafter, by himself, or partner, or agent, or otherwise, either directly or indirectly, set up or carry on the business of a . . ., at . . ., or at any other place within the city of . . .

II. That the plaintiff accordingly purchased from the defendant his said . . ., for the price and at the terms aforesaid, and paid said sum of . . . dollars for the said store and goods, and the good-will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant afterwards, to-wit, on the . . . day of . . ., 19.., set up and carried on the business of . . ., at . . ., to the damage to plaintiff in the sum of . . . dollars.

[Demand of Judgment.]

§ 4644. Complaint of buyer against seller—For not delivering goods sold.

Form No. 1306.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred sacks of potatoes] to the plaintiff [on the . . . day of . . ., 19..], and that the plaintiff should pay therefor . . . dollars on delivery.

II. That on the said day, the plaintiff was ready and willing, and offered to pay the defendant the said sum, upon delivery of the said goods.

III. That the defendant has not delivered said goods.

IV. That on account of the failure of defendant to deliver said goods as aforesaid, plaintiff was compelled to purchase the same in open market at a cost of . . . dollars.

V. That plaintiff has suffered damages on account of defendant's failure to deliver said goods, in the sum of . . . dollars.

[Demand of Judgment.]

§ 4645. The same—For not delivering within specified time.

Form No. 1307.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff agreed with the defendant to buy of him, and the defendant then agreed to sell to the plaintiff, and to deliver to him on the . . . day of . . . , 19.., at . . . , . . . bushels of oats, at the price of . . . cents per bushel, to be paid for on the delivery thereof.

II. That the said time for the delivery of the said oats has elapsed, and that plaintiff has always been ready and willing to receive the said oats, and to pay for them at the price aforesaid, on delivery, according to the terms of said agreement, of all which the defendant had notice.

III. That the defendant has not delivered the same, nor any part thereof, to the plaintiff, at . . ., or elsewhere.

IV. That the plaintiff has thereby lost profits, and has sustained damage to the amount of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4646. The same—Allegation where neither time nor place of delivery was fixed.

Form No. 1308.

That on the . . . day of . . ., 19.., at . . ., the plaintiff was ready and willing, and offered to receive and pay for said flour, and otherwise has duly performed all the conditions thereof on his part.

§ 4647. The same—Allegation where both time and place were fixed.

Form No. 1309.

That the plaintiff was ready at the time and place appointed to receive said . . ., and to pay for the same according to the agreement, and otherwise has duly performed all the conditions of the agreement on his part.

§ 4648. The same—Allegation where the particular time of delivery was not appointed.

Form No. 1310.

That on the . . . day of . . ., 19.., at the place appointed, the plaintiff was ready to receive said . . ., and pay for the

same, according to the agreement, of which the defendant had notice, and the plaintiff has otherwise duly performed all the conditions thereof on his part.

§ 4649. The same—Allegation of part payment.

Form No. 1311.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., it was mutually agreed between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff at . . ., on or before the . . . day of . . ., 19.., [describe the thing], and that the plaintiff should pay to the defendant therefor at the rate of . . . dollars per . . ., amounting to . . . dollars, payable as follows: . . . dollars at the time of making said agreement, and the residue on the delivery of the . . . as aforesaid.

II. That the plaintiff at the time of the contract paid to the defendant the sum of . . . dollars, in pursuance of the agreement.

III. That the plaintiff was ready and willing at the time and place aforesaid, to receive said goods and pay the balance therefor, of all which the defendant had notice; yet the said defendant has not delivered the same or any part thereof; to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4650. Complaint against seller of stock, for non-delivery.

Form No. 1312.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant entered into an agreement subscribed by them, whereby it was mutually agreed between them that the defendant should sell and deliver to the plaintiff, at such time within . . . days thereafter as the plaintiff should elect, . . . shares of the capital stock of the . . . company, and that the plaintiff should pay him therefor . . . dollars.

II. That on the . . . day of . . ., 19.., at . . ., the plaintiff tendered to the defendant said sum of . . . dollars, and otherwise duly performed all the conditions of said agreement on his

part, and demanded of the defendant that he deliver said . . . shares of stock to the plaintiff.

III. That the defendant has not delivered the same.

[Demand of Judgment.]

§ 4651. Allegation of special or consequential damages.

Form No. 1313.

That prior to the making of said agreement the plaintiff had entered into a contract with one M. N. to sell and deliver to him said [describe the property], for the sum of . . . dollars, which said M. N. had agreed to pay therefor; that the said defendant was duly notified of said last-named contract of resale at the time of the making of said agreement of sale between plaintiff and defendant, and knew that the plaintiff purchased said property in order to fulfill his said contract with said M. N.; that said property was not obtainable in the open market at [place of delivery] at the time the same was to be delivered to plaintiff and not prior to the . . . day of . . ., 19.., and that by reason of the defendant's said failure to deliver the same to plaintiff as agreed the plaintiff suffered the loss of his profits upon such resale, to-wit, the sum of . . . dollars.

§ 4652. Answer—Denial of plaintiff's performance.

Form No. 1314.

That the plaintiff has not performed the conditions of said agreement on his part; but, on the contrary, has wholly omitted [here state breach, as if in a complaint against him].

§ 4653. Answer. Explaining the contract, and showing a breach as to delivery.

Form No. 1315.

[Title.]

The defendant answering plaintiff's complaint, alleges:

I. That it was a part of the agreement referred to in the complaint that the plaintiff should deliver the goods sold at . . .

II. That the said goods have not been so delivered.

§ 4654. Defense—Breach of warranty by plaintiff.

Form No. 1316.

[TITLE.]

The defendant answering to the complaint of plaintiff, alleges:

I. That the goods therein mentioned were warranted by the plaintiff to be [genuine French broadcloth].

II. That they were not [genuine French broadcloth].

§ 4655. The same—As to quality.

Form No. 1317.

[TITLE.]

The defendant answers to the complaint:

I. That it was a part of the agreement referred to in the complaint that the wheat therein mentioned should be of a first-class milling quality.

II. That the said wheat was not of a first-class milling quality, but [state wherein the quality was defective].

§ 4656. The same—That goods did not correspond to sample.

Form No. 1318.

[TITLE.]

Comes now defendant, and answering plaintiff's complaint, alleges:

I. That at the time of the making of the said contract of sale mentioned in the complaint, the plaintiff exhibited to the defendant a sample of the said goods so to be sold, and agreed that the said goods would and should be in all respects equal in quality to the said sample.

II. That when the said goods were offered by the plaintiff to the defendant, in pretended compliance with said contract, the defendant found, as the fact was, that the same were not equal in quality to the said sample in this [here state nature of defects], whereupon [state refusal to receive and non-acceptance].

CHAPTER CXVIII.

ON WARRANTIES OF CHATTELS.

§ 4657. Sales by auctioneer.—There seems to be a doubt whether in an ordinary sale of goods by auction an auctioneer has any right or authority to warrant goods sold by him, in the absence of any express authority from his principal to do so, and without proof of some known and established usage of trade from which an authority can be implied.[1] It may be accepted generally as the true doctrine that they are special agents having authority to sell, and not to warrant.[2]

§ 4658. Effect of general warranty.—A general warranty does not extend to defects inconsistent therewith, of which the buyer was then aware, or which were then easily discernible by him without the exercise of peculiar skill, but it extends to all other defects.[3]

§ 4659. Implied warranty of title.—Where the vendor of chattels in his possession gives a written bill of sale containing no covenant of warranty, there is an implied warranty as to the entire title.[4] The vendor in possession warrants the goods by implication; unless at the time he expressly disavows an intent to do so.[5] But if out of the possession of the vendor, in the absence of fraud, the buyer takes at his own risk.[6] Breach of warranty of title is complete as soon as the mortgagee takes possession of the property sold.[7] The use of a certain name in a sale

1 See Upton v. Suffolk County Mills, 11 Cush. 589, 59 Am. Dec. 163; Blood v. French, 9 Gray, 197; Cal. Civ. Code, §§ 1763-1778.

2 The Monte Allegre, 9 Wheat. 616, 647, 6 L. Ed. 174. See Dent v. McGrath, 3 Bush, 174. See, also, Cal. Civ. Code, §§ 1765, 1798; Court v. Snyder, 2 Ind. App. 440, 50 Am. St. Rep. 247, 28 N. E. 718.

3 Cal. Civ. Code, § 1778.

4 Clevenger v. Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410; Miller v. Van Tassel, 24 Cal. 459; Gross v. Kierski, 41 Cal. 111.

5 Miller v. Van Tassel, 24 Cal. 459; Rew v. Barber, 3 Cow. 272.

6 O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; 3 Kent (5th ed.), 478; McCoy v. Artcher, 3 Barb. 323; Edick v. Crim, 10 Barb. 445.

7 Clevenger v. Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410.

note for the goods sold is a warranty that they bear that name.[8] It is implied that the goods sold substantially correspond in their entirety to the representations made as to quality.[9] An express warranty excludes any implied warranty.[10] The complaint need not aver the warranty, for this implied warranty is an inference of law.[11]

§ 4660. **Judicial sale.**—Upon a judicial sale, the only warranty implied is that the seller does not know that the sale will not pass a good title to the property.[12]

§ 4661. **Measure of damages.**—In an action upon an implied warranty of title to personal property, where a judgment in trover has been obtained against the purchaser, the measure of damages is the damages and costs recovered by the true owner, with interest thereon.[13] But where the goods are replevied of the buyer, their value alone, and not damages for their detention, nor attorney's fees paid by him for defending the title, is held to be the measure of damages.[14]

§ 4662. **Money.**—On an exchange of money, each party thereby warrants the genuineness of the money given by him.[15]

§ 4663. **Skill—Implied warranty of.**—When a skilled laborer, artisan, or artist is employed, there is on his part an implied warranty of skill that he is reasonably competent to do the task he undertakes.[16] The representations of a seller familiar with machinery amount to a warranty, whether so intended by him or not, when the buyer is not familiar with machinery, and relies on the statements of the other.[17]

§ 4664. **Waiver of warranty.**—The complaint in an action to recover the price of a machine sold with a warranty, under an agreement that the continued use of the machine by the vendee

8 Flint v. Lyon, 4 Cal. 17.

9 Puritan Mfg. Co. v. Westermire, 47 Or. 557, 84 Pac. 797.

10 Wasatch Orchard Co. v. Morgan Canning Co., 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540.

11 Van Santv. Pl. 287.

12 Cal. Civ. Code, § 1777.

13 Blasdale v. Babcock, 1 Johns. 617; Armstrong v. Percy, 5 Wend. 535.

14 Id. But see Lewis v. Peake, 7 Taunt. 152. See, also, Polhemus v. Heiman, 45 Cal. 573.

15 Cal. Civ. Code, § 1807.

16 Robinson's Pr. 707.

17 Northwestern Lumber Co. v. Callendar, 36 Wash. 492, 79 Pac. 30.

should be regarded as a waiver of the warranty, need not allege that the machine corresponded with the warranty if it avers the continued use of it by the vendee.[18] The contract of sale may provide that retention of the article for a certain period of time shall effect a waiver of any breach of warranty as to quality.[19]

§ 4665. **Warranty of title.**—If the seller has possession of the article, and sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title.[20] In New York, a warranty of title is implied from an unqualified sale.[21] And it extends to the right to the use of the thing sold,—e. g. a patented article.[22] But it arises only in cases where the vendor is in possession.[23] In every sale of personal property, except a judicial sale, there is implied warranty of title or of peaceable possession.[24]

§ 4666. **Warranty by agent.**—An agent, whether general or special, who is authorized to sell personal property, is presumed to possess the power of warranting its quality and condition, unless the contrary appear.[25] So an agent employed to sell negotiable paper may, in the absence of any limitation of his authority, represent it as a business note, and valid.[26]

§ 4667. **Warranty, on sale of written instrument.**—One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such

18 Bragg v. Bamberger, 23 Ind. 198.

19 Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421.

20 2 Kent. Com. 478; Irwin v. Thompson, 27 Kan. 643; Paulsen v. Hall, 39 Kan. 365, 18 Pac. 225; Edgerton v. Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

21 Carman v. Trude, 25 How. Pr. 440; Scranton v. Clark, 39 Barb. 273. See Swectman v. Prince, 26 N. Y. 224.

22 Carman v. Trude, 25 How. Pr. 440.

23 Scranton v. Clark, 39 Barb. 273; Bechet v. Smithers, 18 Jones & Sp. 381.

24 Porte v. United States, Dev. (Court Cl.) 57. See Puckett v. United States, Dev. (Court Cl.) 103. See, also, Cal. Civ. Code, § 1765; Gross v. Kierski, 41 Cal. 111.

25 Nelson v. Cowing, 6 Hill, 336; Palmer v. Hatch, 46 Mo. 585; Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053; Talmage v. Bierhause, 103 Ind. 270, 2 N. E. 716. See Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Decker v. Fredericks, 47 N. J. L. 469, 1 Atl. 470; Cooley v. Perrine, 41 N. J. L. 322, 32 Am. Rep. 210.

26 Ferguson v. Hamilton, 35 Barb. 427, 442; Fenn v. Harrison, 4 T. R. 177. But see Lipscomb v. Kitrell, 11 Humph. 256.

as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.[27]

§ 4668. **Warranty by seller.**—One who sells or agrees to sell personal property, knowing that the buyer relies on his advice or judgment, thereby warrants to the buyer that neither the seller nor any agent employed by him in the transaction knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.[28]

§ 4669. **Burden of proof of warranty.**—If a written contract contains neither representation nor warranty, the burden is upon defendant to prove a warranty.[29]

§ 4670. **Assignment of breach.**—The agreement to take back property sold under a warranty of soundness, but which proved unsound, or whereby defendant agreed to pay a sum of money in consideration of said unsoundness and consequent rescission of sale, does not require assignment of a special breach, within the meaning of the code.[30]

§ 4671. **Averment of warranty.**—A general averment of warranty is sufficient, as that the seller warranted the article to be of good quality.[31]

§ 4672. **Caveat emptor.**—Under the express provisions of section 1764 of the California Civil Code, a contract of sale does not imply a warranty.[32] That the buyer must take care, or be on his guard,[33] is a leading maxim of the law relating to the

27 Cal. Civ. Code, § 1774. See James v. Yaeger, 86 Cal. 184, 24 Pac. 1005; Kendall v. Parker, 103 Cal. 324, 42 Am. St. Rep. 117, 37 Pac. 401; Harvey v. Dale, 96 Cal. 160, 31 Pac. 14; O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

28 Cal. Civ. Code, § 1767.

29 Colorado Dry Goods Co. v. W. P. Dunn Co., 18 Colo. App. 409, 71 Pac. 887; Lenz v. Blake-McFall Co., 44 Or. 569, 76 Pac. 356; Lander v. Sheehan, 32 Mont. 25, 79 Pac. 406.

30 Stone v. Watson, 37 Ala. 279.

31 Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163.

32 Browning v. McNear, 145 Cal. 272, 78 Pac. 722; O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

33 Hob. 99; Co. Lit. 106a; 2 Inst. 714; Broom's Maxims, 605. See Rinschler v. Jelliffe, 9 Daly, 469; Eaton v. Waldron, 67 Hun, 551, 22 N.

contract of sale; and its application is not affected by the circumstances that the price is such as is usually given for a sound commodity.[34] If the vendor warrants the quality of the articles he sells, he is bound to deliver them of the stipulated quality, and the examination and selection of some of the articles by the vendee when they are delivered, does not amount to a waiver of the contract.[35]

§ 4673. Damages on breach.—Under the forms of pleading at common law, the vendee of chattels with a warranty of title could, on a breach of the warranty, recover damages in *assumpsit*, or he might sue in an action on the case for deceit, if there had been deceit, as well as warranty of title; but in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had occurred, and in the latter, that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false.[36] The buyer is not entitled to rescind the contract for breach of a warranty that there will be not less than a certain number of saw-logs, but his remedy is in an action for damages.[37] Where the breach is discovered after delivery, the buyer may retain the goods and sue for the breach, or set off the damage caused thereby, in an action for the price.[38]

§ 4674. Damages, measure of.—When the vendor of personal property is sued for a failure of title, the measure of damages is the price paid by the plaintiff.[39]

The measure of damages for breach of warranty of seeds is the difference in value of the crop produced and what would have been produced.[40] Damages for breach of warranty of quality is the difference in value at the time to which the warranty re-

Y. Supp. 504; Kircher v. Conrad, 9 Mont. 191, 18 Am. St. Rep. 731, 23 Pac. 74, 7 L. R. A. 471.

34 2 Steph. Com. 326; Cro. Jac. 2; Hargous v. Stone, 5 N. Y. 88; 2 Wood's Lect. 251; 2 Kent Com. 478; 1 Story Eq. Jur. 212. But see Bulwinkle v. Cramer, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. 776.

35 Willings v. Consequa, Pet. C. C. 301, Fed. Cas. No. 17767. As to warranty on the sale of chattels, see Cal. Civ. Code, §§ 1763-1786.

36 Miller v. Van Tassel, 24 Cal. 459; Polhemus v. Heiman, 45 Cal. 573.

37 Hulet v. Achey, 39 Wash. 91, 80 Pac. 1105.

38 Browning v. McNear, 145 Cal. 272, 78 Pac. 722.

39 Arthur v. Moss, 1 Or. 193.

40 Moody v. Peirano (Cal. App.), 84 Pac. 783.

ferred;[41] and for breach of warranty of fitness a fair compensation is added thereto for loss due to use of the property for the purpose intended;[42] but neither interest nor costs of suit arising from a subsequent sale are allowed, unless immediate notice is given the original seller of the machine sold under warranty.[43] The purchase price and interest, and not the value of the stock and dividends, are the measure of damage for breach of warranty of title to corporate stock sold.[44] Humiliation and mental agony are not elements of damage for breach of warranty.[45] A loss not within the contemplation of the parties, or not naturally arising from the breach of warranty, cannot be recovered as damages.[46]

§ 4675. **Pleading damages for breach of warranty.**—An allegation that defendant warranted the wheat to be "White Australian," but that it was actually wheat of another and inferior variety, and produced a crop inferior to that which would have been grown had the wheat been of the variety warranted, and that by reason of the premises plaintiff had been damaged in the sum of one thousand dollars, sufficiently alleges that the crop was of less value, and such allegation is not demurrable for want of an allegation of damages.[47] An allegation of a statement of fact, and not of opinion, a positive affirmation, at the time, and as part of the contract of sale for an automobile, that it was in first-class condition and suitable for a particular purpose, for which the seller was advised it was desired, sufficiently pleads an express warranty.[48]

§ 4676. **Executory contract.**—An executory contract for the sale of corn requires that it shall be in good and marketable condition, without express words to that effect.[49] A contract to deliver to the defendants, who were manufacturers of barrels and staves, a certain quantity of stave-bolts, was held to require a delivery of bolts of a good merchantable quality, and suitable

41 Cal. Civ. Code, § 3313; Walsh v. Meyer, 40 Wash. 650, 82 Pac. 938.

42 Cal. Civ. Code, § 3314.

43 Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92.

44 Morgan v. Hendrie, 34 Colo. 25, 81 Pac. 700.

45 Walsh v. Meyer, 40 Wash. 650, 82 Pac. 938.

46 Wright v. Computing Scale Co., 47 Wash. 107, 91 Pac. 571.

47 Moody v. Peirano (Cal. App.), 84 Pac. 783.

48 Mastin v. Bartholomew, 41 Colo. 328, 92 Pac. 682.

49 Peck v. Armstrong, 38 Barb. 215. See Koop v. Handy, 41 Barb. 454.

for the purposes for which they were intended.[50] A contract for the sale of "oxalic acid," even when the seller is not the manufacturer, and at the time of contracting expressly declines all responsibility as to the quality, and the buyer has an opportunity of inspecting it, and no fraud exists, is not complied with by the delivery of an article which does not in commercial language come properly within the description of "oxalic acid."[51]

§ 4677. Fraud need not be alleged.—No averment or knowledge of fraud is necessary to support this action. Such an allegation sounds in tort;[52] and if inserted in the complaint, the plaintiff may be compelled to elect on the trial between the two grounds of liability.[53]

§ 4678. Implied warranty.—On a sale of an existing article, there is no implied warranty that the article is suitable for the purpose for which it was purchased;[54] and this is so even where the article is to be manufactured, if the known, described, and definite article is furnished as ordered.[55] But the rule is different where the goods are ordered for a particular purpose, known to the seller.[56] Every person or corporation who manufactures an article under an order for a particular purpose warrants by the sale of it that it is reasonably fit for that purpose.[57] In every agreement for the future sale of merchandise, there is an implied warranty that it shall be merchantable;[58] but in the case of fruit on trees the warranty applies only to the fruit on the trees at the proper time for its gathering.[59] When one

50 Hetcham v. Wells, 19 Wis. 25.

51 Josling v. Kingsford, 13 Com. B. (N. S.) 447.

52 Holman v. Dord, 12 Barb. 336; Williamson v. Allison, 2 East, 446.

53 Springsteed v. Lawson, 14 Abb. Pr. 328; Sweet v. Ingerson, 12 How. Pr. 331; Edick v. Crim, 10 Barb. 445.

54 Milburn v. Belloni, 34 Barb. 607; Puritan Mfg. Co. v. Westermire, 47 Or. 557, 84 Pac. 797; Ehrsam v. Brown, 76 Kan. 206, 91 Pac. 179, 15 L. R. A. (N. S.) 877. But compare Anson Co. v. Thayer, 50 Hun, 516, 3 N. Y. Supp. 465; Edwards v. Dillon, 147 Ill. 14, 37 Am. St. Rep. 199, 35 N. E. 135; McClamrock v. Flint, 101 Ind. 278; Blackmore v. Fairbanks, 79 Iowa, 282, 44 N. W. 548; Jones v. Just, L. R., 3 Q. B. 197.

55 Oil Creek Min. Co. v. Fairbanks, Morse & Co., 19 Colo. App. 142, 74 Pac. 543.

56 Lenz v. Blake-McFall Co., 44 Or. 569, 76 Pac. 356.

57 Fox v. Stockton etc. Harvester Works, 83 Cal. 333, 23 Pac. 295.

58 Hamilton v. Ganyard, 34 Barb. 204; Cal. Civ. Code, § 1768.

59 Bill v. Fuller, 146 Cal. 50, 79 Pac. 592.

sells an article of his own manufacture, there is an implied warranty that the article is free from any defect produced by the manufacturing process itself; and where the defect is in the materials employed, the warranty is implied only where he is shown or may be presumed to have known the defect.[60] A written guaranty as to quality excludes any implied warranty thereto.[61]

§ 4679. **Quality, how averred.**—The unsound condition of the chattel should be averred according to the fact, in direct and positive terms, and, if valueless, that it was worth nothing, and was of no value.[62]

§ 4630. **Sale by sample.**—On a sale by sample there is an implied warranty that the article shall correspond with the sample; but an examination of samples, when there is an express warranty, is not a waiver of the warranty.[63] The law presumes that the only warranty is that the bulk shall conform to the sample in kind and quality.[64] In a sale by sample by the manufacturer, there is an implied warranty against latent defects.[65] When the contract is in writing, and there is nothing in the contract to indicate a sale by sample, parol evidence cannot be admitted to show sale was made by sample.[66] If the purchaser's agent takes samples of grain in the absence of the seller, and the purchaser buys upon representation of his agent that the samples are fair samples, there is no sale by samples.[67]

§ 4681. **Warranty of quality.**—No particular form of words is essential to constitute a warranty of quality. An assertion of the vendor, if relied upon by the vendee, and understood by

60 Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Cal. Civ. Code, § 1769.

61 Wasatch Orchard Co. v. Morgan Canning Co., 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540.

62 Deifendorff v. Gage, 7 Barb. 18.

63 Willings v. Consequa, Pet. C. C. 301, Fed. Cas. No. 17767.

64 Ramsdell v. United States, 2 Court Cl. (Nott & H.) 508; Hughes v. Bray, 60 Cal. 284; Voss v. Maguire, 18 Mo. App. 477; Gould v. Stein, 149 Mass. 570, 14 Am. St. Rep. 455, 22 N. E. 47, 5 L. R. A. 213.

65 Nixa Canning Co. v. Lehmann-Higginson Grocer Co., 70 Kan. 664, 79 Pac. 141, 70 L. R. A. 653.

66 Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Harrison v. McCormick, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 Pac. 319.

67 Browning v. McNear, 145 Cal. 272, 78 Pac. 722.

both parties as an absolute assertion, and not merely an expression of opinion, will amount to one.[68] Where the plaintiff inspects the goods before purchasing, the case is taken from the operation of the rule of implied warranty.[69] An advertisement of goods for sale, giving them a higher character than upon examination they turn out to merit, will not amount to warranty, where the purchaser relies upon his own inspection.[70] A mere praise of personal property, such as wool, indulged in by the owner when offering it for sale, does not amount to an implied warranty of its quality or condition, if the buyer has an opportunity to examine it and fails to do so, and no artifice is used by the seller to prevent him from making an examination.[71] If one party contracts to deliver the other wool "in good order," and the latter agrees to accept and pay for it, the clause "in good order" is an express warranty.[72]

§ 4682. **Duty of purchaser.**—A purchaser cannot proceed without inquiry or examination to use an article which will damage his business, relying upon a warranty which only goes to the fact of the nature or character of the article, and not to the effect of using it, and still hold the vendor responsible for the consequences.[73] The purpose of notice of defects in machinery sold under warranty is to enable the seller to remedy such defects; and if the seller makes such attempt, any notice required by the contract of sale is unnecessary.[74] If the property sold is to be satisfactory to the buyer, he must within a reasonable time give notice of his dissatisfaction, if any.[75]

68 Polhemus v. Heiman, 45 Cal. 573; Sweet v. Bradley, 24 Barb. 549; Chapman v. Murch, 19 Johns. 290, 10 Am. Dec. 227; Carley v. Wilkins, 6 Barb. 557; Wilbur v. Cartright, 44 Barb. 536; Kircher v. Conrad, 9 Mont. 191, 18 Am. St. Rep. 731, 23 Pac. 74, 7 L. R. A. 471; Fairbank Co. v. Metzger, 118 N. Y. 260, 16 Am. St. Rep. 753, 23 N. E. 372; Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113; McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687.

69 Moore v. McKinlay, 5 Cal. 471. The grounds and principles upon which warranties of title, of quality, etc., are implied, considered in Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163. See, also, Horner v. Parkhurst, 71 Md. 110, 17 Atl. 1027; Hight v. Bacon, 126 Mass. 10, 30 Am. Rep. 639.

70 Calhoun v. Vechio, 3 Wash. C. C. 165, Fed. Cas. No. 2310; McVeigh v. Messersmith, 5 Cranch C. C. 316, Fed. Cas. No. 8931.

71 Byrne v. Jansen, 50 Cal. 624; Berman v. Woods, 38 Ark. 351.

72 Polhemus v. Heiman, 50 Cal. 438.

73 Milburn v. Belloni, 34 Barb. 607.

74 Harrison v. Russel & Co., 12 Idaho, 624, 87 Pac. 784.

75 Tatum v. Geist, 46 Wash. 226, 89 Pac. 547; Stone v. Victor El. Co., 36 Colo. 370, 85 Pac. 327.

§ 4683. **Measure of damages.**—The plaintiff may recover the difference between the value of the chattel as warranted and as found to be by the court or jury, and special damages for injuries occasioned by the condition of the chattel.[76] Special damages for injuries occasioned by the condition of the chattel must be averred, as the communication of infectious diseases by an animal warranted sound.[77]

§ 4684. **That plaintiff relied on warranty.**—A complaint which alleges that plaintiff purchased of defendant twenty-seven head of hogs; that defendant represented them to be sound and healthy; that the plaintiff relied on said representations, having no opportunity by ordinary diligence to discover that the same were not true; that in fact the hogs were diseased and unhealthy, being then infected with hog cholera, and known to be so by the defendant, and that afterwards twenty-five of them died with that disease, is good on demurrer.[78] The complaint must aver that the plaintiff was actually misled by reason of the warranty.[79]

§ 4685. **Warranty of soundness.**—A general warranty of soundness covers even visible defects of a chattel, unless they are such as could be discerned by an ordinary observer without peculiar skill.[80] A mere cold controllable by ordinary remedies, not affecting the general health or usefulness of a horse, is not an unsoundness.[81] A guaranty that the article should pass inspection is nothing more than the usual warranty of the soundness and quality of the thing sold.[82]

§ 4686. **Rights in case of breach.**—The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties

76 Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476.

77 Id. See McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687; Fox v. Stockton etc. Harvester Works, 83 Cal. 333, 23 Pac. 295.

78 Baker v. McGinniss, 22 Ind. 257.

79 Holman v. Dord, 12 Barb. 336; Oneida Mfg. Soc. v. Lawrence, 4 Cow. 440.

80 Chitty on Contracts, 456; Parsons on Mercantile Law, 57; Margetson v. Wright, 20 Eng. Com. Law, 269; Birdseye v. Frost, 34 Barb. 367. See Hoffman v. Oates, 77 Ga. 701; Crossman v. Johnson, 63 Vt. 333, 22 Atl. 608, 13 L. R. A. 678; Leavitt v. Fletcher, 60 N. H. 182.

81 Springsteed v. Lawson, 14 Abb. Pr. 328, 23 How. Pr. 302.

82 Gibson v. Stevens, 8 How. 384, 12 L. Ed. 1123.

to operate as a condition.[83] Or, if part of the price is paid, he may offer to return the machine and recover the consideration paid.[84] And he may refuse to accept jewelry, though bought under contract specifying that no jewelry should be returned except in exchange for other goods.[85] The purchaser cannot recover both his actual damages and the statutory damages.[86] Failure to replace defective parts according to agreement, on account of a strike at the seller's works, is nevertheless a breach.[87]

§ 4687. **Recoupment.**—In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment, to mitigate the amount recovered; but it is not available as a complete defense to the action.[88] Loss of profits from the breaking of defective parts of the machine will not be considered to have been contemplated, if there is no evidence of the seller's knowledge of the extent of the buyer's operations and use of logging-engines.[89] The plea of *non est factum* is a nullity in an action of debt on simple contract.[90] The plea of *non est factum* did not admit the plaintiff's damages.[91] Where the defendant pleaded that the obligation was given for horses, which did not prove to be sound or of as high a pedigree as had been represented to the buyer, the plea was admissible, if the defendant looked only to the mitigation of damages.[92]

Special damages for breach of warranty must be specially pleaded, and it must be shown that they were within the contemplation of the parties, as the necessary result of the breach of warranty, and are rarely allowable, except in cases of fraud in inducing the contract.[93] Under an agreement to make a rebate for defective cans, the buyer must return the defective cans and make his claim, or he cannot plead the same as a counterclaim.[94]

83 Cal. Civ. Code, § 1786; Erie Cy. Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92.

84 Osborne & Co. v. Walther, 12 Okla. 20, 69 Pac. 953.

85 Puritan Mfg. Co. v. Westermire, 47 Or. 557, 84 Pac. 797.

86 Galbraith v. Carmode, 43 Wash. 456, 86 Pac. 624.

87 Puget Sound Iron etc. Works v. Clemmons, 32 Wash. 36, 72 Pac. 465.

88 Earl v. Bull, 15 Cal. 425.

89 Puget Sound Iron etc. Works v. Clemmons, 32 Wash. 36, 72 Pac. 465.

90 Gebhart v. Francis, 32 Pa. St. 78.

91 Bennett v. Brown, 31 Barb. 158.

92 Withers v. Greene, 9 How. 213, 13 L. Ed. 109.

93 Manufacturing Co. v. Gray, 111 N. C. 92, 15 S. E. 940. See Beeman v. Banta, 118 N. Y. 538, 16 Am. St. Rep. 779, 23 N. E. 887.

94 Wasatch Orchard Co. v. Morgan Canning Co., 32 Utah, 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540.

FORMS—ACTIONS ON WARRANTY.

§ 4688. Complaint on warranty of title.

Form No. 1319.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant sold to the plaintiff [state the article sold], for . . . dollars.

II. That by said contract of sale it was understood by the plaintiff and the defendant to be, and it was, a part of the terms and consideration of said contract of sale, that the defendant had the lawful right and title to so sell and to transfer the ownership of said goods to the plaintiff.

III. That the defendant had in fact no right or title to sell or dispose of said goods.

IV. That one E. F. then was the owner of said goods, and afterwards, on the . . . day of . . ., 19.., he demanded possession of the same from the plaintiff; and the plaintiff was compelled to and did then deliver them up to E. F., and they were wholly lost to the plaintiff.

V. That by reason of the premises the plaintiff was misled and injured, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4689. Complaint on warranty of quality.

Form No. 1320.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant warranted a steam-engine to be in good order, and thereby induced the plaintiff to purchase the same of him, and to pay to him . . . dollars therefor.

II. That the said steam engine was not then in good order, whereby plaintiff was damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4690. Complaint on warranty of soundness.

Form No. 1321.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant sold to the plaintiff a horse, for . . . dollars.

II. That by the said contract of sale the defendant warranted the said horse to be sound, and thereby induced the plaintiff to purchase the same of him, and to pay him therefor the said price of . . . dollars.

III. That the said horse was at the time of said sale unsound in this: that [state wherein he was unsound].

IV. That the plaintiff was misled and injured thereby, and has sustained damages by reason of the premises, to the amount of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4691. Complaint on a warranty of judgment.

Form No. 1322.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant, for a valuable consideration, signed to this plaintiff a judgment which on the . . . day of . . ., 19.., he recovered in the superior court of the county of . . ., for the sum of . . . dollars, in a certain action wherein A. B., defendant above named, was the plaintiff, and one C. D. was defendant.

II. That said assignment contained a covenant on the part of the defendant, of which the following is a copy: [Copy of the covenant.]

III. That in truth, at the time of said assignment, said judgment had been paid in full to the defendant, and no part thereof was or now is due thereon.

IV. That by means of the premises this plaintiff was misled and injured, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4692. Complaint on a warranty of a note.

Form No. 1323.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant offered to pass to the plaintiff, for a valuable consideration, a promissory note, of which the following is a copy: [copy of the note]; and he then and there warranted the said note to have been made by the said A. B.

II. That the plaintiff, relying upon said warranty, purchased said note of the defendant, and paid therefor the sum of . . . dollars.

III. That said note was not made by said A. B.; that his name was forged thereto.

IV. That by reason of the premises the plaintiff was injured and misled, to his damage in the sum of . . . dollars.

[Demand of Judgment.]

§ 4693. Complaint on implied warranty of fitness for a particular use.

Form No. 1324.

[Title.]

The plaintiff complains, and alleges:

I. That at all the times hereafter mentioned the plaintiff was a manufacturer of [state what], having a factory at . . .

II. That the defendant, knowing of the manufacturing business in which the plaintiff is and was engaged, and knowing that the plaintiff desired to purchase [state what], to be used in said business, sold and delivered to the plaintiff, on or about the . . . day of . . ., 19.., [state what], to be used by the plaintiff in the said manufacturing business, to the knowledge of the defendant; and the defendant then and there warranted the same to be in all respects fit and proper for such use; and the plaintiff paid the defendant therefor the sum of . . . dollars.

III. That plaintiff relied upon said warranty, and attempted to use said goods for the purpose aforesaid, but that the same when manufactured proved unsound [or state particularly the unfitness, according to fact], and unsuited for manufacture, in the plaintiff's said business.

IV. That as soon as said unfitness was ascertained, plaintiff notified defendant thereof, and offered to return the balance of said goods which had not theretofore been manufactured.

V. That defendant refused to accept said goods, or any part thereof, or to repay to plaintiff the purchase price thereof, to his damage in the sum of . . . dollars.

VI. [Allege any damage sustained such as loss of time, labor, materials, and customers due to the effort in good faith, to use the goods in question for the purpose for which they were intended.]

[Demand of Judgment.]

§ 4694. Complaint on a warranty resulting from a sale by sample.

Form No. 1325.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19. . , at . . ., the defendant offered to sell [or, to manufacture and sell] to the plaintiff certain [describe goods or property], and then and there produced and exhibited to the plaintiff certain samples of such [goods or property] so to be purchased by the plaintiff, and, as an inducement to the plaintiff to make such purchase, warranted and agreed that the [describe goods or property] should be in all respects equal to the said samples.

II. That the plaintiff, after examining said samples, purchased of the defendant [describe goods purchased], relying upon the defendant's said warranty and representation, and agreed to pay therefor the sum of . . . dollars.

III. That thereafter, and on or about . . ., 19. . , the defendant delivered to the plaintiff the said [goods], the same being packed in bales [or, boxes, or otherwise, according to the fact], and that upon the opening and examination of one of said bales [or, boxes] the goods therein were found to correspond with said samples, whereupon the plaintiff, relying upon the aforesaid warranty, and upon the partial examination so made, accepted the whole of said goods and paid the defendant the agreed price therefor, to-wit, the sum of . . . dollars.

IV. That thereafter, and without knowledge of their real condition, plaintiff sold and delivered a portion of said goods to plaintiff's customers; that said customers afterwards returned the same as damaged [or, imperfect], and refused to keep or pay for them; that thereupon the plaintiff examined the remainder of the goods so delivered by defendant, and found that no part thereof corresponded with said samples, but that they were imperfect and unmerchantable, and inferior in all respects to said samples, and of no value.

V. That plaintiff immediately notified defendant of the character and condition of said goods, as aforesaid, and offered to return the same; but defendant refused to receive them or to return to plaintiff the price paid therefor.

VI. That by reason of the aforesaid, plaintiff has been damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 4695. Denial of warranty.

Form No. 1326.

I. The defendant denies, that he at any time represented or warranted to the plaintiff that any sum whatever was due upon said note [or, that said horse was sound, or kind, or true, or gentle, or quiet in harness], as alleged, [but that the plaintiff purchased said . . . with notice [here state defect, if any], and not relying on any representation of the defendant].

§ 4696. Allegation of counterclaim for breach of warranty.

Form No. 1327.

The defendant, for a counterclaim herein, alleges that at the time of the sale of the said goods in the complaint mentioned the said plaintiff represented and warranted that [here state the warranty claimed and allege breach and damage, and close with demand for judgment].

CHAPTER CXIX.

GUARANTIES.

§ 4697. Defined.—A guaranty is a promise to answer for the debt, default, or miscarriage of another person; and the obligation may arise without the knowledge or consent of the principal.[1] An indorser who writes his name on the back of a note, either before or after delivery, is a guarantor for its payment.[2] A mortgage may be construed as a guaranty.[3] The corporation itself not being liable to a purchaser of its stock, the promise of a stockholder, to such purchaser, that he will buy the stock back at a certain price, if the corporation becomes insolvent, is not a guaranty, and need not be in writing.[4] All who sign as guarantors are jointly liable, though the body of the instrument names only one guarantor.[5] Joint liability does not exist between the principal and his guarantor;[6] but section 383 of the California Code of Civil Procedure may be construed to admit of their joinder as defendants, where the guaranty is of the nature of a suretyship.

§ 4698. Original obligation of guarantor.—A promise to answer for the obligation of another becomes an original obligation of the promisor, and need not be in writing—1. Where the promisor has received property to apply pursuant to such promise, or a discharge from an obligation, in consideration of such promise; 2. Where the creditor parts with value on terms under which the party making the promise becomes the principal debtor, and the person in whose behalf it is made his surety; 3. Where the promisee accepts the new promise of the promisor in lieu of an antecedent obligation, or upon a consideration beneficial to the promisor, moving from either party of the original obligation, or from another; 4. Where a factor sells on commission, and guarantees the sale; 5. Where the holder of an instrument for

1 Cal. Civ. Code, §§ 2787, 2788.
2 Rogers v. Schulenburg, 111 Cal. 281, 43 Pac. 899.
3 Carson v. Reid, 137 Cal. 253, 70 Pac. 89.
4 Kilbride v. Moss, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812.
5 Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117.
6 Adams v. Wallace, 119 Cal. 67, 51 Pac. 14.

the payment of money, executed by a third person, transfers it in payment of a precedent debt of his own, or for a new consideration, and at the same time enters into a promise respecting such instrument.[7] When the promise is not accepted for an antecedent debt, it must be in writing.[8] Where a corporation formed by members of a partnership assumes contracts of partnership, there is no need of a formal novation of contract and a release of the partnership to render the corporation liable.[9]

§ 4699. **Guarantors and sureties.**—The common-law distinction between guarantor and surety, in most of the states, has been done away with, and the guarantor has been practically reduced to the footing of a surety, with less protection than an indorser. This difference remains, however, that the obligation of the surety arises out of an instrument, while that of the guarantor is separate and apart from it; that the guarantor becomes liable immediately upon failure of his principal to perform,[10] unless the guaranty be as to collectibility.[11] The surety can be joined as a co-defendant with his principal;[12] but the guarantor's liability is separate, and may exist when the contract is void as against the principal.[13]

A bond for the repayment of certain money to an insurance company, conditioned upon the securing of a judgment against another insurance company which was liable on the same loss is a guaranty, and not a contract of suretyship;[14] and no recovery could be had thereon if the principal obligation was void for any cause other than the personal disability of the principal obligor.[15]

§ 4700. **Insurance versus guaranty.**—An instrument indemnifying an employer against larceny or embezzlement by an employee, though called a bond, is in legal effect a policy of insurance, and will be construed in favor of the insured, whose statements will be regarded as representations, and not warranties, unless the contract makes them such.[16]

7 Cal. Civ. Code, § 2794.
8 Diamond Coal Co. v. Cook, 129 Cal. xviii, 1900, 61 Pac. 578.
9 Mitrovich v. Fresno F. P. Co., 123 Cal. 379, 55 Pac. 1064.
10 Cal. Civ. Code, § 2807.
11 Cal. Civ. Code, §§ 2800-2802.
12 Cal. Code Civ. Proc., § 383.
13 Cal. Civ. Code, § 2810.
14 Parrish v. Rosebud Min. etc. Co. (Cal.), 71 Pac. 694.
15 Id.
16 American Bonding etc. Co. v. Burke, 36 Colo. 49, 85 Pac. 692.

§ 4701. **Absolute guaranties.**—A mere offer to guarantee is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor, without notice of acceptance.[17] In cases of a clear and absolute guaranty, demand on the principal and notice to the guarantor are not necessary.[18] But where the guarantor is to pay, in case the principal fails to pay on demand, a demand is necessary, and must be averred and proved.[19] If one guarantees a debt to be collected by himself, demand on the principal debtor need not be shown; otherwise, on a demand against one who merely guarantees a debt where the creditor is to collect.[20] Thus in an action where the plaintiff guaranteed that certain certificates of stock should pay ten per cent per annum, an averment that no dividend was made was insufficient. The undertaking was collateral, and in all such cases a demand and notice must be averred.[21] On a general guaranty that the debtor will pay, demand on the principal is not necessary to fix the liability of the surety, except for laches of the creditor.[22] So where demand would be useless, as where the principal debtor is insolvent.[23]

§ 4702. **Conditional guaranties.**—The liability of a conditional guarantor is commensurate with that of his principal, and he is no more entitled to notice of a default, unless the act is beyond his inquiry.[24] Where the liability of the guarantor depends upon an action against the principal, it is only necessary to show a suit against the principal.[25] Where one insurance company

17 Cal. Civ. Code, § 2795; Fisk v. Stone, 6 Dak. 35, 50 N. W. 125; Smith Co. v. Thesmann, 20 Okla. 133, 93 Pac. 977.

18 Allen v. Rightmere, 20 Johns. 365, 11 Am. Dec. 288; Mann v. Eckford's Exrs., 15 Wend. 502; Kemble v. Wallis, 10 Wend. 374; Rushmore v. Miller, 4 Edw. Ch. 84; Van Rensselaer v. Miller, Hill & D. Supp. 237; McKenzie v. Farrell, 4 Bosw. 192; Barhydt v. Ellis, 45 N. Y. 110; Cordier v. Thompson, 8 Daly, 172. But compare Mechanics' Fire Ins. Co. v. Ogden, 1 Wend. 137; Morris v. Wadsworth, 11 Wend. 100.

19 Douglass v. Rathbone, 5 Hill, 143; Bank of N. Y. v. Livingstone, 2 Johns. Cas. 409; Nelson v. Bostwick, 5 Hill, 37, 40 Am. Dec. 311; Bush v. Stevens, 24 Wend. 256.

20 Milliken v. Byerly, 6 How. Pr. 214.

21 Hank v. Crittenden, 2 McLean, 557, Fed. Cas. No. 6024; Hernandez v. Stilwell, 7 Daly, 360; Greely v. McCoy, 3 S. Dak. 218, 52 N. W. 1050.

22 Clark v. Burdett, 2 Hall, 217; Union Bank v. Coster's Executors, 3 N. Y. 203, 53 Am. Dec. 280.

23 Morris v. Wadsworth, 11 Wend. 100. See, also, Cooke v. Nathan, 16 Barb. 342.

24 Douglass v. Howland, 24 Wend. 35.

25 Morris v. Wadsworth, 17 Wend.

compromised a claim and took a bond from the insured conditioned to repay the insurance company in event that the insured was not successful in his suit against the other insurance companies, the intention of the parties is assumed to make the repayment contingent upon a decision on the merits in a case involving the same question, and a decision on a defense not available to the obligee will not justify a recovery on the bond.[26] Where one guarantees the debt of another in consideration of a stay of proceedings against the debtor, the promise of a creditor is a condition precedent, and its performance must be alleged in an action against the guarantor.[27] Upon a guaranty that the judgment is collectible, proceedings for the collection in due course of law is a condition precedent, and its performance must be shown, or excuse for its non-performance.[28]

§ 4703. **Continuing guaranty.**—Section 2814 of the California Civil Code, defining continuing guaranty, has no application to the case of one who conveys land as security for the debts of another, without assuming any personal responsibility, as he does not become a guarantor of such debts.[29] Where a detective agency was paid so much per day on a murder case, and a suspect was convicted, and the agency paid up and discharged, but subsequently hired on the same case on a new trial, a written guaranty to pay for the services rendered was not a continuing guaranty which would make the defendants liable.[30] When, by the terms of the guaranty, it is evident the object is to give a standing credit to the principal, to be used from time to time, either indefinitely or until a certain period, then the liability is continuing; but when no time is fixed, and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not.[31] The intention of the parties must be ascertained and carried into effect, and in arriving at that intent the language of the contract must be construed according to its

103. But see Cooke v. Nathan, 16 Barb. 342. See, also, Prentiss v. Garland, 64 Me. 155.

26 Parrish v. Rosebud Min. etc. Co. (Cal.), 71 Pac. 694.

27 Smith v. Compton, 6 Cal. 24.

28 Mains v. Haight, 14 Barb. 76.

29 Sather Banking Co. v. A. R. Briggs Co., 138 Cal. 724, 72 Pac. 352.

30 Blyth v. Pinkerton, 10 Wyo. 135, 67 Pac. 619, 57 L. R. A. 468.

31 Crist v. Burlingame, 62 Barb. 351; Doscher v. Shaw, 52 N. Y. 602; Sickle v. Marsh, 44 How. Pr. 91. As to liability of guarantors, generally, see Cal. Civ. Code, §§ 2806-2815.

plain and obvious import. In case of ambiguity, the language is to be construed most strongly against the guarantor.[32]

§ 4704. **Consideration.**—A guaranty must be in writing, but the consideration need not be stated.[33] And it is confined to the person or persons to whom addressed to give a credit on it.[34] A guaranty not under seal, nor expressing consideration, made contemporaneously with the contract guaranteed, is a part of the contract, and the expression of the consideration in the guaranty takes the contract out of the statute of frauds.[35] Thus a guaranty indorsed on a charter-party at the same time with its execution, and the consideration of one being in fact the consideration of the other, is good.[36] The charter-party referred to in the guaranty becomes part thereof. But if the guaranty were executed subsequently, it would fail for want of consideration, or of the expression of consideration.[37] Where the guaranty of a note was made and the note delivered on one day, the obligation of all the parties to the note becomes effective at the same moment, and the consideration is sufficient and good for the guaranty, although the note was dated prior thereto.[38] Where a sale, the execution of a note, and the guaranty of the note constitute one transaction, the fact that the guaranty was indorsed on the note after its delivery does not require a new consideration.[39] A mortgage given by a wife on her separate property to secure an antecedent debt of the husband without a new consideration, is void.[40] The same is true as to a mortgage on a homestead, even though it is community property.[41] The following have been held to be sufficient consideration for a guaranty: forbearance to sue;[42] suretyship on an appeal-bond;[43] surrender of property to an arbitration.[44] In an action against the managing director of a bank, as guarantor of the bank's certificates, the sig-

32 Crist v. Burlingame, 62 Barb. 351.

33 Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123.

34 Taylor v. Wetmore, 10 Ohio, 490.

35 Jones v. Post, 6 Cal. 102. See Cal. Civ. Code, § 2792; Ellenwood v. Fults, 63 Barb. 321; Gagan v. Stevens, 4 Utah, 348, 9 Pac. 706.

36 Hazeltine v. Larco, 7 Cal. 32.

37 Id.

38 Kennedy v. S. S. Construction Co., 123 Cal. 584, 56 Pac. 457.

39 Howland v. Aitch, 38 Cal. 133.

40 Chaffee v. Browne, 109 Cal. 211, 41 Pac. 1028.

41 California Fruit Co. v. Anderson, 79 Fed. 404.

42 Leslie v. Conway, 59 Cal. 442.

43 Lerch v. Gallup, 67 Cal. 595, 8 Pac. 322.

44 Clark v. Chapman, 98 Cal. 110, 32 Pac. 812, 33 Pac. 750.

nature of the guarantor being considered as a fact, then if the signature was made after the delivery of the certificate to the holder, a new consideration would be necessary.[45]

§ 4705. Guaranty by factor.—A factor who charges his principal with a guaranty commission upon a sale thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.[46]

§ 4706. Joinder of parties.—In New York, it is held that the principal and sureties who engage by different instruments, although written upon the same paper, should not be joined as parties in one action.[47] So a claim against a debtor on a sealed contract, and one against a guarantor by another sealed instrument in the paper, cannot be united,[48] as the original liability and the guaranty are separate contracts.[49] But they may be joined when they engage by one instrument.[50] In Iowa, under a similar statute, the contrary is held.[51] In California, they may be joined, whether the liability is created by the same or separate instruments.[52] In Utah, the maker and the guarantor of a note may be sued thereon in the same action.[53] The obligation is joint and several.[54]

§ 4707. Promise in writing.—It need not be alleged in the complaint that the promise of the guarantor was in writing.[55] A parol guaranty of the payment or collection of a note, given on its transfer in payment for property purchased or debt due by the guarantor, is not within the statute of frauds, but may

45 Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168.

46 Cal. Civ. Code, § 2029; McLeod v. Despain, 49 Or. 536, 124 Am. St. Rep. 1066, 90 Pac. 492, 92 Pac. 1088, 19 L. R. A. (N. S.) 276.

47 Allen v. Fosgate, 11 How. Pr. 218; overruling Enos v. Thomas, 4 How. Pr. 48.

48 De Ridder v. Schermerhorn, 10 Barb. 638.

49 Brewster v. Silence, 8 N. Y. 207; overruling Enos v. Thomas, 4 How. Pr. 48.

50 Carman v. Plass, 23 N. Y. 286.

51 Marvin v. Adamson, 11 Iowa, 371.

52 Code Civ. Proc., § 383.

53 Gagan v. Stevens, 4 Utah, 348, 9 Pac. 706.

54 Colo. Mills' Annot. Stats., § 2528; Doyle v. Nesting, 37 Colo. 522, 88 Pac. 862.

55 1 Chit. Pl. 270; Wakefield v. Greenhood, 29 Cal. 597.

be enforced.[56] An agent authorized to sell a note, and not limited by instructions, can bind his principal by a guaranty that it is good or collectible.[57]

A complaint upon a guaranty which expressly alleges that it was given in consideration that the plaintiff would renew the note of a third person is sufficient on demurrer, although it also sets forth a writing which purports to contain the guaranty, but which is defective under the statute of frauds in not stating the consideration.[58]

§ 4708. **Sufficient consideration.**—Although plaintiff loaned to defendant one hundred dollars and defendant thereafter guaranteed to pay the note of her husband which her husband owed to plaintiff, and which note was due and her husband refused to pay, the guaranty was void for want of consideration.[59] Where the consideration for the indorsement and guaranty of payment of a note was the surrender of a second mortgage lien by the payee of the note, whatever was the value of the lien, it was sufficient consideration to sustain the contract of indorsement and guaranty.[60] No recovery can be had on a bond or obligation of guaranty if the principal obligation was void for any cause other than the personal disability of the principal obligor.[61] Where a guaranty of payment for machinery sold to a vessel was made on the express consideration of one dollar, and it was also proved that after delivery the seller refused to let the vessel leave port before payment, but did so on the execution of the guaranty, there was sufficient consideration for such guaranty.[62]

§ 4709. **Form of guaranty.**—"Mr. H., Sir: You can let D. have what goods he calls for, and I will see that the same are settled for. Yours truly, H. S. B."—is a continued guaranty.[63]

56 Lossee v. Williams, 6 Lans. 228.

57 Id. As to the sufficiency and validity of parol promises, as original and independent contracts, to exclude the operation of the statute of frauds, determined in cases depending on particular facts, see Clifford v. Luhring, 69 Ill. 401; Bunting v. Darbyshire, 75 Ill. 408; Wills v. Brown, 118 Mass. 137; Walker v. Hill, 119 Mass. 249; Booth v. Eighmie, 60 N. Y. 238, 19 Am. Rep. 171; Townsend v. Long, 77 Pa. St. 143, 18 Am. Rep. 438.

58 Cahill Iron Works v. Pemberton, 30 Abb. N. C. 450, 27 N. Y. Supp. 927, 931.

59 Lagomarsino v. Giannini, 146 Cal. 545, 80 Pac. 698.

60 McDermott v. Halleck, 65 Kan. 403, 69 Pac. 335.

61 Parrish v. Rosebud Min. etc. Co. (Cal.), 71 Pac. 694.

62 Washington Iron Works v. McNaught, 35 Wash. 10, 76 Pac. 301.

63 Hotchkiss v. Barnes, 34 Conn. 27, 91 Am. Dec. 713.

Where a vendor of shares of fruit, growing in an orchard, guaranteed the vendee that he should collect the fruit without disturbance and annoyance, and the vendee was subsequently prevented from gathering all the fruit by third persons, the vendee has a right of action against the vendor on his guaranty, as he was not bound to take a portion of his contract.[64] But where the one person wrote, "Let M. [the writer's brother] have what goods he may want, on four months, and he will pay as usual," it was held to be merely an expression of confidence, and not a guaranty.[65]

§ 4710. **Obligation good or collectible.**—A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.[66] Such guaranty is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.[67] Indemnity against loss from non-payment of debt differs from guaranty, in that the liability of the guarantor is fixed by failure of the principal to pay at maturity, while no liability is incurred under the indemnity contract until the guarantee is, with due and reasonable diligence, unable to collect from the principal debtor.[68]

§ 4711. **Liability, limitation of.**—Where one guarantees in writing the debt of another for goods sold and delivered, by the guaranty the defendant becomes the debtor of plaintiff, and no limitation could defeat the action, except that prescribed for indebtedness evidenced by the written guaranty.[69] A delay of three years in giving notice that a guaranty in similar terms has become operative, discharges the guarantor.[70] An action on a written guaranty is limited to four years from the date on which the right of action accrued.[71] The right of action accrues when the breach occurs, where the guaranty is unconditional and

64 Dabovich v. Emeric, 12 Cal. 171.

65 Eaton v. Mayo, 118 Mass. 141. See Switzer v. Baker, 95 Cal. 539, 30 Pac. 761.

66 Cal. Civ. Code, § 2800.

67 Cal. Civ. Code, § 2801.

68 Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64; quoting Burton v. Dewey, 4 Kan. App. 589, 46 Pac. 325.

69 Whiting v. Clark, 17 Cal. 407.

70 Whiting v. Stacy, 15 Gray, 270.

71 Cal. Code Civ. Proc., § 337; Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64.

absolute, as in case of the guaranty of the payment of a note, when the note fell due and remained unpaid.[72] Where the written acknowledgment of a debt of a corporation, guaranteed by stockholders, as agents of the corporation, is silent as to personal debt of guarantors, the running of the statute of limitations upon the individual liability is not affected.[73]

§ 4712. **Notice of acceptance—Pleading.**—Where the guaranty relates to a bill of goods, the guarantor must be immediately notified of the acceptance of the guaranty,[74] to be given in a reasonable time.[75] In some of the states, the guarantor is entitled to notice that his guaranty has been acepted.[76] On a guaranty of prompt payment, an allegation that the guarantor has not paid is essential. Merely alleging that the principal debtor has not paid is insufficient.[77] Where a note is indorsed, "For value received, I hereby guarantee the payment of the within note, demand for payment, protest, and notice of protest waived," the undertaking is not a strict or collateral guaranty, but an original promise to pay the note, and in an action thereon it is not necessary to allege the insolvency of the maker, or that the plaintiff made an effort to collect the note.[78] Whether an agreement by a third party to pay for supplies furnished to a corporation is one of original promise or of guaranty is a question of fact, to be determined from the circumstances of the particular case. It is not determined by the fact that charges are made and statements furnished to the corporation, if the promisor so ordered; but if any credit was in fact given to the corporation, or it was treated as in any degree liable for the indebtedness, the promisor cannot be charged as an original contractor, but at most as a mere guarantor.[79] The complaint in an action on a

72 Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64; London v. Smith, 101 Cal. 415, 35 Pac. 1027; Adams v. Wallace, 119 Cal. 67, 51 Pac. 14.

73 Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64.

74 Taylor v. Wetmore, 10 Ohio, 490.

75 Mussey v. Rayner, 22 Pick. 223; Norton v. Eastman, 4 Greenl. 521; Tuckerman v. French, 7 Greenl. 115; Babcock v. Bryant, 12 Pick. 133; Beekman v. Hale, 17 Johns. 134.

76 Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583; Hank v. Crittenden, 2 McLean, 557, Fed. Cas. No. 6024; Howe v. Nickels, 9 Shep. (Me.) 175; Hill v. Calvin, 4 How. (Miss.) 231; Cal. Civ. Code, § 2795.

77 Roberts v. Treadwell, 50 Cal. 520.

78 Wood v. Farnham, 1 Okla. 375, 33 Pac. 867. See Ward v. Wilson, 100 Ind. 52, 50 Am. Rep. 763; Nading v. McGregor, 121 Ind. 465, 23 N. E. 283, 6 L. R. A. 686; Shearer v. Peale, 9 Ind. App. 282, 36 N. E. 455.

79 Harris v. Frank, 81 Cal. 280, 22 Pac. 856.

guaranty to pay a note out of a particular fund, after the same has been collected by a guarantor, is sufficient on demurrer, without an averment that all of the fund has been collected.[80] A complaint on a written guaranty, purporting to be signed by a firm, the action being against a single defendant, does not state a cause of action as to him without showing that he alone is bound by the guaranty; and it is not sufficient to allege that he agreed to give the guaranty, and that he has signed it himself.[81] A letter of credit, not exceeding a certain sum, and to continue from time to time, is an absolute guaranty, and requires no notice of acceptance;[82] as is also a promise to pay for all hogs purchased by a third party.[83] Acceptance of a promise will be presumed where the cashier of a bank was notified by the guarantor that he would pay a certain note out of money for sheep, received from the maker of the note, and the time was extended upon such promise, at guarantor's request.[84]

§ 4713. **Action against guarantor of mortgage.**—That a mortgage given to secure the payment of several notes falling due at different times provides for payment at times or in modes different from the notes is no objection to suit on the notes at their maturity. The mortgage is no part of the contract of indebtedness.[85] The Washington statute[85a] declaring that no person shall be liable on a negotiable instrument whose signature does not appear thereon has no application to a suit on a guaranty of payment of a negotiable note transferred by delivery only.[86] The guaranty of the payment of notes, executed by his attorney in fact, of one who is liable on notes executed by a firm in payment of the firm debts, because of being a partner in the firm, does not impose any additional obligation.[87]

§ 4714. **Demand of judgment.**—If the sheriff returns the amount due, and the plaintiff has not been fully paid by the sale of the mortgaged property, the clerk, without further order

80 Muller v. Ohm, 66 Cal. 475, 6 Pac. 102.

81 Rose v. Feldman, 67 Cal. 100, 7 Pac. 185.

82 London etc. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

83 Schribner v. Schenkel, 128 Cal. 250, 60 Pac. 860.

84 Bank of Lemoore v. Gulart (Cal.), 54 Pac. 1111.

85 Robinson v. Smith, 14 Cal. 95.

85a Laws 1899, ch. 149, § 18.

86 Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999.

87 Muth v. Goddard, 28 Mont. 237, 98 Am. St. Rep. 553, 72 Pac. 621.

of the court, dockets the judgment for the balance due against those defendants named in the judgment as personally liable for the debt, upon which docketed judgment execution may issue.[88]

§ 4715. Interest.—Where the assignee of a mortgage agreed to waive his lien in favor of one who had agreed to advance money to replace buildings destroyed by fire, but no agreement at the time was made as to interest, the guaranty of the assignee extended no further than the contract, and as this was silent as to the interest, a higher rate of interest than the law allowed could not be collected.[89] Where the grantors in a deed failed to secure an extension of a mortgage debt assumed by the grantee, as they had guaranteed to do, they are liable for any excess of interest which the grantees were out on account of such failure.[90]

§ 4716. Mortgage as security.—A judgment for the amount remaining due after sale under decree of foreclosure of mortgage is, under the California statute, entered without the filing of a separate action. It will be seen by the current of authorities that the action must be upon the original indebtedness, and that the mortgage is considered as a mere security.[91] A mortgage is therefore a mere security for the debt, and does not pass the fee, nor give right to entry.[92] A mortgage in California, then, does not confer a right to the possession of real property, except as a result of foreclosure and sale.[93] And the vendee of the mortgagor cannot be ousted by a purchaser under the decree of foreclosure and sale, unless such vendee was made a party to the foreclosure suit.[94] It shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale,[95] thus restricting the mortgage to the mere purposes of security.[96] The

88 Leviston v. Swan, 33 Cal. 480.

89 Godfrey v. Caldwell, 3 Cal. 101.

90 Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261.

91 McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Tapia v. Demartini, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641.

92 McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Haffley v. Maier, 13 Cal. 13; Fogarty v. Sawyer, 17 Cal. 589; Stewart v. Powers, 98 Cal. 514, 33 Pac. 486.

93 Kidd v. Teeple, 22 Cal. 255.

94 Haffley v. Maier, 13 Cal. 13.

95 Cal. Prac. Act, § 260; Cal. Code Civ. Proc., § 744.

96 McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Grattan v. Wiggins, 23 Cal. 16; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Skinner v. Buck, 29 Cal. 253.

words "whatever its terms," do not relate to stipulations for possession or sale.[97] A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest, as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial foreclosure and sale.[98]

§ 4717. **Complaint.**—The allegations on a letter of credit issued by defendant to plaintiff at the request of G., and in his favor, that defendant wrote a letter of credit at request of G., guaranteeing to plaintiff the payment of G.'s account, setting out a copy of the letter; that notice of the acceptance by plaintiff was given defendant; and that, relying thereon, plaintiff furnished the credit, sufficiently allege that the written guaranty was delivered.[99] Where the plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and canceled such security upon B. executing a bond in their favor, the condition of which was that B. should pay to the plaintiffs such amount, not exceeding four thousand dollars, as should be found due to them from M. after sale of certain goods, and the winding up of the accounts of M. with the plaintiffs, the payment of which bond was guaranteed by the defendant under the same conditions expressed therein, it was held, in an action on the defendant's guaranty, that the want of an averment in the complaint of the winding up of the accounts of the plaintiffs with M., or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint.[100]

§ 4718. **Parol evidence.**—Parol evidence of previous agreement to give a guaranty, or of knowledge of the relations between the principal parties, is inadmissible to make that a continuing guaranty which is not so upon its face.[101] So to charge one as guarantor who is not embraced in the writing.[102]

97 Fogarty v. Sawyer, 17 Cal. 589.

98 Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651.

99 Page etc. Co. v. Joslin, 38 Colo. 162, 88 Pac. 142.

100 Mickle v. Sanchez, 1 Cal. 200.

101 Boston etc. Glass Co. v. Moore, 119 Mass. 435.

102 First Nat. Bank v. Bennett, 33 Mich. 520.

A contract of guaranty is a collateral undertaking, and cannot exist without the presence of a main or substantive liability to which it is collateral. And where there is no primary liability of a third person to the promise which continues after the contract is made, the contract cannot be one of guaranty, but is an original promise, which need not be in writing.[103]

§ 4719. **Leases.**—At the time of the execution of a lease from A. to B., C. wrote underneath it, "I hereby agree to pay the rent stipulated above when it shall become due, provided the said B. does not pay the same." This must be considered as a part of the lease itself, and not within the statute of frauds.[104] The lessee and surety on a lease may be joined as defendants, the surety being a party to the instrument, and not a mere guarantor.[105]

§ 4720. **Release of guarantor.**—Under section 3650 of the Montana Civil Code,[106] providing that a grantor is exonerated, if, by an act of the creditor, without his consent, the original obligation of the principal is altered, or the remedies or rights of the creditor against the principal are impaired, a guarantor of the payment of a note is relieved from liability when the holder's cashier, with the holder's consent or knowledge, accepts as payment from the principal debtor a conveyance of land, and cancels the note, and himself executes a note to the holder for the amount of the debt of the principal debtor.[107] W. gave his note for five thousand two hundred dollars, payable in installments, and his mortgage to secure it. H. gave a mortgage to secure payment of five hundred dollars of the note; and, since H. was a guarantor, his mortgage is discharged on the payment by W. of the first five hundred dollars.[108] Release of the principal by bankruptcy does not release his guarantor.[109]

§ 4721. **Guaranty—Burden of proof.**—It will be presumed that the original and renewal notes guaranteed contain the same pro-

103 Kilbride v. Moss, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812.

104 Evoy v. Tewksbury, 5 Cal. 285.

105 Cal. Code Civ. Proc., § 383; Carman v. Plass, 23 N. Y. 286.

106 Mont. Rev. Codes, § 5673.

107 Stanford v. Coram, 26 Mont. 285, 67 Pac. 1005.

108 Carson v. Reid, 137 Cal. 253, 70 Pac. 89.

109 Security Sav. Bank v. Scott, 3 Cal. App. 687, 86 Pac. 903.

visions, and do not increase the burden of the guarantor.[110] The recital of a consideration raises a presumption of consideration sufficient to authorize a recovery, unless it is overcome by a preponderance of evidence.[111] But in California the writing itself need not state a consideration.[112]

Section 1647 of the California Civil Code enacts that a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates; and by virtue of this section it was shown that a certain fruit company which shipped oranges was in the habit of having the oranges turned over to their agents in cities where shipments were not accepted by the consignees of the fruit, and that the agents then disposed of the fruit to the best advantage. The defendant had guaranteed to the plaintiff bank ninety per cent of the face of all drafts, with bill of lading attached for the oranges shipped by this company. It was a question for the jury to determine whether all fruit shipped was to be considered as pledged to the bank to be held for the benefit of the guarantor. the bank to retain control of the same, or whether no pledge of the oranges was intended.[113] If there is evidence of the guarantor's consent to the extension of time to the principal debtor. the guarantor cannot have a nonsuit, and the fact that defendant guarantor was managing director of the bank at the time the extension was granted may be considered in determining whether he himself consented to the extension.[114]

FORMS—ACTIONS ON GUARANTIES.

§ 4722. Complaint on agreement to be answerable for price of goods sold.

Form No. 1328.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19. . , at . . . , in consideration that the plaintiff, at the request of the defendant, would sell

110 Stanford v. Coram, 26 Mont. 285, 67 Pac. 1005.

111 Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168.

112 Cal. Civ. Code, § 2793.

113 First Nat. Bank v. Bowers, 141 Cal. 253, 74 Pac. 856.

114 Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168.

to one A. B., on a credit of . . . months, such goods as said A. B. should desire to buy of this plaintiff, the defendant promised to be answerable to the plaintiff for the payment by said A. B. of the price of goods so sold on credit.

II. That the plaintiff afterwards, and on the faith of said guaranty, sold and delivered to said A. B. [describe the goods], for the sum of . . . dollars, upon a credit of . . . months, of all of which the defendant had notice.

III. That payment of the same was thereafter demanded from said A. B., but the same was not paid.

IV. That notice of such demand and non-payment was given to the defendant.

V. That on the . . . day of . . ., 19.., at . . ., payment of the same was demanded by the plaintiff from the defendant.

VI. That the defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 4723. Complaint against guarantor of mortgage to recover deficiency after foreclosure.

Form No. 1329.*

[Title.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., the defendants entered into an agreement with the plaintiff, under their hands and seals, in the words and figures following: [Copy agreement.]

II. That the principal sum secured by the note and mortgage referred to in the said agreement became due and payable on the . . . day of . . ., 19.., and that on or about [etc.], the plaintiff commenced an action in the superior court of the county of . . ., in this state, for the foreclosure of the said mortgage; and such proceedings were thereupon had, that on the . . . day of . . ., 19.., a decree was made by the said court, for the foreclosure of the said mortgage and sale of the premises; and that if the proceeds of such sale should be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the amount of such deficiency should be specified in the report of sale

*This form of action is not applicable to California practice.

therein, and W., one of the defendants therein, should pay the same to the plaintiff.

III. That pursuant to said decree or judgment-order, the premises were duly sold on [etc.], by the sheriff of [etc.], for the price or sum of [etc., and that the plaintiff became the purchaser thereof].

IV. That upon said sale there occurred a deficiency of [etc.], as appears by the sheriff's report of said sale, duly filed in the office of the clerk of [etc.], and that thereupon, to-wit, on the . . . day of . . . , 19.. , a judgment was rendered in said court against W., in favor of the plaintiff, for the said sum of [etc.], with interest from . . . , 19.. , of which no part has been paid.

V. That before the commencement of this action he demanded of the defendants payment of the amount of such deficiency, and at the same time tendered to them an assignment of said judgment against W., duly executed by the plaintiff, but that the defendants refused to pay the same, and have ever since neglected and refused to pay the same, although the plaintiff has always been, and still is, ready and willing to deliver to said defendants an assignment of said judgment upon being paid the amount due thereon.

[Demand of Judgment.]

§ 4724. Complaint on guaranty of precedent debt.

Form No. 1330.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , one A. B. was indebted to this plaintiff in the sum of . . . dollars.

II. That on the . . . day of . . . , 19.. , at . . . , the defendant made and subscribed a memorandum in writing, of which the following is a copy: [copy of the guaranty], and delivered the same to the plaintiff, whereby he promised to the plaintiff to answer to him for said debt.

III. That the plaintiff duly performed all the conditions thereof on his part.

IV. That the defendant has not paid the same.

[Demand of Judgment.]

§ 4725. Complaint against sureties for payment of rent.

Form No. 1331.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , one W. B. leased from the plaintiff for the term of . . . years the [house No. . . . street, city of . . . , at the annual rent of . . . dollars, payable monthly.]

II. That [at the same time and place] the defendant agreed, in consideration of the letting of the said premises to the said W. B., to guarantee the payment of the said rent.

III. That the rent aforesaid for the month ending on the . . . day of . . . , 19.. , amounting to . . . dollars, has not been paid.

[If by the terms of the agreement notice is required to be given to the surety, add:] IV. That on the . . . day of . . . , 19.. , the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

V. That he has not paid the same.

[DEMAND OF JUDGMENT.]

§ 4726. Complaint against principal and sureties on contract for work.

Form No. 1332.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , certain articles of agreement were made and entered into between the plaintiff and the defendants under their respective hands and seals, and bearing date the . . . day of . . . , 19.. , of which the following is a copy: [Insert copy.]

II. That the plaintiff afterwards duly performed all the conditions of the said contract on his part, and that the same was fully completed on the . . . day of . . . , 19.. , and that on that day he was entitled to have and receive from the said defendants, upon the said contract, for the said work, mentioned in the said agreement, a large sum of money, viz. the sum of . . . dollars.

III. That the said defendants have wholly failed to perform the said contract on their parts.

IV. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

ANSWERS.

§ 4727. Denial—General form.

Form No. 1333.

[TITLE.]

A. B. and C. D., two of the defendants in the above-entitled action, separately answering the complaint of the plaintiff in this said action:

I. Deny that they, or either of them, made the written guaranty set forth in the said complaint.

II. They deny that the [ale contained in the barrels] mentioned in said complaint [did sour during its voyage], or that it was [unfit for use] when it arrived here.

Wherefore defendants, A. B. and C. D., pray to be dismissed with their costs.

§ 4728. Denial of plaintiff's performance.

Form No. 1334.

[TITLE.]

The defendant, answering to the complaint:

Denies that the plaintiff did supply the goods to the said A. B. alleged in the complaint, or any part thereof.

§ 4729. The same—Departure from guaranty.

Form No. 1335.

[TITLE.]

The defendant answers to the complaint:

That the defendant did not agree to be answerable generally to the plaintiff for the value of goods sold to the defendant, but only for goods to an amount not exceeding . . . dollars, which limit the plaintiff exceeded in his alleged sale.

CHAPTER CXX.

INSURANCE.

§ 4730. Insurance versus guaranty.—An instrument indemnifying an employer against larceny or embezzlement by an employee, though called a bond, is in legal effect a policy of insurance, and will be construed in favor of the insured, whose statements will be regarded as representations, and not warranties, unless the contract makes them such.[1]

§ 4731. Fire insurance—Insurable interest—Averment of.—A legal or equitable title is not necessary to give an insurable interest in property. If one has a right which may be forced against the property, and which is so connected with it that injury thereto will necessarily result in loss to him, he has an insurable interest.[2] One purchasing property by a quitclaim deed, knowing that the title to the lot is in a third person, may gain a continuing insurable interest in a building upon said premises.[3] The interest of the insured is one of the facts constituting the cause of action, and must be alleged.[4] Alleging that the defendants, in consideration, etc., insured him against loss, etc., on his three-story and attic stone building, and a frame one-story building attached, occupied by the said insured, is a sufficient averment of interest, at least on demurrer. If the averment is too general, the defendant's remedy is by motion.[5] An averment that the interest of the mortgagee is fully disclosed in the proof of loss is sufficiently clear as to such interest.[6] Such interest must be alleged not only as to the time the policy was taken out, but also as to the time of loss.[7] An allegation,

1 American Bonding etc. Co. v. Burke, 36 Colo. 49, 85 Pac. 692.

2 Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451. See, also, Cal. Civ. Code, §§ 2546-2558.

3 American Cent. Ins. Co. v. Donlon, 16 Colo. App. 416, 66 Pac. 249.

4 2 Greenleaf on Evidence, §§ 376, 378-381; Freeman v. Fulton Ins. Co., 38 Barb. 247.

5 Fowler v. New York Indemnity Ins. Co., 23 Barb. 143.

6 Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 81 Pac. 1025.

7 Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Ætna Ins. Co. v. Kittles, 81 Ind. 96; St. Paul etc. Ins. Co. v. Kelly, 43 Kan. 741, 23 Pac. 1046; Hardwick v. State Ins. Co., 20 Or. 547, 26 Pac. 840; Earnmoor v. Cal. Ins. Co., 40 Fed.

however, that at the time of insurance, he, the plaintiff, had a chattel mortgage on the property, has been held sufficient, as the interest will be presumed to continue.[8] An allegation, also, that the insurance was effected by plaintiff on "his" building is sufficient without setting out his title.[9] And so of an allegation that the defendant "insured plaintiff" on a certain amount of grain.[10]

§ 4732. Other essential averments—Loss—Policy—Action by mortgagor.—In an action to recover on an insurance policy, it is essential to aver the loss, and to show that it occurred by reason of a peril insured against. It is not necessary to show that the loss did not occur through a peril excepted from the policy. Thus it is not necessary to state that the loss was not caused by invasion, riot, lightning, etc. That is a matter of defense which need not be anticipated.[11] A partial loss is recoverable under an allegation of total loss.[12] An absolute denial on the part of the insurer of liability is a waiver of proofs of loss.[13] An insurance policy being a contract of the insurer's dictation, must be construed most strongly against him.[14] Policies of insurance are written contracts, to be interpreted by the same rules which apply to other contracts, and to be enforced according to the intention of the parties, and are to be construed liberally in favor of the assured.[15] In pleading the policy, formerly it was customary to set out the policy and conditions annexed at length. The more convenient way is to annex a copy to the complaint, and refer to it.[16] In Wyoming, if the declaration fails to describe the property insured, such defect is not cured by the presence

847; Dickerman v. Vermont Mut. Ins. Co., 67 Vt. 99, 30 Atl. 808.

8 Roussel v. St. Nicholas Ins. Co., 41 N. Y. Sup. Ct. 279.

9 Fowler v. New York Ind. Ins. Co., 23 Barb. 143. See People's Ins. Co. v. Heart, 24 Ohio St. 331.

10 Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520.

11 Lounsbury v. Protection Ins. Co., 8 Conn. 466, 21 Am. Dec. 686; Rucker v. Green, 15 East, 290; Hunt v. Hudson Riv. Ins. Co., 2 Duer, 487; Catlin v. Springfield Fire Ins. Co., 1 Sumn. 439, Fed. Cas. No. 2522; Ferrer v. Home Ins. Co., 47 Cal. 416; Forbes v. American etc. Ins. Co., 15 Gray, 249, 77 Am. Dec. 360; Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925. That it is held otherwise in Texas, see Phœnix Ins. Co. v. Boren, 83 Tex. 97, 18 S. W. 484.

12 Peoria Marine etc. Ins. Co. v. Whitehill, 25 Ill. 466.

13 American Cent. Ins. Co. v. Donlon, 16 Colo. App. 416, 16 Pac. 249.

14 Bryan v. Peabody Ins. Co., 8 W. Va. 605.

15 Wells, Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397; Foot v. Ætna Life Ins. Co., 61 N. Y. 571.

16 Fairbanks v. Bloomfield, 2 Duer, 349.

of a description in the copy of the policy which is annexed to the declaration as an exhibit.[17] The payment of the premium is a condition precedent to the right to recover for the loss, and must be alleged.[18] The acknowledgment of the receipt of the premium in the policy may be contradicted.[19] In an action by the mortgagor on a policy issued to him, but on terms payable to the mortgagee, the complaint must aver "that the mortgage has been paid," or must join the mortgagee as a party.[20] Where a policy contained a provision that "if the property" insured "shall be sold," a delivery of the said property to a mortgagee, with the assent of the insurers, does not avoid the policy.[21]

A fire policy, by the terms of which the loss, if any, is made payable to a mortgagee, as his interest may appear, is a contract for the benefit of such mortgagee, and he, or a person to whom he has assigned the claim after a cause of action has accrued, is entitled to recover in his own name the full amount of the insurance, not exceeding the amount due upon the mortgage.[22]

§ 4733. **The complaint.**—It is only necessary, primarily, in an action on an insurance policy, to allege the contract of insurance, the happening of the contingency rendering the insurer liable under the contract, and the amount of indemnity to which the insured is entitled. Anything impeaching the validity of the contract should be alleged by way of defense.[23] A complaint in an action against an insurance company, alleging that the defendant insured certain property of the plaintiff; the total destruction of the property by fire; the loss incurred; that proof of loss was received by the company without objection; that the fire did not happen from any cause mentioned in the policy as relieving the company from liability, and that it occurred without fault

17 Johnson v. Home Ins. Co., 3 Wyo. 140, 6 Pac. 729.

18 Bergson v. Builders' Ins. Co., 38 Cal. 541. See Carpenter v. Holcomb, 105 Mass. 280.

19 Id. Contra, see Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Teutonia Life Ins. Co. v. Mueller, 77 Ill. 22.

20 Ennis v. Harmony Fire Ins. Co., 3 Bosw. 516.

21 Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 93 Am. Dec. 628.

22 Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 272, 40 Am. St. Rep. 325, 55 N. W. 1130; Meriden Sav. Bank v. Home Mutual Ins. Co., 50 Conn. 396; Hastings v. Westchester etc. Ins. Co., 73 N. Y. 141; Tilley v. Connecticut etc. Ins. Co., 86 Va. 811, 11 S. E. 120; Hammel v. Queen Ins. Co., 50 Wis. 240, 6 N. W. 805.

23 Standard etc. Ins. Co. v. Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

of the insured, is not open to demurrer on the ground of a failure to allege performance of the conditions of the policy by the insured.[24] The plaintiff need not allege in his complaint the terms of the application for insurance, when the application was verbal, and was not required by the provisions of the policy to be in writing.[25] An allegation "that the plaintiff duly performed all the conditions of the said contract of insurance on his part," is a sufficient allegation of a notice to the company of the fire and loss, as required by the policy.[26] The plaintiff must aver and prove the amount of the loss.[27] And where preliminary proof of loss is required by the policy, the assured must allege and prove that the proof has been made, or that the requirement has been waived.[28] So where a fire policy provides for payment within a specified number of days after proof and ascertainment of loss, it is essential to show in the complaint that such time had expired before suit. And an allegation that the plaintiff had duly performed all conditions on his part will not aid the complaint, as respects the lapse of the requisite period.[29]

In an action on a fire policy the plaintiff cannot plead that he furnished the required proofs of loss, and recover on evidence that such requirement had been waived.[30]

A complaint alleging that the insured was the owner of the property at the time of the insurance, and at the time of the fire, its value at those times, and also that it was totally destroyed by fire, sufficiently shows the damage sustained by the insured by reason of the fire.[31] Where the policy provides for submission to arbitration as a condition precedent to the right of the insured to recover for a loss, the complaint in an action on the policy must specifically allege the award, or show that it was prevented by the fraudulent conduct of the insurer. And an

24 Tabor v. Goss etc. Mfg. Co., 11 Colo. 419, 18 Pac. 537.

25 Tischler v. Cal. etc. Ins. Co., 66 Cal. 178, 4 Pac. 1169.

26 Emery v. Svea Fire Ins. Co., 88 Cal. 300, 26 Pac. 88; Richards v. Travelers' Ins. Co., 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762.

27 Michael v. St. Louis Mut. Ins. Co., 17 Mo. App. 23; Summers v. Home Ins. Co., 53 Mo. App. 521.

28 McCormack v. North British Ins. Co., 78 Cal. 468, 21 Pac. 14.

29 Cowan v. Phœnix Ins. Co., 78 Cal. 181, 20 Pac. 408; First Nat. Bank v. Dakota etc. Ins. Co., 6 S. Dak. 424, 61 N. W. 439.

30 Long Creek Building Assoc. v. State Ins. Co., 29 Or. 569, 46 Pac. 366. See Insurance Co. v. Thorp, 48 Kan. 239, 28 Pac. 991; Indiana Ins. Co. v. Capehart, 108 Ind. 270, 8 N. E. 285. But see McCullough v. Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; McGuire v. Hartford Ins. Co., 40 N. Y. Supp. 300, 308.

31 Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925.

allegation that the plaintiff has duly performed and kept all the conditions of the policy is not sufficient.[32] Where the policy provides that the amount to be paid thereunder should not exceed the proportion which the amount insured under the policy bears to all the insurance upon the property, the complaint should show that there is no other insurance upon the property, or in case there is other insurance, should give the amount thereof.[33] In an action upon a policy containing a clause making the insurer liable for losses "for which insurers are liable by the rules and customs of insurance" in a particular place, the complaint must allege the local custom by which it is sought to hold the insurer liable.[34] Non-payment must be alleged.[35] And a complaint in an action on an insurance policy, which does not allege that there was any default in payment by the defendant of any sum due on the policy, does not state a cause of action.[36]

§ 4734. Conditions precedent to suit.—A policy may provide that no suit shall be brought thereon unless certain proofs are made within a certain time after the loss, and the compliance with such conditions should be pleaded.[37] Such proof of loss may include the certificate of a notary or magistrate as to the honesty of the loss.[38] These limitations as to time in which suit may be brought may be waived by the insurer by refusing the proof furnished and calling for proof not required,[39] or by failure to reject the offer of insured of a compromise, or by failure to return the policy or to give notice that the limitation would be insisted upon.[40]

§ 4735. Plea in equity.—Defenses, on ground of misconduct of the appraisers in making an award, not being available at law,

32 Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863; Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N. W. 932. But see Tilley v. Connecticut Fire Ins. Co., 86 Va. 811, 11 S. E. 120.

33 Coats v. West Coast etc. Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

34 Miller v. California Ins. Co., 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155.

35 Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939.

36 Gill v. Ætna etc. Ins. Co., 82 Hun, 363, 31 N. Y. Supp. 485. But compare Hanover Fire Ins. Co. v. Schellak, 35 Neb. 701, 53 N. W. 605.

37 Davis v. Pioneer Mut. Ins. Assoc., 44 Wash. 532, 87 Pac. 829.

38 Egan v. Merchants' Fire Assoc., 40 Wash. 513, 82 Pac. 898.

39 Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013.

40 Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61.

may be pleaded in a complaint by way of cross-bill in equity in the law action.[41]

§ 4736. **Time in which to sue.**—The minority of the interested party insured does not extend the time for bringing action, as it is provided in the policy of insurance.[42] Where the policy requires proofs to be furnished within one year, and suit to be brought within two years after the time the cause of action accrues, the cause of action does not accrue until the receipt and approval by the insurer of the proofs of death, and the two years is computed from that time.[43]

If the loss is payable sixty days after furnishing proof of loss, suit cannot be brought until sixty days after the first proof of loss furnished.[44] The agreement limiting the time in which suit may be brought is a matter of contract and applies to infants.[45]

§ 4737. **The same—In case of lost policy.**—If a loss has been sustained under any policy of insurance, and such policy has been lost or destroyed, all rights of every kind and nature, and the time for the presentation of notice of loss, and the time for the presentation of proof of loss are stayed from the date such interested person delivers to the commissioner of insurance the affidavit provided for in the code, and until five days after the date of the delivery by the insurance commissioner to such interested person of any affidavit furnished by any insurance company pursuant to the provisions of the code.[46]

§ 4738. **Agent.**—An agent, to effect an insurance, who retains the policy has the authority to collect it in case of loss, and the presumption is that he did retain it, especially as he proceeded to collect the money.[47] An insurance company whose by-laws reserve to its board of directors power to accept applications, but authorizes its secretary to receive them with the advance premium, will be bound by the written though erroneous statement of the secretary to an applicant that his application had

41 Fire Assoc. v. Allesina, 45 Or. 154, 77 Pac. 123.

42 Mead v. Phœnix Ins. Co., 68 Kan. 432, 104 Am. St. Rep. 412, 75 Pac. 475, 64 L. R. A. 79.

43 Stinchcombe v. New York Life Ins. Co., 46 Or. 316, 80 Pac. 213.

44 Egan v. Merchants' Fire Assoc., 40 Wash. 513, 82 Pac. 898.

45 Gill v. Manhattan Life Ins. Co. (Ariz.), 95 Pac. 89.

46 Cal. Pol. Code, § 598; Stats. 1907, p. 148.

47 De Ro v. Cordes, 4 Cal. 117.

been accepted and that a policy would be issued, if the applicant dies without being informed of the real facts.[48]

§ 4739. **Double insurance.**—A policy forfeitable if the assured shall make any other insurance upon the property, is not forfeited by his taking a second but invalid policy thereon.[49]

§ 4740. **Exceptions in policy.**—A provision in a policy of fire insurance exonerating the company from loss by fire which should happen by explosion must be taken to include an explosion of a steam-engine insured by the policy, as well as any external explosion.[50]

§ 4741. **Parol policy.**—In the absence of a statutory prohibition, a policy of insurance may be made or changed by parol, and the fact that a policy is written does not prevent its change or enlargement or continuance by subsequent parol agreement.[51] A parol contract of insurance may be made.[52] A parol contract made by an insurance company to issue a fire policy is valid, and may be enforced by compelling a specific performance by the company, or by an action for a breach of the agreement.[53]

§ 4742. **Representations.**—A representation is a statement in regard to a material fact made by the applicant for insurance to the insurer, with reference to a proposed contract of insurance. Representations are not part of the contract, but merely collateral to it. It is sufficient if representations are substantially true, while warranties must be strictly complied with.[54]

§ 4743. **Reinsurance.**—There is no privity between the one originally insured and the reinsurer, and the liability over of the reinsurer is solely to the reinsured.[55] But where judgment is

48 Moulton v. Masonic Mut. Ben. Soc., 64 Kan. 56, 67 Pac. 533.

49 Thomas v. Builders' Mut. Fire Ins. Co., 119 Mass. 121, 20 Am. Rep. 317. See Cal. Civ. Code, §§ 2641, 2642.

50 Hayward v. Liverpool etc. Fire etc. Ins. Co., 5 Abb. Pr. (N. S.) 142; Breuner v. Liverpool etc. Ins. Co., 51 Cal. 101, 21 Am. Rep. 703.

51 Westchester Fire Ins. Co. v. Earle, 33 Mich. 143.

52 Alliance Co-op. Ins. Co. v. Corbett, 69 Kan. 564, 77 Pac. 108.

53 Gold v. Sun Ins. Co., 73 Cal. 216, 14 Pac. 786.

54 Buford v. New York Life Ins. Co., 5 Or. 334; Higbee v. Guardian etc. Ins. Co., 66 Barb. 462.

55 Strong v. Phoenix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417.

rendered against the original insurer, and he has contested the suit with the advice or acquiescence and for the benefit of the reinsured, the latter will be bound by the judgment, and for the costs and expenses incurred in the defense.[56]

§ 4744. Interest of insured—Allegation of.—The interest of the insured is one of the facts constituting the cause of action,[57] and the averment that he gave the defendant due proof of loss and of interest cannot be construed as an averment that the plaintiff had an insurable interest.[58] It is the safest practice to aver the interest, when it does not distinctly appear in the policy as set forth or annexed.[59] Interest may be more briefly alleged by inserting after the description of the object insured, "then and until the loss hereinafter mentioned, the property of this plaintiff." It need not be averred that the plaintiff was interested at the time of making the policy. In marine insurance an interest at the commencement of the risk is sufficient,[60] or that the plaintiff was interested in the vessel at the time of the loss, to the extent of the policy. The nature or extent of the trust upon which the interest was held need not be set forth, they being matters of evidence.[61] Where a party building a new house takes out insurance to secure his creditors, but does not so inform the company, and takes the policy in his own name, that misrepresentation is a good defense in a suit by such creditors upon the policy.[62] Where the property is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property.[63]

An oral misrepresentation as to the financial interest of the applicant to the insurance agent, although not communicated to the home office, may be sufficient to void the policy.[64] In a policy

56 Strong v. Phoenix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417. See Cal. Civ. Code, §§ 2646-2649.

57 2 Greenleaf on Evidence, §§ 376, 378-381.

58 Williams v. Insurance Co. of North America, 9 How. Pr. 365.

59 Phillips on Insurance, 612; Ellis on Fire Insurance, 175.

60 2 Greenleaf on Evidence, 381; 2 Phillips on Insurance, 614. That the libel should show insurable interest in a vessel at the time the policy purports to take effect, see Earnmoor v. California Ins. Co., 40 Fed. 847.

61 Henshaw v. Mutual Safety Ins. Co., 2 Blatchf. 99, Fed. Cas. No. 6387.

62 Dunham v. Citizens' Ins. Co., 34 Wash. 205, 75 Pac. 804.

63 Orrell v. Hampden Ins. Co., 13 Gray, 431.

64 Dunham v. Citizens' Ins. Co., 34 Wash. 205, 75 Pac. 804.

issued to a mortgagee and providing that a change of ownership of the property should not invalidate the insurance, an innocent mistake of the mortgagee as to the name of the owner of the legal title will not void the policy.[65]

The holder of a homestead with fee title still in the United States holds an unconditional and sole ownership.[66] The risk on the contents of a house is affected by anything which affects the risk on the house itself.[67] A mortgage upon chattels insured does not make the policy void, in absence of any representations thereto, or knowledge that the company does not insure mortgaged personalty.[68]

§ 4745. **Misrepresentations.**—A bond of indemnity for loss from larceny of employees is void if issued upon the false written statements of the insured, understanding such statements to be the basis for issuance of the bond.[69] If the representations are warranted, and the validity of the policy is dependent upon them, the materiality of such representations is unimportant.[70]

§ 4746. **Change of title or interest.**—A contract of purchase amounting to a mere option makes no change of interest;[71] but a contract of sale placing the vendee in possession does, and the insured's interest becomes equitable and personal in nature.[72] Giving a deed and taking a mortgage back, to secure the purchase price, makes a change of interest sufficient to void a policy.[73] But the taking of a conveyance by deed from the mortgagor to the mortgagee as greater security does not merge the two titles so as to relieve the insurance company from liability to pay loss.[74]

65 Phœnix Assur. Co. v. Hinds, 67 Kan. 595, 73 Pac. 893.

66 Allen v. Phœnix Assur. Co., 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903.

67 Goorberg v. Western Assur. Co., 150 Cal. 510, 119 Am. St. Rep. 246, 89 Pac. 130.

68 Neher v. Western Assur. Co., 40 Wash. 157, 82 Pac. 166.

69 American Bonding etc. Co. v. Burke, 36 Colo. 49, 85 Pac. 692; Fidelity etc. Co. v. Guthrie Nat. Bank, 17 Okla. 397, 87 Pac. 300.

70 Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okla. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61.

71 Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102.

72 Finkbohner v. Glens Falls Ins. Co., 6 Cal. App. 379, 92 Pac. 318.

73 Jump v. North British etc. Ins. Co., 44 Wash. 596, 87 Pac. 928.

74 Ft. Scott Bldg. etc. Assoc. v. Palatine Ins. Co., 74 Kan. 272, 86 Pac. 142.

§ 4747. **Assignment of policy.**—The assignment of a policy as collateral security does not pass the legal title so as to make it void as assigned before loss;[75] but such an assignment may authorize the assignee to demand and receive a paid-up life policy, if the insured pays neither the debt nor the premiums.[76]

§ 4748. **Warranties, misrepresentations, etc.**—Warranties in the application are a part of the policy.[77] Where there is more than one class of property insured, each for a specific amount, it is a severable contract, and a recovery can be had for one or more of the classes, if the contract has not been effected by fraud or the risk increased.[78] Forfeiture will not be enforced unless specifically and definitely provided for.[79] False answers knowingly inserted by the insurance agent, contrary to the instructions of the applicant, cannot be used by the company as a defense, although the answers were declared as warranties.[80] But the same representations would be a good defense for a company not represented by that agent.[81]

§ 4749. **Warranties as to value.**—Under the provisions of the Georgia code, application for insurance must not only be made in the utmost good faith, but the representations contained therein are covenanted to be true. Not that they are warranties so as to vacate the policy, if any of them, whether material or not, are not true; but any variation in them from what is true, whereby the nature or extent or character of the risk is changed, will, if the policy makes them the basis of the contract of assurance, avoid the policy, whether they are or are not willfully and fraudulently made.[82] But a provision in a policy of insurance, that the application for insurance shall be considered as a warranty, and that if the property insured is overvalued in it, the policy shall be void, applies only where the statement as to value is inten-

75 Allen v. Phœnix Assur. Co., 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903.

76 Du Brutz v. Bank of Visalia, 4 Cal. App. 201, 87 Pac. 467, 469.

77 Webb v. Banker's Life Ins. Co., 19 Colo. App. 456, 76 Pac. 738.

78 Miller v. Delaware Ins. Co., 14 Okla. 81, 75 Pac. 1121, 65 L. R. A. 173.

79 Queen Ins. Co. v. Excelsior Milling Co., 69 Kan. 114, 76 Pac. 423.

80 Parrish v. Rosebud Min. etc. Co. (Cal.), 71 Pac. 694.

81 Id. See, also, Foster v. Pioneer Mut. Ins. Assoc., 37 Wash. 288, 79 Pac. 798.

82 Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535. See, also, Cal. Civ. Code, §§ 2561-2583, 2603-2612; Higbee v. Guardian etc. Ins. Co., 66 Barb. 462.

tionally false. So, also, where the policy provides that all fraud, or attempt at fraud, by false swearing as to loss, shall cause a forfeiture of all claim under the policy, a wrongful or intentional false swearing is intended, and not a mere discrepancy or innocent error. And whether fraud is to be inferred from an excessive statement of the value of the property in the original application, or of the loss in the preliminary proofs, is a question of fact; and in neither case does a legal presumption of fraud arise, nor is the burden cast upon the assured to establish that his statement was not intentionally false.[83] In counting on an insurance policy, it is not necessary to aver performance, nor the truth of any affirmative warranty *in præsenti* contained in the application, nor to set forth such warranties.[84]

§ 4750. **Wagering policies.**—Policies executed by way of gaming or wagering, or where the policy stipulates for the payment of the loss whether the insured has any interest or not, or that the policy shall be received as proof of such interest, are void.[85] Insurance of a lottery, or a lottery prize, is unauthorized.[86] An allegation by the plaintiff that the policy in suit was not speculative, without affirmatively setting out an insurable interest, was held sufficient, after verdict.[87]

§ 4751. **Conditions subsequent.**—A condition subsequent and its breach must be specially pleaded, and plaintiff may introduce evidence to rebut any proof of breach so pleaded or show a waiver of the condition.[88] Reoccupancy of a building before its destruction does not revive a policy forfeited on account of allowing the building to remain vacant without consent of the company.[89] The mere fact that some work is done on the premises does not prevent a forfeiture for shutting down the machinery of a shingle-mill for a certain period.[90] The policy may be voided on account of the premises being vacant, and recovery cannot

83 Helbing v. Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72.

84 Cowan v. Phœnix Ins. Co., 78 Cal. 181, 20 Pac. 408.

85 Cal. Civ. Code, § 2558.

86 Cal. Civ. Code, § 2532.

87 Kentucky etc. Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42.

88 Allen v. Phœnix Assur. Co., 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903.

89 German Ins. Co. v. Russell, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234.

90 Brehm Lumber Co. v. Svea Ins. Co., 36 Wash. 520, 79 Pac. 34, 68 L. R. A. 109.

be had for the value of either the house or the corn-crib destroyed by wind.[91]

The presence of dynamite at the time of the loss may relieve the insurer, whether it be the cause of the fire or not.[92] A deed procured by fraud does not affect the title to property, and cannot cause a forfeiture of a policy.[93]

§ 4752. Action by assignee.—In an action on a policy of fire insurance, the interest of the assignee must be stated in the complaint, to make out a cause of action.[94] Where a complaint by the assignee of a fire policy averred an insurance of assignor on his building; that the policy was duly assigned, with the consent of the insurers; that the plaintiff, at the time of the loss, was the lawful owner of the policy and of the claim against the insurers by reason of the policy and loss; and that he made a demand of payment, accompanied with the written assent of the person to whom the original assured had, after the loss, assigned all his property, it was held bad on general demurrer, as not showing any interest of the plaintiff or his assignor in the subject insured.[95] An erroneous indorsement upon a policy may be reformed to conform to the intent of the parties.[96] Where by the policy the interest of a trustee is not to be invalidated by any act or neglect on part of the owner of the property, the trustee is not bound to an amount of loss agreed to between the owner and the company.[97] The assignee of a policy of insurance takes it subject to all equities.[98] An assignment of a policy of insurance upon a stock of goods, effected in the name of the assignor, made as collateral security for a debt, with an agreement that in case of loss by fire, the assignee shall collect the money and pay the debt, attaches in equity as a lien upon the amount due on the policy to the extent of the debt, as soon as the loss occurs.[99]

91 Republic County Mut. Fire Ins. Co. v. Johnson, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419.

92 Bastian v. British American Assur. Co., 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255.

93 Hartford Fire Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278.

94 Granger v. Howard Fire Ins. Co., 5 Wend. 202.

95 Fowler v. New York Indem. Ins. Co., 26 N. Y. 422.

96 Hartford Fire Ins. Co. v. McCarthy, 69 Kan. 555, 77 Pac. 90.

97 Scottish Union etc. Ins. Co. v. Field, 18 Colo. App. 68, 70 Pac. 149.

98 Winslow v. Nayson, 113 Mass. 414.

99 Bibend v. Liverpool etc. Fire etc. Ins. Co., 30 Cal. 78.

§ 4753. **Recovery of premium, dues, and assessments.**—The policy may be rejected and the premiums advanced may be recovered if the policy offered is not as represented by the company's agent.[100] Suit may be brought for money had and received upon a note given for an advance premium, where the company has cashed the note but failed to deliver the policy in time.[101] Upon an allegation for damages for not issuing a policy, the plaintiff may recover, as money had and received, the premium advanced.[102] Payment of premium after death of the insured does not alter the rights of the parties, where the policy has not been delivered.[103] Payments made by mistake after the endowment policy is due may be recovered from the company.[104]

§ 4754. **Complaint, for failure to insure.**—A complaint in an action for the breach of an agreement by the defendant to renew a policy of fire insurance, setting forth the date and amount of the original policy, and the property insured and its value, and alleging that the contract was for a renewal of that policy upon the same property, and for a like amount, and was founded upon a valuable consideration, and further alleging a breach of the contract by the defendant, and the consequent damage to the plaintiff, was held sufficient.[105]

§ 4755. **Life insurance—Application.**—A paper attached to the application, with the heading, "Questions to be answered by the medical examiner for the company," is not to be deemed the application or a part of the application, and the statements made by the applicant to the medical examiner, in answer to the questions in that paper, are not warranties within the meaning of the policy. Incorrect statements by the applicant for a policy of life insurance, in answer to questions by the examining physician, will not be deemed such a misrepresentation as to avoid the policy when it appears that the physician's report as to the appli-

100 Anderson v. New York Life Ins. Co., 34 Wash. 616, 76 Pac. 109.

101 Summers v. Mutual Life Ins. Co., 12 Wyo. 369, 109 Am. St. Rep. 992, 75 Pac. 937, 66 L. R. A. 812.

102 Id.

103 Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 Pac. 822.

104 Hopkins v. Northwestern Nat. Life Ins. Co., 41 Wash. 592, 83 Pac. 1019.

105 Gold v. Sun Ins. Co., 73 Cal. 216, 14 Pac. 786. See Schwahn v. Michigan etc. Ins. Co., 89 Wis. 84, 61 N. W. 78.

cant's condition, and not the statements of the applicant himself, was relied upon by the company.[106]

§ 4756. **Life-insurance policy—Averments.**—A complaint on a life policy which contains no allegation that the policy is unpaid is fatally defective, and is not cured by a verdict in favor of the plaintiff.[107] The complaint must aver the loss, and that it occurred by reason of a peril insured against, but need not contain allegations for the purpose of meeting or cutting off a defense, nor aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from excepted risks.[108] Nor need the application for insurance be set out in the complaint.[108a] An allegation in the complaint that the deceased "complied with the terms of said agreement so far as the same were to be complied with by him," is not equivalent to alleging that the deceased "duly performed all the terms and conditions of the policy," so as to render inadmissible under the complaint evidence that the defendant waived the condition in the policy that it should become forfeited if the deceased should fail to pay any installment of the premium the day when payable.[109] The general rules of pleading apply in an action upon a life policy issued by an association doing business under the mutual assessment plan, and the plaintiff in such action, as in other cases, must show by proper averment his true cause of action, and the relief to which he is entitled. The complaint must allege that an assessment was made and collected, and what was the amount thereof, or that it was demanded and refused.[110] But it is not necessary to aver in the complaint the number of the members of the association against whom assessments might be made.[111] And where the contract stipulates that proofs of death

106 Higbee v. Guardian etc. Ins. Co., 66 Barb. 462.

107 Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939.

108 Dennis v. Union Mutual Life Ins. Co., 84 Cal. 570, 24 Pac. 120. And see London etc. Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140.

108a Britt v. Mutual Life Ins. Co., 105 N. C. 175, 10 S. E. 896; Knights of Honor v. Wollschlager, 22 Colo. 213, 44 Pac. 598; Penn. Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Continental Life Ins. Co. v. Rogers, 119 Ill. 474, 59 Am. St. Rep. 810, 10 N. E. 242.

109 De Frece v. National Life Ins. Co., 19 N. Y. Supp. 8.

110 Deardorff v. Guaranty etc. Assoc., 89 Cal. 599, 27 Pac. 158. To same effect, see Martin v. Association, 46 Hun, 426; Meyers v. United Life etc. Assoc., 17 N. Y. Supp. 727.

111 Elkhart Mutual Aid etc. Assoc. v. Houghton, 103 Ind. 286, 53 Am. Rep. 514, 2 N. E. 763. But see Mutual Accident Assoc. v. Tuggle, 138 Ill. 428, 28 N. E. 1066.

shall be furnished to the secretary of the association, the complaint is sufficient if it shows that such proofs were furnished to the association, and it is not necessary to aver therein a demand before suit brought.[112]

§ 4757. **Accident policy—Averments.**—An allegation in a suit on an accident policy that the insured was under the care of a physician for a certain stated period of time, naming the dates, sufficiently alleges the time to entitle him to the benefits for the time named; and the insurer must plead the defense that no notice of the sickness was given, if it does not appear from the complaint that any notice was required.[113]

§ 4758. **Accident policy — Averments — Continued.**—A complaint in an action upon an accident-insurance policy, which alleges that the deceased sustained bodily injuries effected through external, violent, and accidental means, and that the death of the deceased was occasioned by said injuries alone, the same state of facts being provided against by the policy, states a cause of action.[114] So in an action against a mutual-benefit insurance society, a complaint which sets up the contract of insurance, alleges performance of the conditions by the plaintiff, avers that he was totally disabled, and that he has made proper proof of his disability, is sufficient without averring that the proof was satisfactory to the corporate officers.[115] Where an accident policy is conditioned that it shall not cover injuries received while the insured is under the influence of liquor, etc., it is not necessary to negative in the complaint or petition a breach of the conditions, though the policy provides that a compliance with the conditions are "conditions precedent" to its enforcement.[116] And the fact that the plaintiff unnecessarily negatives such conditions does not place on him the burden of proof to sustain the

112 Excelsior etc. Assoc. v. Riddle, 91 Ind. 84. See, also, Rebut v. Legion of the West, 96 Cal. 661, 31 Pac. 1118; Curtis v. Mutual Ben. L. Co., 48 Conn. 98; O'Brien v. Home Ben. Soc., 46 Hun, 426; Suppiger v. Covenant Mut. Ben. Assoc., 20 Ill. App. 595.

113 Mutual Ben. Assoc. v. Nancarrow 18 Colo. App. 274, 71 Pac. 423.

114 Richards v. Travelers' Ins. Co., 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762.

115 Supreme Council etc. v. Forsinger, 125 Ind. 52, 21 Am. St. Rep. 196, 25 N. E. 129.

116 Jones v. United States Mut. Acc. Assoc., 92 Iowa, 652, 61 N. W. 485.

allegation, on issue being taken thereto.[117] Plaintiff need not plead the waiver of a breach of warranty.[118]

§ 4759. **Accident policy—Answer.**—Unperformed conditions in an accident policy requiring a visible mark or injury, and that the injury should not have been sustained in a wild country, are matters of defense, and must be specially pleaded.[119] The defense of forfeiture for non-user of the property as a factory must be specially pleaded.[120]

§ 4760. **Life insurance—Presumptions.**—It is presumed that the insured paid all regular assessments after the first, and the burden is on defendant to prove non-payment;[121] as is also the burden to prove that insured died of an overdose of a narcotic, and that the statements made in an application for reinstatement were false.[122] Defendant must prove the fact of a suicide voiding the policy.[123] There is no presumption that any of the property covered by a policy was included by fraud.[124]

§ 4761. **Life insurance—Conflict of laws.**—Where a policy of life insurance was made by a New York company, with a condition that it should not become valid until countersigned by their agent at Chicago, and the premium paid, and the condition complied with in Chicago, it was held that the law of Illinois as to assignment of the policy prevailed, and that such an assignment by a married woman by way of pledge was good in equity.[125]

§ 4762. **Life insurance — Construction of instruments and statutes.**—A policy of insurance on the life of a husband was made payable to the wife, her executors, administrators, or assigns, for her sole use, and in case of her death before his, to be

117 Jones v. United States Mut. Acc. Assoc., 92 Iowa, 652, 61 N. W. 485; Newman v. Covenant etc. Assoc., 76 Iowa, 64, 14 Am. St. Rep. 196, 40 N. W. 87, 1 L. R. A. 659; Sutherland v. Standard etc. Ins. Co., 87 Iowa, 505, 54 N. W. 453; Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604.

118 Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182.

119 United States Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176.

120 Queen Ins. Co. v. Excelsior Milling Co., 69 Kan. 114, 76 Pac. 423.

121 Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 Pac. 665.

122 Denver Life Ins. Co. v. Crane, 19 Colo. App. 191, 73 Pac. 875.

123 Ross-Lewin v. Germania Life Ins. Co., 20 Colo. App. 262, 78 Pac. 305.

124 Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287.

125 Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398.

paid to her children. A statute authorized a husband to effect such an insurance, and protected it from his creditors. The wife assigned the policy for value, and died before the husband. In an action thereon, it was held that the policy was payable to the children, not to the assignee, in the event which had happened.[126]

§ 4763. **Life insurance—Suicide.**—Life-insurance policies of the present day generally contain a provision that in case the insured should "die by his own hand or act, the policy shall be void." If death occurs in such a manner, it is held that this proviso would not prevent a recovery, if the insured killed himself in a fit of insanity, which overpowered his consciousness, reason, and will; that it is incumbent upon the plaintiff to show that the insured was insane when the act of self-destruction was committed; proof merely that he was insane at times would not be sufficient; that insanity could not be inferred from the fact that the insured destroyed his own life.[127] In an action on a policy containing such provision, papers offered for the purpose of showing compliance with the requirements of the policy as to preliminary proof of death are *prima facie* evidence against the insured of the facts recited therein, including the manner of the insured's death, even though such recital show a death by suicide.[128] When a policy of life insurance contains a provision that the company does not assume the risk of self-destruction of the insured person, it is not incumbent upon the plaintiff to plead or prove that the insured person had not committed self-destruction, but the burden rests upon the insurance company to plead and prove such self-destruction as a matter of defense.[129]

§ 4764. **Assigned.**—That a policy was duly assigned and transferred indicates that the assignment was by a sealed instrument, and a consideration is inferred.[130] In California, all written instruments import a consideration.[131]

126 Connecticut Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725.

127 Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414. See Merritt v. Cotton States Life Ins. Co., 55 Ga. 103; Hathaway's Admr. v. Nat. Life Ins. Co., 48 Vt. 335.

128 Walther v. Mutual Ins. Co., 65 Cal. 417, 4 Pac. 413.

129 Dennis v. Union Mut. Life Ins. Co., 84 Cal. 570, 24 Pac. 120; Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. 332.

130 Fowler v. New York Indem. Ins. Co., 23 Barb. 143; Morange v. Mudge, 6 Abb. Pr. 243.

131 Civ. Code, § 1614.

§ 4765. **Warranties.**—The untruthfulness of matters warranted, if made a part of the policy, is a good defense.[132] And the validity of the contract depends upon the truthfulness of such warranties, and not upon their materiality.[133] Plaintiff need not plead defendant's waiver of a breach of warranty.[134]

Occasionally waiting on customers, for the accommodation of a saloonkeeper, without pay, and without any financial or other interest in the saloon, does not constitute a breach of warranty not to be "connected" in any way with the manufacture or sale of liquors.[135] An exceptional over-indulgence does not constitute a breach of warranty that one is a man of temperate habits, but it is a breach if the excessive indulgences are periodical and habitual.[136]

The certificate of an employer that he had examined the books of his accountant on a certain date and found them correct is a representation of a fact, and not a warranty of its truth so as to void the renewal of an indemnity policy.[137]

§ 4766. **Life insurance—Contribution and subrogation.**—If one of several beneficiaries pays the premiums on a life-insurance policy to keep it up, he acquires an equitable interest in the whole of the proceeds, and in order for the others to share in the proceeds they must pay up their share of the premium.[138] The statute of limitations against a claim for contribution by one of the beneficiaries begins running only from the death of the insured.[139]

An agreement to arbitrate is a waiver on part of the company of an option to repair the building.[140] Where by the terms of a policy the insurer is to be subrogated to all the rights of the owner, the company may be plaintiff in a suit for damages for the setting of the fire.[141] And if the insured relieves the one

132 Webb v. Bankers' Life Ins. Co., 19 Colo. App. 456, 76 Pac. 738.

133 Hoover v. Royal Neighbors of America, 65 Kan. 616, 70 Pac. 595.

134 Arnold v. American Ins. Co., 148 Cal. 660, 84 Pac. 182.

135 Collins v. Metropolitan Life Ins. Co., 32 Mont. 329, 346, 108 Am. St. Rep. 578, 80 Pac. 609, 1092.

136 Holtum v. Germania Life Ins. Co., 139 Cal. 645, 73 Pac. 591.

137 Remington v. Fidelity & Deposit Co., 27 Wash. 429, 67 Pac. 989

138 Stockwell v. Mutual Life Ins Co., 140 Cal. 198, 98 Am. St. Rep. 25, 73 Pac. 833.

139 Id.

140 Alliance Co-op. Ins. Co. v. Arnold, 65 Kan. 163, 69 Pac. 174.

141 Crissey etc. Lumber Co. v. Denver etc. Ry. Co., 17 Colo. App. 275, 68 Pac. 670. See, also, Caledonia Ins. Co. v. Northern Pacific Ry. Co., 32 Mont. 46, 79 Pac. 544.

guilty of negligently setting the fire, either by a settlement or by contract, he cannot also recover on his policy.[142]

§ 4767. **Marine insurance—Mutuality of agreement.**—In an action on an open policy, providing that the company shall be liable for such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary to aver that an amount sought to be recovered had been mutually agreed upon and indorsed upon the policy.[143]

§ 4768. **Marine insurance—Nature of the loss.**—The complaint must show a loss of a nature intended to be covered by the insurance;[144] but not to negative possible defenses. And the loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable, and the claim for damages must be deemed to have then attached, although she was kept afloat some time after such injury.[145] In an action on a marine policy by the terms of which the company is liable for any loss occasioned by fire, except when caused by explosion of boiler, and except as limited by certain warranties contained in the policy, a complaint which alleges that the loss was caused by fire which was not caused by the explosion of any boiler, and alleges generally that the plaintiffs had performed all the conditions of the contract on their part, is held sufficient.[146] But a complaint is held to be fatally defective when it fails to allege that the policy or certificate covered the precise loss by fire and water, or that when the loss occurred the policy and certificate were still binding.[147]

§ 4769. **Marine insurance—Parties.**—Those who had an interest in the vessel insured at the time of the fatal injury may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others, who are not parties to

142 Downs v. Pioneer Mut. Ins. Assoc., 41 Wash. 372, 83 Pac. 423.

143 Crane v. Evansville Ins. Co., 13 Ind. 446.

144 Ellis on Fire Insurance, 176; Phillips on Insurance, 618.

145 Duncan v. Great Western Ins. Co., 5 Abb. Pr. (N. S.) 173; Pardo v. Osgood, 5 Rob. 348; reversing 2 Abb. Pr. (N. S.) 365.

146 Louisville Underwriters v. Durland, 123 Ind. 544, 24 N. E. 221, 7 L. R. A. 399.

147 Weltin v. Union Marine Ins. Co., 13 N. Y. Supp. 700, 37 N. Y. St. Rep. 595.

the action.[148] Where the policy is on account of whom it may concern, the person to whom it is issued may sue, on behalf of all the owners, in his own name, as a trustee of an express trust.[149] If such person die, his personal representative may sue.[150] Where several insurance companies join in one policy, in which the several liability of each is set forth, they may be joined as defendants in an action to recover the loss.[151]

§ 4770. **Foreign insurance company's compliance with statutes.**—In an action against a foreign insurance company, it is not necessary to allege or show that the laws of the state in which the contract was made, authorizing the company to do business therein, had been complied with.[152] But in an action by such company such compliance must be shown.[153]

§ 4771. **Attaching policy and application.**—Where by the express terms of the policy the proposals, answers, and declarations made by the applicant are made a part of the policy, they should be stated in the complaint in an action founded on the policy.[154] But such application need not be attached when not made a condition of the policy.[155]

§ 4772. **Marine insurance—Risks.**—Capture, though not enumerated, is one of the risks where the enumeration of risks

148 Duncan v. Great Western Ins. Co., 5 Abb. Pr. (N. S.) 173.

149 Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; Walsh v. Washington Marine Ins. Co., 32 N. Y. 427; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77; Protection Ins. Co. v. Wilson, 6 Ohio St. 554; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Waring v. Indemnity Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146; Strohn v. Hartford Ins. Co., 33 Wis. 648; Fleming v. Ins. Co., 12 Pa. St. 391; Williams v. Ocean Ins. Co., 2 Metc. (Mass.) 303; Knight v. Eureka etc. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778.

150 Sleeper v. Union Ins. Co., 65 Me. 385, 20 Am. Rep. 706.

151 Bernero v. South British etc. Ins. Cos., 65 Cal. 386, 4 Pac. 382; Insurance Co. v. Boykin, 12 Wall. 433, 20 L. Ed. 442; Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925.

152 Germania Fire Ins. Co. v. Curran, 8 Kan. 9; Weber v. Union Mut. Life Ins. Co., 5 Mo. App. 51; Fitzsimmons v. City Fire Ins. Co., 18 Wis. 234, 86 Am. Dec. 761.

153 Jones v. Smith, 3 Gray, 500; Washington M. Ins. Co. v. Hastings, 2 Allen, 398; Washington M. Ins. Co. v. Chamberlain, 16 Gray, 165.

154 Bidwell v. Connecticut Mut. Life Ins. Co., 3 Sawy. 261, Fed. Cas. No. 1393; Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623; Bobbitt v. Liverpool Ins. Co., 66 N. C. 70, 8 Am. Rep. 494.

155 Union Ins. Co. v. McGookey, 33 Ohio St. 555; Mutual Benefit Ins. Co. v. Cannon, 48 Ind. 264.

was in the English form, and upon a loss the company was liable.[156]

§ 4773. **Marine insurance—Interest, how alleged.**—In a declaration upon a policy of insurance on the cargo of a canal boat, it was held a sufficient averment of the plaintiff's interest to allege that the insurance was "for the account and benefit of the plaintiff as a common carrier, for hire," etc., and a sufficient averment of the liability incurred to state that an amount of goods exceeding that mentioned in the policy was intrusted to him as a carrier, and that they were consumed by fire, and the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment.[157] If the insurance was upon the goods to be laden, state that they were laden, and their loss.[158]

§ 4774. **Marine insurance—Contribution.**—The owner of a vessel is not entitled to contribution on general average, for damage sustained, or expense incurred, by reason of the perils of the seas, if the vessel was unseaworthy when she left port, although from a latent defect.[159]

§ 4775. **Marine insurance—Jettison.**—A vessel fell in with a ship in a sinking condition. To save the lives of the ship's passengers and crew, the master of the vessel consented to receive them; but as it was necessary to throw overboard part of his cargo to make room for them, he began to do so before any of them came on board, and continued it while they were coming on board, until room enough was made. The owner of the vessel sued the insurers for a contribution to general average, for the above jettison. It was held that he could not recover.[160]

§ 4776. **Marine insurance — Particular average.** — Furniture was insured "free of particular average" (which was taken to mean "against total loss only"). During the voyage, the vessel

156 The Merchants' Ins. Co. v. Edmond etc., 17 Gratt. 138. See Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65; American H. Ins. Co. v. Patterson, 28 Ind. 17.

157 Van Natta v. Mutual Security Ins. Co., 2 Sandf. 490. See De Forest v. Fulton Fire Ins. Co., 1 Hall, 94.

158 Marsh on Insurance, (3d ed.) 244, 245, 278, 724.

159 Wilson v. Cross, 33 Cal. 60.

160 Dabney v. New England Mut. Ins. Co., 14 Allen, 300.

was wrecked and condemned, and said goods were transshipped, parts of sets into one vessel, and parts into another. One of said vessels was lost, with its cargo, and the other arrived safely. It was held that the insurers were liable for the goods lost.[161]

§ 4777. **Conflict of laws.**—In case of a maritime policy made payable at San Francisco, the laws of California govern.[162]

§ 4778. **Marine insurance—Abandonment.**—It is not necessary, in an action of covenant on a policy, that the declaration should aver that the plaintiff had abandoned to the underwriters.[163]

§ 4779. **Marine insurance—Insurance by agent.**—Where the agent of an insurance company was fully authorized to make insurance of vessels, and had in fact on a previous occasion insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E. P. D., general agent," etc., does not make the previous transaction a nullity until approved.[164] And though the general agent sent back the application, directing the agent who delivered the policy to return to insured his premium note and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor canceled the policy.[165]

§ 4780. **Mutual-benefit insurance—The insurance society.**—In California, mutual-benefit insurance societies are not insurance companies, and are exempt from the provisions of all the insurance laws of the state, and a beneficiary fund of such an organiza-

161 Pierce v. Columbia Ins. Co., 14 Allen, 320.

162 Progress Co. v. St. Paul Fire etc. Ins. Co., 146 Cal. 279, 79 Pac. 967.

163 Hodgson v. Marine Ins. Co., 5 Cranch, 100, 3 L. Ed. 48. See Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664; Snow v. Union Mut. etc. Ins. Co., 119 Mass. 592, 20 Am. Rep. 349.

164 Insurance Co. v. Webster, 6 Wall. 129, 18 L. Ed. 888.

165 Id.; Amer. Law Reg., July, 1868.

tion is not controlled by such laws.[166] In Washington, fraternal insurance associations must, upon their organization, adopt an assessment rate equal to those recommended by the Fraternal Congress Mortality Table.[167]

Although the constitution declares that the officers of the subordinate lodges are agents of the members, and not of the supreme lodge, where the secretary of the subordinate lodge collects the dues to forward to the supreme lodge such secretary is an agent of the supreme lodge, and payment to him is a payment to the supreme lodge.[168] But laws and rules depriving local camp clerks of authority to alter or waive the terms of the contract of insurance are binding upon the insured.[169] Because the lodge physician who examined the applicant for insurance afterwards learned, through treatment of the member professionally, that some of the applicant's answers were not true, such knowledge does not constitute notice to the lodge, and the lodge is not estopped from afterwards declaring the certificate void.[170]

§ 4781. **Mutual-benefit insurance—The contract.**—Fraternal beneficiary associations created by statute have power to pay benefits only to their members or the beneficiaries named by such members, and out of the funds contributed by the members for that purpose; and a contract by one society to pay the death losses of another, in consideration of the transfer of its members, being unauthorized by law, is void.[171] The signatures and delivery required by the terms of the laws of the association must be secured in accordance with those laws before the contract of insurance becomes binding.[172]

§ 4782. **Mutual-benefit insurance—Laws of society as part of contract.**—Where the certificate is so defective in its recitals as to make a reference to the by-laws of the association necessary in order to understand the obligations of the parties, such by-laws

166 Cal. Pol. Code, § 630; Marshall v. Grand Lodge A. O. U. W., 133 Cal. 686, 66 Pac. 25.

167 Wash. Laws, 1901, p. 362, ch. 174; State v. Fraternal Knights and Ladies, 35 Wash. 338, 77 Pac. 500.

168 Reed v. Ancient Order of the Red Cross, 8 Idaho, 409, 69 Pac. 127.

169 Sterling v. Woodmen of the World, 28 Utah, 505, 80 Pac. 375.

170 Whigham v. Supreme Court I. O. F. (Or.), 94 Pac. 968; Kennedy v. Grand Fraternity, 36 Mont. 325, 92 Pac. 971.

171 Bankers' Union of the World v. Crawford, 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79.

172 Sterling v. Woodmen of the World, 28 Utah, 505, 80 Pac. 375.

become a part of the agreement.[173] The rules and laws of the association will be liberally construed to carry out the manifest intentions of the parties.[174] It is presumed that a member understands the rules and regulations of the society.[175]

§ 4783. Mutual-benefit insurance — Amendments.—Before a mutual-benefit association can amend its constitution or adopt by-laws so as to modify a contract of insurance, it must have expressly reserved such right, or have secured the express consent of the insured.[176] But where the certificate and by-laws show that the member agreed to be bound by subsequently enacted by-laws, and such by-laws are reasonable and necessary to carry out the purposes of the society, he is bound thereby.[177] The insured is not bound by a law passed by defendant society without his knowledge, providing that active army service would forfeit his certificate;[178] nor by a law providing that the oldest members of the association should be assessed according to their age and others as to the time of their entry.[179]

§ 4784. Mutual-benefit insurance—Suspension and expulsion. —The failure to make the monthly report does not operate as a suspension of a subordinate lodge until notice has been duly given to such lodge from the supreme lodge.[180] The relation between the members and the association is one of contract.[181] The expulsion of a member from the society must be made in accordance with its rules and constitution; otherwise, it is null and void.[182] A member of a fraternal insurance society who is denied rights to which he is entitled, must first appeal as provided in the by-laws of the order, and failure to do so will defeat an action against the association by the holder of a benefit certificate where the member had been suspended from the order, and the holder

173 Miller v. National Council Knights and Ladies etc., 69 Kan. 234, 76 Pac. 830.

174 Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485.

175 Sterling v. Woodmen of the World, 28 Utah, 505, 80 Pac. 375.

176 Miller v. Tuttle (Kan.), 73 Pac. 88.

177 Miller v. National Council Knights and Ladies etc., 69 Kan. 234, 76 Pac. 830.

178 Richter v. Supreme Lodge K. of P., 137 Cal. 8, 69 Pac. 483.

179 Benjamin v. Mutual Reserve Fund Life Assoc., 146 Cal. 34, 79 Pac. 517.

180 Reed v. Ancient Order of Red Cross, 8 Idaho, 409, 69 Pac. 127.

181 Logsdon v. Supreme Lodge Fraternal Union of America, 34 Wash. 666, 76 Pac. 292.

182 Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485.

had not appealed as provided by the by-laws of the association.[183] Where the only recourse prescribed by the rules of the society for a wrongful expulsion of the member whose life was insured while insane was to submit the matter to arbitration, and the society refused to do that, the only recourse left to the beneficiary is through the courts.[184]

If by the rules of the society a failure to pay dues within a prescribed time suspends the member and renders his certificate void, such failure to pay works an absolute forfeiture.[185] Insanity of the member is no excuse for his non-payment of dues.[186]

§ 4785. **Mutual-benefit insurance—Beneficiaries.** — A person not within the class for whose benefit a mutual society is organized cannot become a beneficiary.[187] The member may at will change his beneficiaries by complying with the by-laws,[188] but usually not by will.[189]

§ 4786. **Mutual-benefit insurance—Venue.**—The venue of a cause of action on a certificate of membership of a fraternal benefit association is the county of the member's residence at the time of his death.[190] Where none of the officers of a corporation reside or have an office in the county, service of process shall be made on any clerk or agent found in the county;[191] and service on a fraternal benefit association may be made on the secretary of the local lodge.[192] In Washington, foreign beneficiary societies must appoint the commissioner of insurance to accept service of process;[193] but the action need not be brought in the county where such commissioner is.[194]

183 Modern Woodmen of America v. Taylor, 67 Kan. 368, 71 Pac. 806.

184 Dubcich v. A. O. U. W., 33 Wash. 651, 74 Pac. 832.

185 Kennedy v. Grand Fraternity, 36 Mont. 325, 92 Pac. 971.

186 Sheridan v. Modern Woodmen of America, 44 Wash. 230, 120 Am. St. Rep. 987, 87 Pac. 127, 7 L. R. A. (N. S.) 973.

187 Modern Woodmen of America v. Puckett (Kan.), 94 Pac. 132; Caldwell v. Grand Lodge U. W. of Cal., 148 Cal. 195, 113 Am. St. Rep. 219, 82 Pac. 781, 2 L. R. A. (N. S.) 653.

188 Knights of Maccabees v. Sackett, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423; Bernheim v. Martin, 45 Wash. 120, 88 Pac. 106.

189 Burke v. Modern Woodmen of America, 2 Cal. App. 611, 84 Pac. 275; Knights of Maccabees v. Sackett, 34 Mont. 357, 115 Am. St. Rep. 532, 86 Pac. 423.

190 Hildebrand v. United Artisans, 46 Or. 134, 114 Am. St. Rep. 852, 79 Pac. 347.

191 B. & C. Codes, § 55.

192 Id.

193 Laws 1901, p. 360.

194 Butler v. Sup. Ct. of I. O. F., 48 Wash. 147, 93 Pac. 66.

§ 4787. **Mutual-benefit insurance — Complaint.** — Allegations that a party had a vested interest in a life policy by virtue of an antenuptial contract and by a gift *inter vivos* are not necessarily inconsistent.[195] It is not necessary for the beneficiary to allege that he had an insurable interest; but if he has not, it is a defense for the defendant to plead.[196] The complaint should show where the action accrued.[197] It is not necessary to allege and prove that the statements in the application were true, it being a defense to be pleaded by defendant if they were not true;[198] as is also the defense of suicide.[199] If deceased became so intemperate as to impair his health, and died from intemperance, that is a defense to be set up by the defendant association.[200] There must be an allegation of the payment or of the tender of dues and assessments.[201]

§ 4788. **Mutual insurance money, etc., not liable to process.**— The money, benefit, annuities, endowment, charity, relief, or aid to be paid as provided by the contracts issued by any corporation doing business under the act relating to the mutual insurance of live-stock, shall not be liable to attachment or other process, and shall not be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debts or liability of the contract holder, or any beneficiary named thereunder.[202]

§ 4789. **Denial of liability—Conditions in policy.**—Denial of all liability on a policy, on the ground that the loss was not from a peril insured against, is a waiver of proof of loss, required in the policy, as also of an allowance therein to the insurers of sixty days in which to pay. A policy of insurance on real and personal property contained a false warranty as to incumbrances on the realty; the personal property was separately valued and appraised, and it did not appear that the warranty was an inducement to its insurance. It was held that plaintiff could recover

195 Hill v. Groesbeck, 29 Colo. 161, 67 Pac. 167.

196 Foresters of America v. Hollis, 70 Kan. 71, 78 Pac. 160.

197 Hildebrand v. United Artisans, 46 Or. 134, 114 Am. St. Rep. 852, 79 Pac. 347.

198 Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

199 Cox v. Royal Tribe of Joseph, 42 Or. 365, 95 Am. St. Rep. 752, 71 Pac. 73, 60 L. R. A. 620.

200 Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485.

201 Sterling v. Woodmen of the World, 28 Utah, 526, 80 Pac. 1110.

202 Cal. Stats. 1907, p. 955.

the value of the personal property.[203] The defendant should state particularly and specifically in what respect the assured had vitiated the contract by fraud or mistake, or in what regard or on what account the defendant had ceased to be liable under the policy. Defenses to life and accident policy of insurance are not favored by the courts, unless clearly meritorious.

A condition in a policy that fraud or false swearing shall forfeit all claim relates only to the preliminary proofs, and a plea founded upon such condition must allege that the fraud, etc., was committed in those proofs, and that it was committed by the plaintiff or some party in interest.[204] If a policy of insurance contains a clause that if the assured keep gunpowder the same shall be void, and the complaint avers that the plaintiff faithfully complied with the terms of the policy, and the answer does not deny the same, nor set up as new matter the keeping of the gunpowder, the fact cannot be insisted on as a defense.[205] Where a clause of a policy provides that it shall be void, "if the risk be increased by any means," the fact that there was an increase of risk by the act of the assured is an affirmative defense, and must be set up in the answer.[206]

§ 4790. **Fraud and false swearing.**—Upon the question of fraud and false swearing by the insured, so as to deprive him in case of a loss of any benefit under the contract, any discrepancy found to exist between his sworn statement of his losses and the actual loss which can reasonably be accounted for on the score of opinion is entitled to no weight. Such discrepancy will be considered as evidence of fraud or false swearing only when it is such as to show a material and intentional over-valuation by him.[207]

§ 4791. **General denial.**—General denial does not raise the issue that the insured was in sound health when insured. The condition and breach should be pointed out.[208] So, also, as to non-payment of premiums.[209]

203 Koontz v. Hannibal Savings etc. Co., 42 Mo. 126, 97 Am. Dec. 325.

204 Ferriss v. North American Fire Ins. Co., 1 Hill, 71.

205 Cassacia v. Phœnix Ins. Co., 28 Cal. 628.

206 Tischler v. California etc. Fire Ins. Co., 66 Cal. 178, 4 Pac. 1169.

207 Clark v. Phœnix Ins. Co., 36 Cal. 168.

208 Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867.

209 National Mut. Fire Ins. Co. v. Sprague, 40 Colo. 344, 92 Pac. 227.

§ 4792. **Answer—Proximate and remote cause of loss.**—If defendant insurance company claims exemption from liability on the ground that while the proximate cause of loss to plaintiff was a peril insured against, nevertheless it was remotely caused by, or would not have occurred but for, a peril excepted in the contract of insurance, defendant must specify in his answer the proximate cause of loss, the manner in which the excepted peril caused or contributed to the loss, and upon what premises or at what place the peril excepted caused the peril insured against.[210]

§ 4793. **Answer—Special defenses.**—In an action of covenant on a policy under seal, any special matter of defense must be pleaded.[211] In an action on a policy of marine insurance, the defendant's remedy to compel a disclosure by the plaintiff of the number of packages, or the quantity and nature of the cargo lost or injured, and the items of expenses incurred, is by requiring a bill of particulars, rather than by motion to make the complaint more definite.[212] In an action on a time policy of marine insurance to recover for a total loss, the complaint alleged that the vessel insured, while employed in the Gulf of California, was on a certain day totally lost by the perils of the sea. The answer denied that the vessel, while employed in the Gulf of California, was, on the day alleged, or at any other time, totally lost by the perils of the sea. It was held that the answer did not deny the total loss of the vessel by the perils of the sea.[213] An answer setting up invalidity of insurance policy sued on, states facts sufficient to constitute a defense.[214]

Where the complaint in an action on a fire policy alleges that a watchman was employed by the plaintiff in and upon the premises day and night, and was upon the premises at the time of the fire, and the answer denies that a watchman was in and upon the premises day and night, and avers that at the time of the fire no watchman was in and upon the premises, the denial is sufficient, and presents an issue as to whether or not the watchman was

210 Cal. Code Civ. Proc., § 437a (1907).

211 Marine Ins. Co. v. Hodgson, 6 Cranch, 206, 3 L. Ed. 200. As to the manner of pleading a want of seaworthiness to an action on a time policy, see Jones v. Insurance Co., 2 Wall. Jr. 278, Fed. Cas. No. 7470.

212 Cockroft v. Atlantic Mut. Ins. Co., 9 Bosw. 681.

213 Gulf etc. Nav. Co. v. State Inv. Co., 70 Cal. 586, 12 Pac. 473.

214 Wood v. Cascade Fire etc. Ins. Co., 8 Wash. 427, **40 Am. St. Rep.** 917, 36 Pac. 267.

there.[215] Non-payment of premiums cannot be proved under a general denial.[216] The violation of any condition subsequent to be used as a defense must be specially pleaded.[217] A clause in an accident-insurance policy exempting the company from liability for "intentional injuries inflicted by the insured or any other person," precludes a recovery when the insured has been killed by the intentional act of another, and the company need not show that such injuries were inflicted at the instance of the insured. And an answer by the company that the death of the insured was caused by intentional injuries inflicted by another person, during a personal altercation between the latter and the insured, states a complete defense to an action on the policy.[218] In an action against an insurance company to recover a premium paid, the fact that the defendant pleads an affirmative defense, setting up the issuance of a policy by it in return for such premium money, is a sufficient admission of the defendant's corporate capacity to waive allegation and proof by the plaintiff on that point.[219]

§ 4794. Damages settled by another.—If the fire was caused by the negligence of another, who settled for a portion of the loss, such settlement does not preclude an action on the policy, in absence of an express covenant to assign to the insurer any claims for negligence.[220]

FORMS IN ACTIONS ON INSURANCE CONTRACTS.

§ 4795. Complaint on fire policy—By the insured.

Form No. 1336.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation duly created by and under the laws of this state [or, the state of, etc.], organized pur-

215 Trojan Min. Co. v. Fireman's Fund Ins. Co., 67 Cal. 27, 7 Pac. 4.

216 National Mut. Fire Ins. Co. v. Sprague, 40 Colo. 344, 92 Pac. 227.

217 Allen v. Phœnix Assur. Co., 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903.

218 Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 22 Am. St. Rep. 410, 25 Pac. 713, 11 L. R. A. 297. See, to same effect, Hutchcraft v. Travelers' Ins. Co., 87 Ky. 301, 8 S. W. 570, 12 Am. St. Rep. 484; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 36 L. Ed. 847, 12 Sup. Ct. 988.

219 Sengfelder v. Mutual Life Ins. Co., 5 Wash. 121, 31 Pac. 428.

220 Farmers' Alliance Mut. v. Vallie, 35 Colo. 72, 83 Pac. 962.

suant to an act of the legislature [of said state] entitled [title of the act], passed [date of passage], and the acts amending the same.

II. That the plaintiff [was the owner of, or] had an interest in a [dwelling-house, known as No. 200 . . . street, in the city of . . .], at the time of its insurance and destruction [or injury] by fire as hereinafter mentioned.

III. That on the . . . day of . . ., 19.., at . . ., in consideration of the payment by the plaintiff to the defendant of the premium of . . . dollars, the defendant, by its agents duly authorized thereto, made its policy of insurance in writing, a copy of which is annexed hereto, marked "Exhibit A," and by this reference made part hereof.

IV. That on the . . . day of . . ., 19.., said dwelling-house and furniture were totally destroyed [or, greatly damaged, and in part destroyed] by fire.

V. That the plaintiff's loss thereby was . . . dollars.

VI. That on the . . . day of . . ., 19.., he furnished the defendant with proof of his said loss and interest, and otherwise performed all the conditions of said policy on his part.

VII. That the defendant has not paid the said loss, nor any part thereof.

[Demand of Judgment.]

[Annex copy of policy.]

§ 4796. The same—Where plaintiff purchased property after insurance.

Form No. 1337.

[Title.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in last form.]

II. That [name of original insured] was the owner of, or had an interest in, [etc.].

III. [The same as in last form, substituting the name of the original insured, instead of the words "the plaintiff."]

IV. That on the . . . day of . . ., 19.., at . . ., with the consent of the defendant, in writing, on said policy, by its said agents, the said [original insured] sold, assigned, and conveyed to the plaintiff, his interest in the said [property] and in the said policy of insurance. [Continue as in last form.]

[Demand of Judgment.]

[Annex copy of policy.]

§ 4797. The same—Another form.

Form No. 1338.

[TITLE.]

The plaintiff complains, and alleges:

I. That he was the owner of a [match factory, and the machinery therein], in the town of . . ., county of . . ., at the time of its insurance and destruction by fire, as hereinafter mentioned.

II. That on the . . . day of . . ., 19. . , at . . ., in consideration of the sum of . . . dollars to them paid, the defendant executed to the plaintiff a policy of insurance on the said property, a copy of which is hereto annexed [marked "Exhibit A"], and made part of this complaint.

III. That on the . . . day of . . . , 19. . , the said property was totally destroyed by fire.

IV. That the plaintiff's loss thereby amounted to more upon each part of the property separately insured, than the amount of such separate insurance.

V. That on the . . . day of . . ., 19. . , he furnished the defendant with proof of his said loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

VI. That the defendant has not paid the said loss, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4798. The same—Loss payable to mortgagee.

Form No. 1339.

[TITLE.]

The plaintiff complains, and alleges:

[Allege as in form No. 1336, substituting the original insured's name for the word "plaintiff" down to V.]

V. That on the . . . day of . . ., 19. . , the said insured made, executed, and delivered to plaintiff his mortgage on said premises, to secure the sum of . . . dollars, and assigned said policy to plaintiff, as further security, and thereupon defendant, at the request of plaintiff and of the insured, indorsed on said policy, "loss, if any, payable to [plaintiff]."

VI. That said mortgage and the debt secured thereby is wholly unpaid and unsatisfied.

[Continue as in V and VI of the preceding form.]

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4799. Complaint by executor on life policy.

Form No. 1340.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 1336.]

II. That on the . . . day of . . . , 19.. , at . . . , the defendant, in consideration of the [annual, semi-annual, or otherwise] payment by one A. B. to it, of . . . dollars, made its policy of insurance in writing, of which a copy is hereto annexed, marked "Exhibit A," and made part of this complaint, and thereby insured the life of said A. B. in the sum of . . . dollars.

III. That on the . . . day of . . . , 19.. , at . . . , the said A. B. died.

IV. That on the . . . day of . . . , 19.. , at . . . , said A. B. left a will, by which the plaintiff was appointed the sole executor thereof [or, this plaintiff and C. D. were appointed executors thereof].

V. That on the . . . day of . . . , 19.. , said will was duly proved and admitted to probate in the probate court of the county of . . . , and letters testamentary thereupon were thereafter issued and granted to the plaintiff, as sole executor [or otherwise], by the probate court of said county; and this plaintiff thereupon duly qualified as such executor, and entered upon the discharge of the duties of his said office.

VI. That on the . . . day of . . . , 19.. , the plaintiff furnished the defendant with proof of the death of the said A. B., and the said A. B. and the plaintiff each duly performed all the conditions of said insurance on their part.

VII. That the defendant has not paid the same, and the said sum is now due thereon from the defendant to the plaintiff, as such executor.

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4800. Allegation of renewal.

Form No. 1341.

That on the . . . day of . . . , 19.. , at . . . , the defendant, by its agents duly authorized thereto, in consideration of . . . dollars to it paid by the plaintiff, executed and delivered to this plaintiff its certificate of renewal of said policy, of which the following is a copy, annexed as a part of this complaint.

§ 4801. Complaint by insured on agreement to insure, policy not delivered.

Form No. 1342.

[TITLE.]

The plaintiff complains, and alleges:

I. [Incorporation of defendant, as in form No. 1336.]

II. That on and before the . . . day of . . . , 19.. , the plaintiff applied to A. B., who was then and there the duly authorized agent for the defendant, for insurance against loss or damage by fire upon a certain stock of merchandise, the property of said plaintiff, consisting of [describe it], contained in a building occupied by the plaintiff for [state what], in said town of . . . And the defendant, by its said agent, then and there agreed to become an insurer to the plaintiff on the said stock for three months from that day, for . . . dollars, at a premium of . . . , and that the said defendant would execute and deliver to the plaintiff a policy of insurance in the usual form of policies issued by it, for the sum of . . . dollars, for the term of three months from the said day.

III. That the plaintiff then and there paid to the defendant said premium, to-wit, . . . dollars.

IV. That it was then and there agreed between the plaintiff and the defendant, that the said insurance should be binding on it for the term of three months from the time of the receipt of the said premium, for the sum of . . . dollars; and the said defendant then and there, in consideration of the premises, agreed with the plaintiff, to execute and deliver to him, in a reasonable and convenient time, a policy, in the usual form of policies issued by said company, insuring the said stock of goods in the sum of . . . dollars against loss and damage by fire, the insurance to commence at the time of the receipt of the said premium, and to continue for the said term of three months.

V. That the defendant, by a policy of insurance issued in its usual form, among other things did promise and agree [here set out the legal effect of the contemplated policy].

VI. That after the insurance so made, and after the said promise to execute and deliver a policy in conformity thereto, and within the said term of three months, for which the said plaintiff was so insured, to-wit, on the . . . day of . . . , 19.. , the said stock of merchandise in the said building mentioned, and intended to be so insured, was totally destroyed by fire.

VII. That the plaintiff duly fulfilled all the conditions of said agreement and insurance on his part, and that more than . . . days [or otherwise, as required by the policy] before the commencement of this action, to-wit, on the . . . day of . . . , 19.. , at . . . , he gave to the defendant due notice and proof of the loss as aforesaid, and demanded payment of the said sum of . . . dollars.

VIII. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4802. Complaint by wife, partner, or creditor of the insured.

Form No. 1343.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the defendant, in consideration of the [annual, or otherwise] payment to it of . . . dollars, executed to the plaintiff a policy of insurance on the life of [her husband] A. B., of which a copy is hereto annexed, and made a part of this complaint, and marked "Exhibit A."

II. That the plaintiff had a valuable interest in the life of the said A. B. at the time of his death, and at the time of effecting the said insurance. [State nature of interest.]

III. That on the . . . day of . . . , 19.. , at . . . , the said A. B. died.

IV. That on the . . . day of . . . , 19.. , the plaintiff furnished the defendant with proof of the death of the said A. B., and otherwise performed all the conditions of the said policy on [her] part.

V. That the defendant has not paid the said sum, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4803. Complaint by assignee in trust for wife of insured.

Form No. 1344.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 1336.]

II. [Same as in form No. 1340.]

III. That on the . . . day of . . . , 19.. , the said A. B. [with the written consent of the defendant, or otherwise, according to

the terms of the policy], assigned said policy of insurance to this plaintiff, in trust for E. B., his wife.

IV. That up to the time of the death of A. B., all premiums accrued upon said policy were fully paid.

V. That on the . . . day of . . . , 19. . , at . . . , said A. B. died.

VI. That said A. B. and the plaintiff each performed all the conditions of said insurance on their part, and the plaintiff, more than . . . days before the commencement of this action, to-wit, on the . . . day of . . . , 19. . , at . . . , gave to the defendant notice and proof of the death of said A. B. as aforesaid, and demanded payment of the said sum of . . . dollars.

VII. That the defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

[Annex copy of policy.]

§ 4804. Complaint by insured on accident insurance policy.

Form No. 1345.

[Title.]

The plaintiff complains, and alleges:

I. That defendant is a corporation, organized under the laws of the state of New York.

II. That on the . . . day of . . . , 19. . , at the city of San Francisco, and state of California, in consideration of the payment by plaintiff to defendant of a premium of . . . dollars [gold coin], defendant made and delivered to plaintiff its policy of insurance, in writing, upon the life of . . . , of the city and county of San Francisco, and state of California, a copy of which is annexed to this complaint, marked "Exhibit A," and by this reference made a part hereof; and thereby insured the life of said . . . , in the sum of . . . dollars [gold coin], against loss of life by personal injury caused by accident, as stated in said policy, for the term of [six] months from and after the . . . day of . . . , 19. .

III. That afterwards, to-wit, on the . . . day of . . . , 19. . , for a valuable consideration, the defendant made and delivered to plaintiff its written consent that said . . . might pursue the vocation of supercargo on a sailing-vessel during the continuance of the said policy of insurance, without prejudice to said policy, a copy of which consent is hereto annexed as a part of this complaint, and marked "Exhibit B."

IV. That between the . . . day of . . . , 19.. , and the . . . day of . . . , 19.. , and as plaintiff is informed and believes and avers, on or about . . . 19.. , and while said insurance policy and said written consent were in force, said . . . received a personal injury which caused his death within three months thereafter, and that said injury was caused by an accident within the meaning of said policy and insurance, and the conditions and agreements therein contained, to-wit, by the destruction and loss of a certain schooner called . . ., while said . . . was on board of her as supercargo, and not otherwise, by a storm at sea, or other perils thereof, while she was on a trading voyage from the port of San Francisco, in said state, to the Aleutian Islands, in the North Pacific Ocean, and back to said San Francisco, within the meaning of said policy and written consent, and between the said . . . day of . . . and said . . . day of . . .

V. That plaintiff at the times of making and delivery of said policy and written consent, as aforesaid, was the wife of said . . . , and as such had a valuable interest in his life.

VI. That said . . . and this plaintiff each fulfilled all the conditions and agreements of said policy of insurance on their part, and the plaintiff more than sixty days before the commencement of this action, to-wit, on or about the . . . day of . . . , gave to the defendant due notice and proof of the death of said . . . , as aforesaid, and demanded payment of the sum of . . . dollars [gold coin], but no part thereof has been paid.

VII. That the defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

[Annex copies of "Exhibit A" and "Exhibit B."]

§ 4805. Complaint on membership certificate of fraternal insurance order.

Form No. 1346.

[Title.]

The plaintiff complains, and alleges:

I. That the defendant is, and was at the dates hereinafter named, a mutual-benefit association [or, fraternal order] duly incorporated under the laws of the state of . . . , and doing the business of insuring the lives of its members upon the mutual or assessment plan; and that on the . . . day of . . . , 19.. , one E. F. was received into said association as a member thereof, and

remained such member in good standing and entitled to all the privileges and benefits appertaining to his said membership until his death, as hereinafter stated.

II. That at the time said E. F. was so received as a member of said association said defendant duly executed and delivered to him a certain written and printed certificate bearing date the . . . day of . . . , 19.. , a copy of which certificate is attached hereto, marked "Exhibit A," and made a part hereof.

III. That the said E. F. during his lifetime fully complied with the requirements of the articles of association of the defendant, and with all its regulations and by-laws in force at the time of the issuance of said certificate and thereafter adopted, and performed all the agreements and conditions of said certificate on his part to be performed.

IV. That said E. F. died on or about the . . . day of . . . , 19.. , but not from any of the causes excepted in said certificate or the by-laws of said defendant, and that this plaintiff on the . . . day of . . . , 19.. , and more than sixty days before the commencement of this action, made and delivered to the defendant due notice and proof of the death of the said E. F., and performed all the conditions of said certificate and of the by-laws of said association required to be performed on [her] part.

V. Upon information and belief, that since the death of said insured there has been, and still is, in the treasury of the defendant a sufficient sum to pay the plaintiff's claim, and all other just claims against the defendant. [Or, that defendant since the death of said E. F. has wholly refused and neglected to levy or collect any assessment upon its members to pay plaintiff's said claim, notwithstanding sufficient funds to pay the same might have been procured by such levy and collection.]

VI. That no part of said sum has been paid, and that plaintiff is still the holder and owner of said certificate.

[Demand of Judgment.]

[Annex copy of policy.]

§ 4806. Complaint by insured on accident policy.

Form No. 1347.

[Title.]

The plaintiff complains, and alleges:

I. [Allege incorporation of defendant.]

II. That on or about the . . . day of . . . , 19.. , in considera-

tion of the payment by plaintiff to defendant of an annual premium of . . . dollars, defendant made and delivered to plaintiff its policy of accident insurance in writing, a copy of which policy is hereto attached, marked "Exhibit A," and made a part hereof.

III. That on or about the . . . day of . . . , 19.. , while said policy was in full force, plaintiff received a personal injury through external, violent, and accidental means, to-wit, [describe the manner of inflicting it, as: by the accidental discharge of a gun in the hands of one X. Y.].

IV. That by reason of said injury plaintiff was prevented for the space of . . . months from prosecuting his occupation as a . . .

V. That the plaintiff duly performed all the conditions of said policy on his part to be performed, and on the . . . day of . . . , 19.. , and more than . . . days before the commencement of this action, gave to the defendant due notice and proof of said accident and the duration of said disability, and demanded payment of the sum of . . . dollars, which the defendant refused to pay.

VI. That no part of said sum has been paid, and that there is now due and owing from the defendant to the plaintiff the sum of . . . dollars, with interest from the . . . day of . . . , 19..

[Demand of Judgment.]

[Annex copy of policy.]

§ 4807. Complaint by personal representatives of insured upon accident policy when accident caused death.

Form No. 1348.

[Title.]

The plaintiff complains, and alleges:

I, II, and III. [As in last preceding form, substituting the name of the insured for the word "plaintiff."]

IV. That by reason of said injury, and as the direct result thereof, the said insured died on or about the . . . day of . . . , 19.. , a resident of the county of . . . , state of . . . , and that thereafter, and on or about the . . . day of . . . , 19.. , this plaintiff, upon proceedings duly had, was by order of the . . . court of . . . county, state of . . . , duly appointed administrator of the estate of said deceased, and duly gave bond and qualified as such, and is now such administrator duly qualified and acting.

V and VI. [As in last preceding form, changing paragraph V so that it alleges that both the plaintiff and the insured duly performed all the conditions of the policy.]

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4808. Marine insurance—Complaint on open policy.

Form No. 1349.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 1336.]

II. That the plaintiff was the owner of [or, had an interest in] the ship [name of ship], at the time of its insurance and loss, as hereinafter mentioned.

III. That on the . . . day of . . ., 19.., at . . ., the defendant, in consideration of . . . dollars to it paid [or, which the plaintiff then promised to pay], executed to him a policy of insurance upon the said ship, a copy of which is hereto annexed and made part hereof [or, whereby it promised to pay to the plaintiff, within . . . days after proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during its next voyage from . . . to . . ., whether by perils of the sea, or by fire, or by other cause therein mentioned, not exceeding . . . dollars].

IV. That the said vessel, while proceeding on the voyage mentioned in the said policy, was, on the . . . day of . . ., 19.., totally lost by the perils of the sea [or otherwise].

V. That plaintiff's loss thereby was . . . dollars.

VI. That on the . . . day of . . ., 19.., he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4809. The same—Complaint on cargo lost by fire—Valued policy.

Form No. 1350.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation, as in form No. 1336.]

II. The plaintiff was the owner of [or had an interest in] [two hundred barrels of flour], shipped on board the vessel called the A. D., from . . . to . . . , at the time of the insurance and loss hereinafter mentioned.

III. That on the . . . day of . . . , 19.. , at . . . , the defendant, in consideration of . . . dollars, which the plaintiff then paid, executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed, marked "Exhibit A," and made part of this complaint [or, whereby it promises to pay to the plaintiff . . . dollars in case of the total loss, by fire or other causes mentioned, of the said goods, before their landing at . . . ; or, in case of partial damage, such loss as the plaintiff might sustain thereby, provided the same should not exceed . . . per cent of the whole value of the goods].

IV. That on the . . . day of . . . , 19.. , at . . . , while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire.

V. That the plaintiff's loss thereby was . . . dollars.

VI. That on the . . . day of . . . , 19.. , he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VII. That the defendant has not paid the said loss, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4810. The same—Allegation of valued policy.

Form No. 1351.

That on [etc.], at [etc.], in consideration of the premium of . . . dollars, then and there paid to it by the plaintiff, the defendant, by its agents duly authorized thereto, made its policy of insurance in writing, of which a copy is annexed, marked "Exhibit A," and thereby insured for him . . . dollars upon the ship . . . , then lying in the harbor of . . . , for a voyage from . . . to . . . , against the perils of the sea, and other perils in the policy mentioned.

§ 4811. The same—Complaint on freight—Valued policy.

Form No. 1352.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation, as in form No. 1336.]

II. That he had an interest in the freight to be earned by the ship [Flying Mist], on her voyage from . . . to . . . , at the time of the insurance and loss hereinafter mentioned, and that a large quantity of goods was shipped upon freight in her at that time.

III. That on the . . . day of . . . , 19 . . , at . . . , the defendant, in consideration of . . . dollars to it paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed, marked "Exhibit A," and made part of this complaint, and thereby insured for him . . . dollars upon certain goods then laden upon the ship, for a voyage from . . . to . . . , against the perils of the sea, and other perils in the policy mentioned.

IV. That the said vessel, while proceeding upon the voyage mentioned in the said policy [or, during said voyage, and while lying in the port of . . .], was [or, said goods, the freight whereof was insured, were], on the . . . day of . . . , 19. . , totally lost by [the perils of the sea].

V. That the plaintiff has not received any freight from the said vessel, nor did she earn any on the said voyage, by reason of her loss as aforesaid.

VI. That the plaintiff's loss thereby was . . . dollars.

VII. That on the . . . day of . . . , 19. . , he furnished the defendant with proof of his loss and interest, and otherwise performed all the conditions of the said policy on his part.

VIII. That the defendant has not paid the said loss.

[Demand of Judgment.]

[Annex copy of policy.]

§ 4812. The same—Averment of loss by collision.

Form No. 1353.

That on the . . . day of . . . , 19 . . , while the said [ship], with the said goods on board, was proceeding on her said voyage, and before her arrival at her said port of destination in the said policy mentioned, another vessel, with great force and violence was carried against and run foul of the said [ship] and the said [ship] thereby was, with the said goods, sunk and [totally] lost.

§ 4813. The same—Averment of waiver of condition.

Form No. 1354.

That afterwards, and on the . . . day of . . . , 19. . , at . . . , the defendant, by its agents duly authorized thereto, waived the

condition of the said policy by which [designating it], and released and discharged the plaintiff from the performance thereof [or, and consented that the plaintiff should, etc., according to the facts].

§ 4814. The same—Complaint for partial loss and contribution.

Form No. 1355.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation as in form No. 1336.]

II. That on the . . . day of . . . , 19.. , at . . . , in consideration of the premium of . . . dollars, then and there paid by the plaintiff to the defendant, the defendant, by its agents duly authorized thereto, made its policy of insurance in writing, of which a copy is annexed as a part of this complaint, and marked "Exhibit A," and thereby insured for him . . . dollars upon certain goods then and there laden upon the ship . . . , for a voyage from . . . to . . . , against the perils of the sea. [Otherwise, mention the perils which occasioned the loss.]

III. That said ship did, on the . . . day of . . . , sail on the said voyage, and while said ship proceeded thereon was, by the perils of the seas, dismasted, and otherwise damaged in her hull, rigging, and appurtenances, insomuch that it was necessary for the preservation of said ship and her cargo, to throw over a part of said cargo [or, a part of her rigging and furniture], and the same was accordingly thrown over for that purpose.

IV. That in consequence thereof, the plaintiff was obliged to expend . . . dollars in repairing said ship, at . . . , and is also liable to pay . . . dollars as a contribution to and for the loss occasioned by said throwing over of part of said cargo.

V. That on the . . . day of . . . , 19.. , at . . . , he gave to the defendant due notice and proof of the loss as aforesaid, and otherwise duly fulfilled all the conditions of said policy of insurance on his part.

VI. That no part of the same has been paid by the defendant.

[DEMAND OF JUDGMENT.]

[Annex copy of policy.]

§ 4815. The same—Allegation for a particular average loss.

Form No. 1356.

That on the . . . day of . . . , while on the high seas, the seawater broke into the said ship, and damaged the said [flour] to the amount of . . . dollars.

ANSWERS.

§ 4816. Denial of policy.

Form No. 1357.

[TITLE.]

The defendant answers to the complaint, and alleges:

That it did not make or deliver the policy of insurance alleged.

§ 4817. Denial of plaintiff's interest.

Form No. 1358.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the plaintiff did not own, and had no insurable interest in, the said goods [or, building, etc.], at the time of the happening of said loss.

§ 4818. Denial of loss.

Form No. 1359.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said building was not destroyed [or, injured] during term of said insurance by [state perils], but said loss occurred wholly by [indicate the excepted peril].

§ 4819. Allegation that policy was obtained by misrepresentations.

Form No. 1360.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the defendant was induced to subscribe the policy and become an insurer, as alleged in the complaint, by the misrepresentation made by the plaintiff to the defendant of a fact then material to be known to the defendant, and material to the risk of the said policy; that is to say, [state misrepresentation].

§ 4820. Allegation of transfer without insurer's consent.

[TITLE.] Form No. 1361.

The defendant answers to the complaint, and alleges:

I. That it is among other things provided by said insurance policy, that in case of any transfer or termination of the inter-

est of the insured, either by sale or otherwise, of the property insured, without the consent of the company, the policy should from thenceforth be void.

II. That after the making of said policy, and before the loss alleged, the interest of the said [insured] in said [things insured] was terminated and transferred, and the title thereto vested in said plaintiff without the consent of the defendants whereby the policy became and was void at the time of said loss.

§ 4821. Allegation of unseaworthiness of vessel.

Form No. 1362.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. [Allege provisions of policy, unless it appears by the complaint.]

II. That at . . . , and in the course of said voyage, and in reference to the said voyage, and to any damage which the said ship sustained in the prosecution thereof, a regular survey was had on the . . . day of . . . , 19. . , upon which survey the said ship was thereby declared unseaworthy, by reason of her being rotten. [Or, state particulars showing a ground of condemnation wholly within the provisions of the policy.]

§ 4822. Denial of making of proof of loss.

Form No. 1363.

[TITLE.]

The defendant answers to the complaint, and denies:

That the said plaintiff did, within . . . days, which was the time limited in the conditions annexed to the said policy, nor within a reasonable time after the said loss, make out or deliver a particular account of such loss and damage, signed by or on behalf of the plaintiff, and verified by his oath or affirmation; but neglected to do so for the space of . . . months after said loss.

§ 4823. Allegation that plaintiff gave fraudulent account of loss

Form No. 1364.

[TITLE.]

The defendant answers to the complaint, and alleges:

That after the alleged loss and damage, and before action, the plaintiff made and delivered to the defendant a false and fraudu-

lent account of the alleged loss and damage, as and for such account as is mentioned in the conditions contained in [or, annexed to] said policy, in which said account he represented and stated that insured goods and property of the plaintiff to the amount of . . . dollars had been burnt and destroyed by the said fire, and that his loss and damage by the said fire were to the said amount of . . . dollars, with intent to induce the defendant to pay to him said amount; whereas, insured goods and property of the plaintiff had not been burnt or destroyed by said fire to that amount, and his said loss and damage do not exceed . . . dollars, as the plaintiff then well knew.

§ 4824. Allegation of extra-hazardous risk.

Form No. 1365.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. [Allege provisions of policy.]

II. That after the making of the said policy, and before the loss alleged, the plaintiff received into his said store a large quantity of goods known and described as extra-hazardous, to-wit, . . . well knowing that such reception was a violation of the conditions in the said policy contained; and at the time of the said fire, the said plaintiff had in said store a large quantity of such extra-hazardous goods.

§ 4825. Allegation of sale of damaged goods by plaintiff, and that defendant paid deficiency.

Form No. 1366.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the invoice value of the said [insured goods] amounted to . . . dollars, and that the said last-mentioned amount was the sum insured thereon under the policy mentioned in the complaint, and that the net market value of the said [insured goods], if the same had not been damaged, was estimated by S. C. & Co., by whom the said insurance was effected, at the sum of . . . dollars.

II. That the said [insured goods] were sold at auction in the city of . . . , on or about the . . . day of . . . , 19.. , by order of the said S. C. & Co.

III. That the proceeds of such sale amounted to . . . dollars, thereby showing a loss of . . . per cent on the above estimated net market value of the said goods, if the same had not been damaged; that the same percentage on the sum insured on the said goods amounted to . . . dollars; and that the defendant, on or about the . . . day of . . . , 19.. , paid the said last-mentioned sum, together with the expenses of the said sale by auction, to the said S. C. & Co., and that the said S. C. & Co. accepted and received such payment as an adjustment and settlement of the damage or injury to the said goods.

§ 4826. Allegation of other insurance without consent.

Form No. 1367.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said insurance policy provides: [Here set forth terms of condition in policy prohibiting other insurance, if the same be not set forth by the plaintiff in his complaint.]

II. That at the time of the issuance of the said policy the said property had been previously, and then was, insured in another company, to-wit, the A. X. Company, in the sum of . . . dollars, of which previous insurance this defendant had no knowledge; nor did this defendant consent thereto, nor indorse such consent upon the policy described in the complaint in this action. [If the additional insurance was effected after the issuance of the policy in suit, vary the foregoing allegation accordingly.]

§ 4827. Allegation that action not commenced within time limited by policy.

Form No. 1368.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said insurance policy provides: [Here set forth terms of provisions requiring action to be brought on the policy within a limited time.]

II. That the said fire [or, loss] occurred on the . . . day of . . . , 19.. , and that this action was commenced on the . . . day of . . . , 19.. , which was more than . . . days after the occurrence of the said fire [or, loss], whereby this action has become wholly barred by the terms of the said policy.

§ 4828. Allegation of cancellation of policy before loss.

Form No. 1369.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said policy of insurance contained the following provision: [Here set forth the provision allowing cancellation, if it be not set forth in plaintiff's complaint.]

II. That on the . . . day of . . . , 19. . , this defendant made and served upon the plaintiff a notice of its election to cancel said policy, of which notice the following is a copy: [Copy of notice.]

III. That at the time of the service of said notice of cancellation the defendant tendered to the plaintiff the sum of . . . dollars, being the amount of unearned premium upon said policy upon cancellation thereof, but that plaintiff refused and still refuses to accept said unearned premium, or to surrender said policy, although the defendant has ever since been and is now ready and willing to pay to the plaintiff said unearned premium, and now brings the same into court for the benefit of the plaintiff, if he will accept the same, and surrender said policy.

§ 4829. Allegation that material statements in application were false.

Form No. 1370.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said policy of insurance mentioned in the complaint was founded upon and issued in consideration of the statements made by the said E. F. in his written application for insurance, which said application was made by said assured and presented to this company on or about the . . . day of . . . , 19. .

II. That said application so made contained the following question, viz.: [state question]; and that the said assured answered the said question in writing and made his said answer a part of said application, as follows: [State answer.]

III. That the said answer so made in said application was willfully false when made, and known so to be by the said assured; that the said assured was not at that time [here negative the false statement], but on the contrary, was [here state the real fact].

IV. That the said statement so made by said assured was material to the risk, and was relied upon and believed by this defend-

ant, and that the said policy was thereafter issued by reason of said statement, and in reliance thereon, and not otherwise.

§ 4830. Allegation that building was unoccupied.

Form No. 1371.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That said policy contained the following provision: [Insert provision prohibiting vacancy without consent.]

II. That the building described in said policy became vacant and unoccupied on or about the . . . day of . . . , 19. . , and so remained vacant and unoccupied up to the time of the said fire; and that this defendant at no time consented that such building might remain vacant or unoccupied, nor was such consent ever indorsed upon said policy, whereby said policy became wholly void.

§ 4831. Allegation of voluntary assignment or mortgage by assured.

Form No. 1372.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said policy of insurance contained the following provision: [Insert provision prohibiting the change of title of property or mortgage.]

II. That on or about the . . . day of . . . , 19. . , the said assured duly made and executed and delivered a voluntary assignment for the benefit of his creditors to one L. M., which assignment conformed in all respects to the requirement of the statutes of the state of . . . , and was fully perfected by the execution and filing in the proper office of all bonds, schedules, inventories, and other papers required by law to be executed or filed in order to constitute a complete voluntary assignment under the laws of said state.

[If it be claimed that the policy is avoided by the mortgage: II. That on or about the . . . day of . . . , 19. . , the said plaintiff executed and delivered to one O. P. a mortgage upon said property for the sum of . . . dollars, without the knowledge of this defendant, and without any consent on the part of this defendant, either indorsed upon said policy or otherwise, whereby said policy has become wholly void.]

§ 4832. Outline of answer by fraternal benefit order, alleging failure to conform to constitution or by-laws.

Form No. 1373.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said assured made a written application for membership in the defendant order on or about the . . . day of . . . , 19.. , and that the said benefit certificate mentioned in the complaint was issued in reliance upon said application and the said statements and agreements therein contained; that among the said statements and agreements was an agreement that the said assured should be governed by all the provisions of the constitution and by-laws of said order then existing, or which might thereafter be adopted, and that failure to conform to such provisions or any of them should avoid the said certificate.

II. That the constitution of said order then contained and still contains the following provision: [Insert provision claimed to have been violated.]

III. That on or about the . . . day of . . . , 19.. , the said assured [here state violation of the provision with particularity]; and that by reason thereof the said certificate became and is void and of no effect.

CHAPTER CXXI.

INDEMNITY BONDS AND UNDERTAKINGS.

§ 4833. **Definition.**—Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.[1] An agreement to furnish a bond of indemnity is in effect an agreement to indemnify, and may be sued upon as such, if the bond be not furnished as agreed. And a cause of action upon an agreement to indemnify against liability arises when the liability is incurred.[2] An agreement to indemnify a person against an act thereafter to to be done is void, if the act be known by such person at the time of doing it to be unlawful;[3] but not void if the act has already been done, unless it was a felony.[4]

§ 4834. **Essential averments—Damage—Demand.**—In actions upon an ordinary contract to indemnify against loss or damage, the plaintiff must aver actual damage; and if he has paid under a judgment this should be stated, with the date of the judgment, the court in which it was rendered, and the amount of the judgment; while on an agreement to save from liability, actual damage need not be averred;[5] but consequential damages must be specially alleged.[6] Thus in an action on a bond of indemnity, the plaintiff must set out wherein he has been damnified. A general averment of loss is insufficient.[7] But where defendant agreed to indemnify the plaintiff against loss on a sale of stock, on demand, an action for the deficiency may be maintained, at any time after the sale, without a previous demand.[8] So, also, in an action on a bond to indemnify the plaintiff against damages he might sustain by the levy of an attachment, the plaintiff alleged the re-

1 Cal. Civ. Code, § 2772.

2 Showers v. Wadsworth, 81 Cal. 270, 22 Pac. 663.

3 Cal. Civ. Code, § 2773.

4 Cal. Civ. Code, § 2774.

5 McGee v. Roen, 4 Abb. Pr. 8.

6 Swan's Pl. 381. For allegations in such actions, see Allaire v. Ouland, 2 Johns. Cas. 52; Holmes v. Weed, 19 Barb. 128.

7 Coe v. Rankin, 5 McLean, 354, Fed. Cas. No. 2943. See, also, Barr v. Ward, 36 Neb. 905, 55 N. W. 282; Bricker v. Stone, 47 Mo. App. 530; Davis v. Smith, 79 Me. 351, 10 Atl. 55; Eldridge v. Crow, 7 N. Y. Misc. 150, 27 N. Y. Supp. 362.

8 Halleck v. Moss, 22 Cal. 266.

covery of a judgment against plaintiff for damages against which he was indemnified, and the payment of said judgment. The averment of payment was material to plaintiff's right to recover for the amount of such judgment.[9] The averment that the plaintiff necessarily incurred expenses is equivalent to the allegation that he incurred necessary expenses.[10] And the complaint must show how and in what manner these necessary expenses were incurred, naming the count in the allegation.[11] But the failure to make such an averment is not fatal; it is at most but an irregularity.[12] In an action on a contract to indemnify plaintiff for expenses and attorney's fees, if plaintiff's offer to purchase stumpage from a corporation of which defendant was president was not accepted, it was not necessary for the complaint to state the contents of plaintiff's offer to purchase such stumpage, which was refused.[13] The allowance of counsel fees upon an indemnity bond must turn upon the covenants of the bond. If the bond is conditioned to pay all counsel fees incurred in consequence of the legal enforcement of the payment of the penalty of the bond, attorney's fees expended by the plaintiff in the suit on the bond may be recovered, including reasonable attorney's fees in the supreme court.[14] The attorney's fee need not be paid, it being sufficient that the liability has been incurred.[15]

§ 4835. **Action on undertaking.**—If a provisional remedy has been allowed in an action, and the action be dismissed, or a judgment of nonsuit entered, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.[16] Upon a bail-bond for the appearance of a person arrested in proceedings for contempt, if the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued, and the costs of the proceedings.[17] Upon any undertaking in attachment given in pursuance of section 540 or 555 of the California Code of Civil Procedure, suit may be commenced if an execution upon the

9 Roussin v. Stewart, 33 Cal. 208.
10 Glover v. Tuck, 1 Hill, 66.
11 Patton v. Foote, 1 Wend. 207.
12 Packard v. Hill, 7 Cow. 434.
13 Manary v. Runyon, 43 Or. 495, 73 Pac. 1028.
14 Tunstead v. Nixdorf, 80 Cal. 647, 22 Pac. 472.
15 Plymouth Gold Min. Co. v. United States Fidelity etc. Co., 35 Mont. 23, 88 Pac. 565.
16 See Cal. Code Civ. Proc., § 581.
17 Cal. Code Civ. Proc., § 1220.

judgment be returned unsatisfied, in whole or in part; or he may proceed, as in other cases, upon the return of an execution.

§ 4836. **Action on undertaking—Averments.**—In an action upon an undertaking given on appeal from the judgment of a superior court for the possession of real estate, for costs and damages, and for the value of the use and occupation of the premises, it is not necessary to aver in the complaint that the superior court had jurisdiction to render the judgment appealed from. Nor is it necessary to allege that the undertaking had the effect to stay the execution of the judgment, if it appears therein that proceedings for the execution of the judgment were never taken. If a copy of the undertaking be set out in the body of the complaint, it will be taken and considered as a part thereof. A complaint, in such case, is not defective because it contains no averment that an execution had been issued and returned unsatisfied, or because no demand for payment is alleged to have been made on the principal.[18] Nor is it necessary to allege that the plaintiff in the judgment was entitled to the possession of the premises pending the appeal.[19] A complaint against the obligors in an undertaking given on an arrest under section 182 of the New York Code of Procedure, must show the recovery of a judgment in the action wherein it was given, by the defendant therein. An allegation of the discontinuance of such action is not sufficient.[20]

§ 4837. **Common-law bonds.**—A bond given by a contractor pursuant to an unconstitutional statute cannot be upheld as a common-law obligation.[21]

§ 4838. **Interpretation.**—In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: 1. Upon an indemnity against liability expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to

18 Murdock v. Brooks, 38 Cal. 596.

19 See, also, Pieper v. Peers, 98 Cal. 42, 32 Pac. 700.

20 Moses v. Waterbury Button Co., 37 N. Y. Super. Ct. (5 J. & Sp.) 393.

21 San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 Pac. 964; Montague & Co. v. Furness, 145 Cal. 205, 78 Pac. 640; Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701.

recover without payment thereof; 3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion; 4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so; 5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former; 6. If the person indemnifying, whether he is a principal or surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former; 7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.[22] An indemnity against the acts of a certain person applies also to those of his agent.[23]

A judgment creditor is not bound to take proceedings against the judgment debtor before commencing action against his surety on bond, where the surety has agreed to pay the judgment.[24]

§ 4839. **Notice of debt.**—That the defendants had notice of the debt need not be alleged, as it is matter which lies properly in the knowledge of the defendant, especially if it is averred that the books and papers of the firm were transferred to the defendants.[25]

§ 4840. **Partnership indemnity.**—Where a partner, in retiring, covenants to indemnify his successors against all liabilities connected with the business in which the parties had before been

22 Cal. Civ. Code, § 2778.

23 Cal. Civ. Code, § 2775. See, also, as to contracts of indemnity and rules in reference thereto, Theobald's Principal and Surety; Chitty Jr. on Contracts (5th Am. ed.) 56; Stone v. Hooker, 9 Cow. 154; Whitaker v. Smith, 4 Pick. 83; Chace Admr. v. Hinman, 8 Wend. 452, 24 Am. Dec. 39.

24 Hawk v. Barton, 130 Cal. 654, 63 Pac. 64.

25 Clough v. Hoffman, 5 Wend. 499.

engaged, the covenant did not apply to the liabilities incurred by the plaintiff while he carried on the business on his own account.[26]

§ 4841. **Right of surety.**—Where Jones, for the accommodation of Smith, indorses a note to Stiles, and Smith delivers an article of property to Jones, to indemnify him against his liability on the indorsement, Stiles can in equity avail himself of the security for the satisfaction of the note. Jones merely seeks to indemnify himself; he is not to make profit out of the indorsement. He is personally liable to pay the whole debt, whether he receives anything from the principal or not, and it is his duty to pay it; and as Jones holds property in his hands belonging to his principal expressly for his indemnity, if it is applied to the payment of the debt, both the duty of himself and his principal is discharged, and the indemnity at the same time satisfied.[27]

§ 4842. **When indemnitor is surety.**—Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay.[28]

§ 4843. **Eviction by wrongdoer.**—If a tenant is evicted by a wrongdoer, the landlord is not bound to indemnify him.[29]

§ 4844. **Voluntary payment.**—Under a bond conditioned to indemnify the obligee against being compelled by law to pay a second time a sum claimed and paid to the obligor, if the obligee is subsequently sued by two other persons separately claiming the same sum, and interpleads such plaintiffs by suit in chancery, and by leave obtained pays the money into court, this is not a breach of the bond, for it is a voluntary payment.[30]

§ 4845. **Breaches and damages.**—Taking all our statutes together, the obvious design was to put an undertaking on the same footing as a bond.[31] Special breaches should be assigned

26 Haskell v. Moore, 29 Cal. 437.
27 Van Orden v. Dunham, 35 Cal. 145.
28 Cal. Civ. Code, § 2779.
29 Schilling v. Holmes, 23 Cal. 227.
30 Massey v. Schott, Pet. C. C. 132, Fed. Cas. No. 9262.
31 Canfield v. Bates, 13 Cal. 606.

in all cases.[32] Where the condition of a bond is to pay the debt of another, the condition operates merely by way of defeasance. A bond should be sued on, setting out breaches and damages.[33] It is in general sufficient to allege the breach in the terms of the condition of the bond.[34] A declaration on a bond given to prosecute with effect a writ of replevin, where the breach assigned is "that the suit was not prosecuted with effect," is sufficient.[35] The non-payment of a judgment obtained against the administrator may be assigned as a breach of the condition of such bond.[36]

§ 4846. **Conditions.**—Where the bond was not upon the record, and the complaint did not specify the conditions, it was held insufficient.[37]

§ 4847. **Construction.**—An undertaking on an attachment is an original, independent contract on the part of the sureties, and must be construed in connection with the statute which authorizes it.[38] If a word is omitted by mistake, and by looking at the whole undertaking and the statute it is apparent what word was intended to have been inserted, the omitted word may be supplied, and the contract read as if it had been expressed, without first reforming it by supplying the omitted word.[39] The enforcement of a bond is governed by the laws of the state where the contract was made, and the legal rate of interest of that state is the rate allowed.[40]

§ 4848. **Consideration.**—Where it appears that the instrument was given in pursuance of a statute requirement, in a form prescribed thereby, and in a case within the statute, those facts constitute a sufficient consideration to support it, though it be without seal, and no further averment of consideration is necessary.[41]

32 Western Bank v. Sherwood, 29 Barb. 383.

33 Baker v. Cornwall, 4 Cal. 15; Postmaster-General v. Cross, 4 Wash. C. C. 326, Fed. Cas. No. 11303. See Morgan v. Menzies, 60 Cal. 341.

34 See Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1341.

35 Gorman v. Lenox's Exrs., 15 Pet. 115, 10 L. Ed. 630.

36 People v. Dunlap, 13 Johns. 437. See Frankel v. Stern, 44 Cal. 168, as to measure of damages.

37 Woods v. Rainey, 15 Mo. 484. See Donaldson v. Butler County, 98 Mo. 163, 11 S. W. 572; Jenner v. Stroh, 52 Cal. 504; Crook County v. Bushnell, 15 Or. 169, 13 Pac. 886.

38 Frankel v. Stern, 44 Cal. 168.

39 Id.

40 Monier v. Clarke, 12 N. Mex. 118, 75 Pac. 35.

41 Slack v. Heath, 4 E. D. Smith, 95, 1 Abb. Pr. 331; County of Montgomery v. Auchley, 92 Mo. 126, 4 S. W. 425.

And if the complaint sets out the bond in full, showing it to be an instrument under seal, and importing a consideration, the complaint is not demurrable for failure to allege that the bond was based on sufficient consideration.[42] The complaint, by averring that it was sealed, imports a consideration; it is not necessary that it should also show that it was within the statute.[43] An undertaking executed by a sheriff before releasing property which he has ascertained to be exempt from execution is void for want of consideration.[44] The fact that the contract between the owner and the contractor does not require a bond is no defense, if in fact the owner was induced to make the contract upon an oral promise to furnish a bond.[45]

§ 4849. **Defective undertaking.**—If an undertaking has been executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended.[46] Where a mere defective undertaking has been *bona fide* given, and the party will file a good one before the case is submitted, the court should permit him to do so.[47]

§ 4850. **Demand.**—Demand upon the principal is necessary.[48] But a demand upon the defendant is unnecessary.[49] But if a demand is necessary by the special terms of the undertaking, it should be averred. Where a demand is necessary to fix the liability of sureties to an undertaking, it must be made before the commencement of an action for the breach of the undertaking, and be averred in the complaint.[50]

§ 4851. **Description of instrument.**—A complaint in an action upon a statutory undertaking which contains no other description of the instrument than an allegation that it corresponds with the provisions of a certain section of the Practice Act is defective. The defect, however, being of form rather than of substance, objection to it must be taken by demurrer to the complaint.[51]

42 Considine v. Gallagher, 31 Wash. 669, 72 Pac. 469.

43 Clark v. Thorp, 2 Bosw. 680.

44 Servanti v. Lusk, 43 Cal. 238.

45 Sweeney v. Ætna Indemnity Co., 34 Wash. 126, 74 Pac. 1057.

46 Morgan v. Thrift, 2 Cal. 563.

47 Coulter v. Stark, 7 Cal. 244; Cunningham v. Hopkins, 8 Cal. 33.

48 Nelson v. Bostwick, 5 Hill, 37, 40 Am. Dec. 310.

49 Ernst v. Bartle, 1 Johns. Cas. 319.

50 Morgan v. Menzies, 65 Cal. 243, 3 Pac. 807.

51 Mills v. Gleason, 21 Cal. 274; distinguished in Kurtz v. Forquer, 94 Cal. 91, 29 Pac. 413.

§ 4852. **Estoppel.**—In an action for use and occupation, upon an undertaking on appeal, the defendants are estopped from denying that the defendant in the judgment was in the possession at the time he took his appeal and gave the undertaking.[52]

§ 4853. **Justification.**—In California, in any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in section 1056 of the code, require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount is equivalent to that of two sufficient sureties. Whenever an undertaking has been given and approved in any action or proceeding, and it is thereafter made to appear to the satisfaction of the court that any surety upon such undertaking has for any reason become insufficient, the court may, upon notice, order the giving of a new undertaking, with sufficient sureties, in lieu of such insufficient undertaking. In case such new undertaking so required shall not be given within the time required by such order, or in case the sureties thereon fail to justify thereon when required, all rights obtained by the filing of such original undertaking shall immediately cease.[53] In Montana, if appellee insists that the sureties justify, the statute is mandatory; but he may waive his privilege.[54] Bonding companies, as sureties, need not justify, but their qualifications to act as sureties are governed by section 1056 of the California code.

52 Murdock v. Brooks, 38 Cal. 596.

53 Cal. Code Civ. Proc., § 1057; Alaska Codes, pt. 4, ch. 12, §§ 109, 110; Ariz. Civ. Code, pars. 426-431, 820, 918; Idaho Rev. Codes, §§ 4934, 5376; Mont. Rev. Codes, §§ 7192-7195; Nev. Comp. Laws, §§ 1902, 3618, 3699, 4471, 4472, 4477; Or. B. & C. Codes, §§ 269, 271, 288, 346, 549, 2210; Utah Rev. Stats., § 3493; also, §§ 3024, 3026, 3049, 3051, 3060, 3068, 3085, 3312, 3493, 3748, 3831, 4997, 5169; Wash. Bal. Codes, §§ 5355, 5480, 5481; Wyo. Rev. Stats., §§ 3424, 3973, 4154, 4529.

54 Morin v. Wells, 30 Mont. 76, 75 Pac. 688.

§ 4854. **Action by assignee.**—The assignee or pledgee of a negotiable bond is the real party in interest.[55] To enable the assignee of a judgment to sue on the appeal-bond, he must have an assignment of the bond.[56] An assignment which purports to transfer to the assignee all the right, title, and interest of the assignor in the undertaking, "and in the amount thereby secured," is broad enough to enable the assignee to recover for use and occupation pending the appeal, and costs.[57]

§ 4855. **Undertaking on appeal—Appeal dismissed.**—Where an appeal is taken to the supreme court from a judgment by filing notice of appeal and undertaking, and the appeal is afterwards dismissed by the supreme court for failure of the appellant to send up a transcript, the sureties are liable on the undertaking on appeal.[58] Where an appeal is withdrawn or dismissed by consent of both parties, without being called to a final hearing, no action can be maintained on the appeal-bond.[59] Where an appeal is dismissed on motion of respondent, based on written consent of the appellant, the dismissal operates as an affirmance of the judgment, and charges the sureties on the undertaking on appeal.[60]

§ 4856. **Undertaking on appeal—Delivery—Consideration.**—In an action on an undertaking on appeal, it is a sufficient averment of the delivery of the undertaking if the complaint shows that it was filed in the clerk's office.[61] The consideration is sufficiently shown if the appeal-bond recites that it was given to perfect an appeal from a certain judgment rendered.[62]

§ 4857. **Undertaking on appeal—Execution, issue of.**—An averment in the complaint in a suit on an appeal-bond that execution had been issued on the judgment and returned unsatisfied is unnecessary. The non-payment of the judgment can be shown without issuing an execution.[63] The obligee in appeal-bonds given

55 Board of Commissioners v. Schradsky, 31 Colo. 178, 71 Pac. 1104.

56 Moses v. Thorne, 6 Cal. 87.

57 Murdock v. Brooks, 38 Cal. 596.

58 Ellis v. Hull, 23 Cal. 160. See Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Pieper v. Peers, 98 Cal. 42, 32 Pac. 700.

59 Osborn v. Hendrickson, 6 Cal. 175.

60 Chase v. Beraud, 29 Cal. 138.

61 Holmes v. Ohm, 23 Cal. 268.

62 Adler v. Staude, 136 Cal. 182, 68 Pac. 599.

63 Tissot and Wife v. Darling, 9 Cal. 278; Pieper v. Peers, 98 Cal. 42, 32 Pac. 700.

by the same party in the same action, on an appeal from the county to the district court, and from the latter to the supreme court, may maintain an action on either bond without reference to an action pending on the other.[64]

§ 4858. **Undertaking on appeal—Frivolous appeal.**—Damages for a frivolous appeal cannot be recovered in an action upon the undertaking on appeal, unless they have been specially awarded by the appellate court.[65]

§ 4859. **Undertaking on appeal—Final judgment.**—It need not be alleged that the judgment was final.[66]

§ 4860. **Undertaking on appeal—Judgment reversed.**—Where an appeal-bond was conditioned to pay the judgment appealed from, if the same should be affirmed, and it appeared that the judgment appealed from was reversed, the conditions of such bond were not broken, and no action would lie thereon.[67]

§ 4861. **Undertaking on appeal—Judgment affirmed.**—Under the usual undertaking on appeal, if the judgment be affirmed, the liability of the surety accrues only after an affirmance upon that appeal of the then existing judgment. An interlocutory order of affirmance reserving leave to answer and litigate further, followed by new pleadings and a new judgment upon the new issue, does not render the sureties liable.[68] An undertaking or bond was construed to relate only to an action pending against the obligees at the time it was given.[69]

§ 4862. **Undertaking on appeal—Liability of sureties.**—The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves.[70] And a judgment against the principal is conclusive against the surety.[71] A guardian on appeal cannot question the

64 Duncan v. Thomas, 17 Colo. App. 522, 69 Pac. 310.

65 Hathaway v. Davis, 33 Cal. 161.

66 Sutherland v. Phelps, 22 Ill. 91.

67 Chase v. Ries, 10 Cal. 517.

68 Poppenhusen v. Seeley, 3 Keyes, 150.

69 Beach v. Endress, 51 Barb. 570.

70 Tarpey v. Schillenberger, 10 Cal. 390.

71 Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647.

validity of an appeal-bond in favor of his ward for want of a proper obligee.[72] But an undertaking on appeal conditioned for the payment of what the judgment creditor has no legal right to receive is not, as to such condition, binding upon the sureties.[73] The sureties on an appeal-bond cannot be sued until the judgment against their principal is in a condition to be enforced by execution. So long as there is an order of court in force, staying execution on the judgment against a party who had appealed from a lower court, the sureties on the appeal-bond cannot be sued.[74] Transfer of an appeal to another court does not release the sureties.[75] Nor does the imprisonment of a guardian for contempt of court on failure to pay a judgment satisfy an appeal-bond given on appeal from such judgment.[76] However, if on appeal the complaint is amended so as to include another cause of action, the sureties on the appeal-bond are released.[77]

§ 4863. **Undertaking on appeal—Made and filed.**—The averment that the defendants made and filed their certain undertaking in writing (describing it) is sufficient.[78]

§ 4864. **Undertaking on appeal—Parties.**—Where defendant executed an undertaking on appeal to husband and wife, plaintiffs, an action on the undertaking may be maintained in the name of husband and wife.[79]

§ 4865. **Appeal—Substitution of surety.**—Whenever any surety on an undertaking on appeal, executed to stay proceedings on a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.[80]

§ 4866. **Appeal—Ultimate and probative facts.**—An allegation in a complaint in an action against the sureties upon an

72 Duncan v. Thomas, 17 Colo. App. 522, 69 Pac. 310.

73 Whitney v. Allen, 21 Cal. 233.

74 Parnell v. Hancock, 48 Cal. 452.

75 Barela v. Tootle, 29 Colo. 52, 66 Pac. 899.

76 Duncan v. Thomas, 17 Colo. App. 522, 69 Pac. 310.

77 Smith v. Hauer, 8 Idaho, 370, 69 Pac. 109.

78 Gibbons v. Berhard, 3 Bosw. 635. But compare Pevey v. Sleight, 1 Wend. 518.

79 Tissot v. Darling, 9 Cal. 278.

80 Cal. Code Civ. Proc., § 1059.

undertaking on appeal from the judgment of a justice's court that the defendant in the action in that court "appealed to the superior court" from the judgment is a sufficient averment of the ultimate fact that the appeal was taken. The several acts performed in taking the appeal are probative facts, and should not be alleged.[81]

§ 4867. **Arrest.**—On a bond given to an officer to be relieved from arrest, on an attachment conditioned to appear at the return day, an allegation of non-appearance is sufficient.[82] On an attachment for a contempt the complaint must state plaintiff's connection with the attachment proceedings, and to what extent he was aggrieved by the acts of defendant.[83] He may prove that publication was made in the mercantile reports as a part of the damage to his business and credit, and this though defendant is not shown to have been directly responsible for such publication.[84] That the order for the arrest was duly granted is sufficient.[85]

§ 4868. **Arrest—Essential averment.**—A complaint on a recognizance in a criminal case should aver that the same was filed in or became a matter of record in the court where it was returnable.[86]

§ 4869. **Arrest—Execution must be averred.**—In an action upon an undertaking given to procure a discharge from arrest, the complaint is bad upon demurrer if it omits to aver the issuing and return of an execution against the property of the debtor arrested, and also the issuing and return of an execution against the person.[87] Execution against property need not be averred.[88]

§ 4870. **Arrest—Execution against the person.**—The averment of the recovery of the judgment, and proceedings thereupon had supplementary to execution, and the issuance of attachment for

81 Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296.

82 Thomas v. Cameron, 17 Wend. 59; Hart v. Seixas, 21 Wend. 40.

83 Rayner v. Clark, 7 Barb. 581.

84 Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975.

85 Cal. Code Civ. Proc., § 456.

86 Mendocino County v. Lamar, 30 Cal. 627. That the complaint need not aver that a demand for payment was made on the sureties, see State v. Biesman, 12 Mont. 11, 27 Pac. 534.

87 Gauntley v. Wheeler, 31 How. Pr. 137.

88 Renick v. Orser, 4 Bosw. 384; Gregory v. Levy, 12 Barb. 610.

contempt, under which the instrument sued upon was executed, is sufficient.[89]

§ 4871. **Indictment found.**—Where a bail-bond is given to appear and answer an indictment, the complaint must aver that the indictment was found or is pending.[90]

§ 4872. **Recognizance.**—In an early California case it was held that in an action in the district court upon a recognizance of bail given under order of the county judge for the release of a party charged with larceny, the complaint need not aver that the recognizance was certified by the lower court to the district court, nor that the principal has not satisfied the judgment of forfeiture, and that the rule that such certificate and averment are necessary refers to proceedings by *scire facias* upon a record of the recognizance to which the accused is a party.[91] The complaint alleged substantially that G. was indicted for gaming and arrested, and the defendant executed the recognizance which was set out; that G. appeared at the first term of the court thereafter and pleaded not guilty, and the case was continued to next term, at which time, the case being called for trial, G. did not appear, and the defendants, though "called," did not produce his body; that the court then made an order forfeiting the recognizance, and that the defendants did not produce the body of G. before the final adjournment of the court. Such a complaint was held to state a cause of action.[92]

An action on a forfeited bail-bond may be brought in the name either of the people or of the county, and the district attorney is authorized to bring the action.[93] In an action of debt on a recognizance at common law, the utmost strictness ever required was that the declaration should state it with certainty, pursuing the description in the entry of recognizance, and should allege in what court, at whose suit, and for what sum the defendants acknowledged themselves obligated, also that it should be averred that it is a record, and stating the breach according to the terms of the recognizance.[94]

89 Kelly v. McCormick, 2 E. D. Smith, 503.

90 People v. Smith, 3 Cal. 271.

91 People v. Love, 19 Cal. 676.

92 People v. Smith, 18 Cal. 498.

93 People v. De Pelanconi, 63 Cal. 409.

94 State v. McGuire, 42 Minn. 27, 29, 43 N. W. 687. See Prior v. Bodrie, 49 Mich. 200, 13 N. W. 515.

§ 4873. **Attachment—Principal and surety.**—Where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety.[95]

An action on an undertaking in attachment may be maintained against principal and sureties jointly, without first obtaining judgment against the principal.[96] In an action on such undertaking, signed only by the sureties, the plaintiffs in the attachment suit are parties having an interest in the controversy adverse to the plaintiff, and may be properly joined with the sureties as parties defendant.[97] In an action against the sureties upon an attachment bond, the complaint does not state facts sufficient when it alleges the execution of the bond by the principals without alleging that the sureties joined in the execution, although it may set out a copy thereof in the complaint, to which the names of the sureties are appended.[98] And in an action for damages on such bond, an allegation in the complaint that the defendants gave a bond to the plaintiff, not that they executed one, is insufficient to state a cause of action.[99] Counsel fees for defending the attachment suit cannot be recovered, in the absence of an allegation that they have been actually paid.[100]

§ 4874. **Extent of surety's liability.**—A surety on an attachment bond cannot be held for the consequences of wanton and malicious acts of the principal.[101]

§ 4875. **Attachment—Consideration.**—Where defendant applies to the court for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the court makes an order discharging the writ and releasing the property, in a suit against the sureties on

95 Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647.

96 Mattler v. Brind, 2 Colo. App. 439, 31 Pac. 348.

97 Hoskins v. White, 13 Mont. 70, 32 Pac. 163.

98 Seattle Crockery Co. v. Haley, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650.

99 Church v. Campbell, 7 Wash. 547, 35 Pac. 381.

100 Elder v. Kutner, 97 Cal. 490, 32 Pac. 563.

101 Plymouth Gold Min. Co. v. United States Fidelity etc. Co., 35 Mont. 23, 88 Pac. 565.

the undertaking, the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made.[102] The recitals in statutory undertakings given in such cases have the same effect, and are to be construed in the same way, as bonds making the same recitals, and are conclusive of the facts stated.[103] And a complaint in an action on an undertaking given under section 540 of the Code of Civil Procedure of California, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that the same was given to prevent a levy.[104] Suit brought upon a second bond which was taken by the sheriff in lieu of a prior bond for release of attached property is a ratification of such act of the sheriff and estops plaintiff from suing on the first bond.[105] The complaint failing to allege execution or delivery of the undertaking is bad on demurrer.[106]

§ 4876. Attachment—Averments.—It need not be alleged that the attachment was duly issued, if it be shown that it was issued from a court of general jurisdiction.[107] And in reciting the fact of a levy of the writ the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is sufficient without averment of the previous proceedings.[108] It is no defense that the damage might have been avoided by putting up the statutory bond.[109]

102 McMillan v. Dana, 18 Cal. 339. Contra, see Drovers' Live Stock Com. Co. v. Custer County State Bank, 19 Okla. 302, 91 Pac. 850.

103 Bailey v. Ætna Indemnity Co., 5 Colo. App. 740, 91 Pac. 416; McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175.

104 McNamara v. Hammerslag (Cal.), 2 Pac. 391, 1 West Coast Rep. 560; McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

105 Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156.

106 San Francisco Sulphur Co. v. Ætna Indemnity Co., 7 Cal. App. xiii, 93 Pac. 888.

107 Cruyt v. Phillips, 7 Abb. Pr. 205.

108 McMillan v. Dana, 18 Cal. 339; Gregory v. Levy, 12 Barb. 610.

109 McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175.

§ 4877. **Attachment—Released upon delivery.**—The complaint should allege that the property attached was released upon the delivery of the undertaking.[110] A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action.[111] It is necessary also to state the consideration of the undertaking; a mere reference to the condition of the bond itself is insufficient.[112]

§ 4878. **Attachment—Release from.**—Recovery may be had on a bond given to a sheriff to release property from attachment to the extent of the penalty. Such bond is not a statutory undertaking, and is valid at common law. Execution against the judgment debtor is not a condition precedent to suit on the bond, and any mistake in the recital as to the amount for which attachment issued may be explained and corrected by parol.[113] It takes effect at the time of its delivery.[114] Such a bond is for the benefit of the plaintiff who may sue upon it, and if the sheriff takes a sufficient statutory undertaking, he has no further responsibility.[115] The bond given to release property attached, only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his payment.[116] An indemnity bond to the sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect.[117]

§ 4879. **Administrator's bond.**—Where an administrator makes premature payment of a claim, and takes a bond of indemnity, such a bond would be held legal and binding.[118]

§ 4880. **Execution, seizure under.**—An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right.[119]

110 Williamson v. Blattan, 9 Cal. 500.

111 Id.; Jenner v. Stroh, 52 Cal. 504.

112 Palmer v. Melvin, 6 Cal. 651. As to sufficient allegation of demand made upon defendant, see Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072.

113 Palmer v. Vance, 13 Cal. 553.

114 Buffendeau v. Brooks, 28 Cal. 641.

115 Curiac v. Packard, 29 Cal. 194.

116 Low v. Adams, 6 Cal. 277.

117 Davidson v. Dallas, 8 Cal. 227.

118 Comstock v. Breed, 12 Cal. 289.

119 Stark v. Raney, 18 Cal. 622.

§ 4881. **Conditions precedent.**—If the obligors undertake to indemnify the sheriff for any damage by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because judgment has been rendered against him, but must first pay the judgment.[120] If the sheriff is indemnified for the act alone, and suit is brought against him and judgment recovered, the sheriff cannot afterwards have judgment on the indemnity bond against the sureties upon five days' notice unless he gave the sureties written notice of the action brought against him.[121] Where a building contract requires the contractor to furnish the materials for the building, and the condition of his bond is that he will "faithfully comply with all the terms" of the contract, the owner may sue on the bond, on the failure of the contractor to pay for materials furnished, without first paying the claims for such materials.[122]

§ 4882. **Claim and delivery—Action by assignee.**—In an action by the assignee of an undertaking given in proceedings of claim and delivery, it is sufficient, by way of showing plaintiff's title, to allege that the undertaking was duly assigned, etc., to him, without alleging that the judgment in the action was also assigned.[123] When the action is brought by the assignees of only a portion of the promisees, there is a defect of parties; all the promisees should be represented.[124] Where a replevin bond substantially conforms to the act, the assignee of the defendants can maintain an action upon it.[125]

§ 4883. **Claim and delivery—Consideration.**—The averment of delivery and release is an averment of consideration, and must be stated, even if the undertaking was under seal.[126] But if the undertaking recites the performance of the condition, a complaint setting forth the undertaking need not also aver performance.[127]

120 Lott v. Mitchell, 32 Cal. 23.

121 Dennis v. Packard, 28 Cal. 101. See Code Civ. Proc., § 1055; Tunstead v. Nixdorf, 80 Cal. 647, 22 Pac. 472; Oaks v. Scheifferly, 74 Cal. 478, 16 Pac. 252.

122 Trinity Parish of Seattle v. Ætna Indemnity Co., 37 Wash. 515, 79 Pac. 1097.

123 Morange v. Mudge, 6 Abb. Pr. 243.

124 Bowdoin v. Coleman, 6 Duer, 182, 3 Abb. Pr. 431.

125 Wingate v. Brooks, 3 Cal. 112.

126 Nickerson v. Chatterton, 7 Cal. 568.

127 McMillan v. Dana, 18 Cal. 339.

§ 4884. **Claim and delivery—Delivery and release.**—It must be averred that the property was delivered or released.[128] If plaintiff dismisses his action after a return of the property, defendant cannot recover attorney fees and expenses in preparing his defense.[129]

§ 4885. **The same—Demand.**—No demand need be averred where judgment was returned unsatisfied.[130]

§ 4886. **Claim and delivery—Facts authorizing issue of process.**—The complaint returned need not aver that it was taken in pursuance of the statute. It is enough that the instrument set forth is in accordance with the statute.[131]

§ 4887. **Claim and delivery—Interest awarded.**—Upon an undertaking given in an action of claim and delivery, for the payment of a fixed sum, and not conditioned for the return of the goods, interest may be awarded upon the amount of the penalty from the date of judgment in the original action, because after the recovery the sureties are in default, and the neglect to pay puts them in the wrong.[132]

§ 4888. **Claim and delivery—Joint bond.**—No recovery can be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only.[133] Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal.[134]

§ 4889. **Claim and delivery—Judgment in the alternative.**—The complaint should show that judgment was rendered in the alternative. It must be averred that neither had the property been returned nor the specified value thereof, as fixed by the judgment in the original suit, paid.[135] If there is no judgment for the return of the property, if plaintiff fails to prosecute, and

128 Palmer v. Melvin, 6 Cal. 651; Williamson v. Blattan, 9 Cal. 500.

129 Edwards v. Bricker, 66 Kan. 241, 71 Pac. 587.

130 Bowdoin v. Coleman, 3 Abb. Pr. 431; Slack v. Heath, 1 Abb. Pr. 331.

131 McMillan v. Dana, 18 Cal. 339; Shaw v. Tobias, 3 N. Y. 188; Gregory v. Levy, 12 Barb. 610.

132 Emerson v. Booth, 51 Barb. 40.

133 City of Sacramento v. Dunlap, 14 Cal. 421.

134 Id.

135 Nickerson v. Chatterton, 7 Cal. 568.

does not return the property to defendant, it is a breach of the bond, and the sureties are liable therefor.[136]

§ 4890. **Claim and delivery—Liability of sureties.**—Where plaintiff in replevin gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs, his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods, but not for damages for the original taking and detention—the value of the goods not having been found by the jury.[137] If an undertaking in an action in replevin commenced in a justice's court limits the liability of the persons who execute it to a judgment for the return of the property rendered by the justice, and such judgment is not rendered in the justice's court, a recovery cannot be had upon the undertaking, even if on appeal such judgment is rendered by the higher court. Otherwise, if the statutory form of the undertaking is followed. A judgment in favor of the defendant which does not award him a return of the property does not impose any liability upon the sureties.[138]

§ 4891. **Claim and delivery—Reference to section of act.**—A complaint upon an undertaking given under the provisions of a statute which contains no other description of the instrument than an allegation that it corresponds with the provisions of such statute is defective. The material portions of the undertaking should be set forth; but it will be at most only a defect of form, and objection must be taken by demurrer.[139]

§ 4892. **Claim and delivery—Value of property.**—The complaint does not state facts sufficient to constitute a cause of action unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered;[140] but if plaintiff's affidavit fixes the value of the property claimed, neither she nor her sureties can dispute that valuation.[141] However, a special demurrer on grounds of uncertainty, because the complaint describes the property in general terms, should be overruled.[142]

136 Keenan v. Washington Liquor Co., 8 Idaho, 383, 69 Pac. 112.
137 Ginica v. Atwood, 8 Cal. 446.
138 Mitchum v. Stanton, 49 Cal. 302.
139 Mills v. Gleason, 21 Cal. 274.
140 Clary v. Rolland, 24 Cal. 147.
141 Hill v. Gardner, 35 Wash. 529, 77 Pac. 808.
142 Keenan v. Washington Liquor Co., 8 Idaho, 383, 69 Pac. 112.

§ 4893. **Injunction.**—A bond of indemnity executed in pursuance of articles of agreement may, in equity, be restrained so as to conform to those articles. But a departure from the articles must be clearly shown. Thus, under an agreement to indemnify a retiring partner against demand upon the concern, and a bond of indemnity reciting that it was agreed to indemnify against debts, including those due from others which had been assumed, it was held that the bond might be enforced.[143]

§ 4894. **Joint and several liability.**—One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act.[144]

§ 4895. **Liability of sureties.**—Where the sheriff, under a writ of attachment, is about to levy upon the property of a firm, and a bond is executed by third parties as sureties, conditioned to keep harmless and indemnify the sheriff against all damages and expense he may be put to by reason of the non-seizure of the property, and "to pay whatever judgment may be rendered against said defendants," and judgment was obtained against one only of the defendants,—plaintiffs failing on the trial to prove the other to be a partner,—the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties. Such bond will be presumed to have been executed with reference to the provisions of the statute, and will be held such a security, and the fact that judgment was obtained against one only of the defendants satisfies the condition to "pay whatever judgment may be rendered against said defendants."[145] If an appeal is taken and an appeal-bond given, the plaintiff, upon confirmation of judgment in his favor, may immediately look to the sureties on either the appeal-bond or the bond given the sheriff for release of the attached property; and if the judgment be paid by the sureties on the appeal-bond, they may recover the whole of such payment from the sureties on the prior bond. There is no contribution between the sureties of the two bonds.[146]

143 Finley v. Lynn, 6 Cranch, 238, 3 L. Ed. 211.

144 Cal. Civ. Code, § 2777.

145 Heynemann v. Eder, 17 Cal. 433.

146 Day v. McPhee, 41 Colo. 467, 93 Pac. 670.

§ 4896. **Indemnity to sureties.**—Creditors are generally entitled to the benefit of securities given to a surety as an indemnity;[147] but this rule cannot apply where the securities are put up by a third disinterested party.[148]

§ 4897. **Injunction—Damages.**—The extent of recovery on an injunction bond is determined by its terms; but there can be no recovery beyond the limits of the condition prescribed by statute.[149] Where an officer is enjoined from paying over money in his hands, legal interest only can be recovered as damages for its detention, in an action on the injunction bond.[150] To recover damages for the wrongful issuing of the writ, it was held that the amount paid to counsel as a fee to procure the dissolution of the injunction was properly allowed as part of the damages;[151] but only such attorney fee as is chargeable against motion to dissolve the injunction can be recovered.[152] So held also when an order to show cause why an injunction should not issue was made, though the fee was paid after the return of the order to show cause, provided the retainer was before that date.[153]

§ 4898. **Injunction—Damages must be averred.**—In an action against the sureties on an injunction bond, the condition of which was that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded, it was held that such complaint is fatally defective.[154] The allegation of general damages only in the complaint in an action on an injunction bond will not authorize the proof of any special damages, which must be alleged before they can be proved.[155]

147 Mont. Rev. Codes, § 5694; Cal. Civ. Code, § 2824.

148 O'Neill v. State Sav. Bank, 34 Mont. 521, 87 Pac. 970.

149 Quinn v. Baldwin, 19 Colo. App. 497, 76 Pac. 552.

150 Lally v. Wise, 28 Cal. 539.

151 Ah Thaie v. Quan Wan et al., 3 Cal. 216; Parker v. Bond, 5 Mont. 1, 1 Pac. 209. See Bustamente v. Stewart, 55 Cal. 115.

152 Church v. Baker, 18 Colo. App. 369, 71 Pac. 888; Quinn v. Silka, 19 Colo. App. 507, 76 Pac. 555; Frantz v. Saylor, 12 Okla. 39, 69 Pac. 794.

153 Prader v. Grim, 13 Cal. 585.

154 Tarpey v. Shillenberger, 10 Cal. 390.

155 Parker v. Bond, 5 Mont. 1, 1 Pac. 209.

§ 4899. **Allegation of non-payment.**—A complaint on an injunction bond which fails to allege that the damage claimed has not been paid is insufficient.[156]

§ 4900. **Injunction—Enjoining payment of money.**—M., a sheriff, had in his hands money belonging to L., which he had collected on an execution in favor of L. & D. against S. W. & C. commenced an action against M. & L. and others to enjoin M. from paying the money to L., and procured a preliminary injunction, which was served on M. alone, but L. appeared in the action and defended. The injunction bond ran to all the defendants. It was held that L. could maintain an action for damages on the injunction bond.[157]

§ 4901. **Injunction—Statement of trial.**—It is sufficient to allege that an injunction was granted by a court or judge, that issues were joined and judgment rendered. All obligees on an injunction bond may join as plaintiffs, whether their several claims be similar or not.[158] A complaint which contains two counts, one for damages against the plaintiff in an injunction suit, and the other against the sureties upon the injunction bond, but which fails to aver either malice or want of probable cause in the issuance of the writ of injunction, fails to state any cause of action against the plaintiff in the injunction suit.[159] The plaintiff in the injunction suit is not liable upon the injunction bond if he was not a party to the undertaking.[160]

§ 4902. **Injunction—Breach of conditions basis of action.**—The breach of the conditions of a penal bond constitutes, in fact, the basis of the plaintiff's action, and it should be assigned with certainty and particularity, so as to show the injury.[161] In general, it is sufficient to allege the breach in the terms of the condition of the bond.[162] Action on an injunction bond may be

156 Bebee v. Jackson, 32 Mont. 217, 79 Pac. 1051; Van Horn v. Holt, 30 Mont. 69, 75 Pac. 680.

157 Lally v. Wise, 28 Cal. 539.

158 Cumberland Coal and Iron Co. v. Hoffman Steam Coal Co., 15 Abb. Pr. 78; Loomis v. Brown, 16 Barb. 325.

159 Asevado v. Orr, 100 Cal. 293, 34 Pac. 777.

160 Ghiradelli v. Bourland, 32 Cal. 588.

161 Campbell v. Strong, Hempst. 265, Fed. Cas. No. 2367a; Dixon v. United States, 1 Brock. 177, Fed. Cas. No. 3934; Postmaster-General v. Cross, 4 Wash. C. C. 326, Fed. Cas. No. 11306.

162 Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1341; Gorman v. Lenox, 15 Pet. 115, 10 L. Ed. 680.

brought at any time after judgment, but if an appeal is taken after such action is commenced the action abates, and should be dismissed rather than continued, pending a decision on the writ of error.[163]

§ 4903. **Injunction—Notice.**—Notice to the representative and a demand upon him are not always essential.[164] It is not necessary to aver notice to the sureties, nor to state who was the applicant for the order for prosecution.[165]

§ 4904. **Parties.**—In an action on a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors.[166] In case of an injunction suit against the mayor and common council of a city, a later suit upon the bond may be brought in the name of the city, as it is the real party in interest.[167]

§ 4905. **Pleading—Breach.**—In actions on penal bonds, the complaint must specifically assign the breaches for which the action is brought;[168] thus on a bond conditioned that a party shall pay on a certain contingency or on demand, or for an uncertain sum, breaches must be assigned;[169] also, on a bond given on a plea of a title before a justice.[170] But not on a bond payable in money by installments.[171] Nor to bonds payable in money only, which may be brought under actions on written instruments. In a declaration in debt on a penal bond payable to an individual, there must be an averment of the non-payment of the penalty; but it is otherwise in cases of official bonds payable to the state.[172]

§ 4906. **Arbitration bond—Payment at a future day.**—Where the award directs payment at a future day, and, pursuant to

163 Tutty v. Ryan, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920.

164 People v. Rowland, 5 Barb. 449.

165 People v. Falconer, 2 Sandf. 81.

166 Lindsay v. Flint, 4 Cal. 88.

167 City of Boise v. Randall, 8 Idaho, 119, 66 Pac. 938.

168 Baker v. Cornwall, 4 Cal. 15; Munro v. Alaire, 2 Caines, 320; Rumsey v. Matthews, 1 Bibb, 242; Burnett v. Wylie, Hempst. 197, Fed. Cas. No. 2172a. See Hazel v. Waters, 3 Cranch C. C. 682, Fed. Cas. No. 6284; Western Bank v. Sherwood, 29 Barb. 383.

169 Nelson v. Bostwick, 5 Hill, 37, 40 Am. Dec. 310.

170 Patterson v. Parker, 2 Hill, 598.

171 Harmon v. Dedrick, 3 Barb. 192; Spaulding v. Millard, 17 Wend. 331.

172 State v. Phares, 24 W. Va. 657; Rigg v. Parsons, 29 W. Va. 522, 2 S. E. 81.

authority given in the submission, requires the debtor to give security for its payment, an action lies upon the arbitration bond, upon the refusal to give security, without waiting till the time of payment.[173] Where the defendant revoked the arbitrator's powers before the submission was actually made a rule of court, the plaintiff should assign the revocation as a breach, not the nonperformance of the award.[174]

§ 4907. **Essential averments—Request—Sale and accounting.**—Request is a condition precedent in a bond to account on request,[175] and a sale must be averred, with a refusal to account therefor.[176]

§ 4908. **Fidelity bond—Application.**—Such a bond applies to the honesty of the clerk, and not to his ability, and the sureties are not responsible for loss arising from a mere mistake; unless the clerk conceals deficiencies, and for this purpose makes false entries in the books.[177]

§ 4909. **Fidelity bond—Consideration and acceptance.**—Appointment to office and its emoluments is a sufficient consideration to support the obligation of sureties for fidelity.[178] The acceptance of a fidelity bond is presumed from its retention by the obligee and the continuance of the principal in the discharge of the duties.[179]

§ 4910. **Fidelity bond—Faithful discharge of duties.**—In a suit on a bond to secure faithful performance of various duties of secretary and treasurer to a private association, if the defendant, who was a surety (the principal being dead), craved oyer of the bond and conditions, and pleaded general performance, it is sufficient.[180] Where an inhabitant of a town acted as justice of the peace, and gave a bond with sureties for the faithful discharge of his duties as justice, the fact that no law required him

173 Bayne v. Morris, 1 Wall. 97, 17 L. Ed. 495.

174 Frets v. Frets, 1 Cow. 335; William v. Maden, 9 Wend. 240.

175 Davis v. Cary, 15 Q. B. 418, 69 Eng. Com. L. 416.

176 Wolfe v. Luyster, 1 Hall, 161.

177 Union Bank v. Clossey, 10 Johns. 271.

178 United States v. Linn, 15 Pet. 290, 10 L. Ed. 742.

179 Boyd v. Agriculture Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

180 Jackson v. Rundlet, 1 Woodb. & M. 381, Fed. Cas. No. 7145.

to give a bond would not affect the validity of the instrument as a common-law obligation.[181]

The cause of action accrues when consequential injury has followed official nonfeasance or misfeasance, and not before.[182] It is necessary to allege and prove the existence of conditions and circumstances requiring some official action on the part of the officer, and that the injury sought to be redressed was inflicted while the officer was so attempting to act, or on account of his failure to act at all.[183] Sureties on an official bond are liable only for a breach of official duty committed by their principal during the term of office for which the bond was given, and the fact that the breach occurred during such term must be alleged in the complaint.[184]

§ 4911. **Official bond.**—In an action upon a sheriff's bond, the declaration must show a breach of duty.[185] Where the condition of a treasurer's bond was that he "should keep a separate account in the bank of A., as such treasurer, of all moneys," etc., it was held that a breach might be assigned by negativing the words of the condition, though only nominal damages could be recovered under it.[186]

§ 4912. **Official bond—Breach must be assigned.**—In a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being, in point of law, within the scope of the covenant, the defect is fatal, even after verdict.[187] Recovery of a judgment against the principal is not a breach, but merely evidence of a breach, and the breach should be alleged outside of any allegation of such judgment.[188] Where, in an action upon a sheriff's bond, the declaration did not charge the sheriff with a breach of his duty in the

181 Williamson v. Woolf, 37 Ala. 298.

182 People v. Cramer, 15 Colo. 155, 25 Pac. 302; Clelland v. McCumber, 15 Colo. 355, 25 Pac. 700.

183 Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157.

184 Hubert v. Young, 64 Cal. 213. See Kellum v. Clark, 97 N. Y. 390; Buffalo County v. Van Sickle, 16 Neb. 363, 20 N. W. 261; Board of Supervisors v. Alford, 65 Miss. 63, 7 Am. St. Rep. 637, 3 South. 246; State v. Kurtzeborn, 78 Mo. 98.

185 South v. State, 18 How. 396, 15 L. Ed. 433.

186 Albany Dutch Church v. Vedder, 14 Wend. 165.

187 Minor v. Merchants' Bank of Alexandria, 1 Pet. 46, 67, 7 L. Ed. 47. Compare Snow v. Johnson, 1 Minn. 48.

188 United States v. Meade, 9 Ariz. 209, 80 Pac. 326.

execution of any writ or process in which the real plaintiff was personally interested, but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob, the declaration did not set forth a sufficient cause of action against the sheriff and his sureties.[189]

§ 4913. **Official bond—Change of parties on bond.**—Where the principal causes his name to be stricken from a bond without their knowledge or consent, it is void as against the sureties.[190] But the name of an obligor may be erased and a new obligor inserted, by consent of all parties, without making the bond void.[191] However, on application of a surety, on an official bond of a public officer to be released, his co-sureties are released, and an entirely new bond should be executed.[192]

§ 4914. **Official bond—Limitations.**—In California and Oregon, an action on the official bond of a public officer for a defalcation is an action on a liability created by statute, and must be commenced in the time provided for such.[193]

§ 4915. **Contractor's bond.**—The rental value of a building may be recovered as damages on a contractor's bond for failure to complete the building on time.[194] Also, a reasonable attorney's fee incurred in resisting mechanics' liens which were filed on the property because of default of the contractor.[195] If the builder's contract requires the completion and surrender of the building free of all liens, the surety on the contractor's bond is bound to raise any such liens or to pay all costs and expenses of doing so.[196]

189 South v. State of Maryland, 18 How. 396, 15 L. Ed. 433.

190 Miller v. Stewart, 9 Wheat. 702, 6 L. Ed. 189; Hunt v. Adams, 6 Mass. 521; Martin v. Thomas, 24 How. 315, 16 L. Ed. 689.

191 Speake v. United States, 9 Cranch, 28, 3 L. Ed. 645. The question whether the addition of a surety without the knowledge of the former surety, avoids the bond, was raised in Oneal v. Long, 4 Cranch. 60, 2 L. Ed. 550.

192 Cochise County v. Ritter, 3 Ariz. 208, 73 Pac. 448.

193 State v. Davis, 42 Or. 34, 71 Pac. 68, 72 Pac. 317; County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 65 Pac. 459.

194 Tally v. Ganahl, 151 Cal. 418, 90 Pac. 1049.

195 Id.; Ausplund v. Ætna Indemnity Co., 47 Or. 10, 81 Pac. 577, 82 Pac. 12.

196 McKinnon v. Higgins, 47 Or. 44, 81 Pac. 581.

§ 4916. **Indemnity bond—Time to sue.**—An indemnity against judgment liens does not accrue until something has to be paid in order to protect the title against any such liens.[197] A restriction in an indemnity bond may be so unreasonable as to be inoperative,[198] and the time limit may be waived by the indemnitor by accepting final payments and then allowing liens to be filed.[199] Action on an undertaking given to release attached property may be brought immediately on return of execution against the judgment debtor unsatisfied.[200]

§ 4917. **Collector's bond.**—The district attorney of a county has the authority, of his own volition, with or without instructions from the controller of state, superior court, or the board of supervisors of a county, to bring an action upon the official bond of the tax-collector of a county.[201] In an action of covenant brought on a penal bond given to account for public moneys, if the breach assigned is the non-performance of the conditions, the count will be adjudged bad on demurrer. The breach assigned must be the non-payment of the penalty.[202] All the money due on a tax-collector's bond may be recovered in a single action, in the name of the people of the state, although part of the money thus due may belong to the county and part to the state.[203] The complaint in an action on a tax-collector's bond need not aver that the taxes charged on the assessment-roll were legally assessed.[204] The securities on the official bond of a sheriff and *ex officio* collector of the revenue are liable for an act of the latter in collecting an assessment of taxes on property not subject to taxation.[205]

§ 4918. **Official bond—Constable.**—An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the nonfeasance or misfeasance of the officer.[206] In an action against sureties on a constable's

197 Peterson v. Creason, 47 Or. 69, 81 Pac. 574.

198 Ausplund v. Ætna Indemnity Co., 47 Or. 10, 81 Pac. 577, 82 Pac. 12.

199 McKinnon v. Higgins, 47 Or. 44, 81 Pac. 581.

200 Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

201 People v. Love, 25 Cal. 520.

202 United States v. Brown, 1 Paine, 422, Fed. Cas. No. 14670.

203 People v. Love, 25 Cal. 520.

204 Id.

205 State v. Shacklett, 37 Mo. 280.

206 Van Pelt v. Littler, 14 Cal. 194.

bond, in addition to the allegation that the officer did not levy the amount of an execution, or take the body of the defendant, it must be alleged that the defendant had property which might have been levied upon, or that his body could have been found.[207] If the bond and complaint are not sufficient as to the sureties, a joint judgment cannot be had.[208] An action to recover damages for a breach of the condition of the official bond of a constable, by reason of his illegal seizure and conversion of the property of the plaintiff, under a writ issued against the property of third persons, is properly brought against the constable and the sureties on his official bond.[209]

§ 4919. **Official bond—Constable's deputy.**—In the absence of statutory provisions as to the appointment of deputies by constables, the common-law rule applies, and constables may act by deputy, in the exercise of their ministerial functions.[210]

§ 4920. **Official bond—Copy.**—If a copy of the bond sued on is set out in the complaint, an answer denying its execution which is not verified admits its due execution.[211]

§ 4921. **Official bond—County assessor.**—In a suit upon the official bond of a county assessor, who had received a certificate of election, given bond, and entered upon his duties, neither the principal nor the sureties can deny the official character of the assessor. They are estopped by the bond.[212]

§ 4922. **Official bond—Date.**—Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed.[213] In an action of debt on a bond to a judge of probate, the declaration is defective if it does not allege the precise day on which the defendants became bound.[214]

§ 4923. **Official bond—Defect in.**—If there is a defect in an official bond by the failure of the principal to place a seal oppo-

207 Lawton v. Erwin, 9 Wend. 233.
208 Felonicher v. Stingley, 142 Cal. 630, 76 Pac. 504.
209 Bell v. Peck, 104 Cal. 35, 37 Pac. 766.
210 Jobson v. Fennell, 35 Cal. 711.
211 Sacramento County v. Bird, 31 Cal. 67.
212 People v. Jenkins, 17 Cal. 500.
213 United States v. Linn, 1 How. 104. 11 L. Ed. 64.
214 Moore v. Lothrop, 75 Me. 301.

site his name, the defect will not defeat a recovery thereon as against the sureties, if the defect is suggested in the complaint.[215]

§ 4924. **Official bond—Delivery.**—In a suit on a bond, delivery must be alleged; but the omission to allege it can only be taken advantage of by demurrer; it is cured by verdict.[216] The production of the bond in court by the obligee is sufficient evidence of its delivery.[217] The sheriff's bond may be so defective as to refute any authority on the part of the sheriff to deliver the same for the sureties, and such is the case where the sheriff's name does not appear as principal, only one of six sureties being named in the instrument, the amounts signed by the sureties showing a total of seven thousand dollars instead of ten thousand dollars, and two sureties not having justified.[218]

§ 4925. **Official bond—Execution of.**—If the complaint on an official bond avers the due execution of the same by both principal and sureties, and the answer takes issue on the averment, and the verdict and judgment are for plaintiff, the judgment will not be disturbed on appeal upon the judgment-roll, on the ground that what purports to be a copy of the bond annexed to the complaint does not contain the signature of the principal.[219] In some states, sureties on a sheriff's bond may bind themselves without joining the sheriff.[220] If sureties on an official bond sign with an express understanding with the principal in the bond that certain other persons shall sign as sureties, and that unless such other persons sign it shall not be delivered, a delivery of the bond to the obligee without the signature of such other persons does not render it invalid as to the sureties who do sign.[221]

§ 4926. **Sheriff's bond—For selling homestead.**—A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiff, which sets out that the sheriff was in

215 Sacramento County v. Bird, 31 Cal. 67. See People v. Huson, 78 Cal. 154, 20 Pac. 369.

216 Garcia v. Satrutegui, 4 Cal. 244.

217 Tidball v. Halley, 48 Cal. 610; State v. Suwanee County Commissioners, 21 Fla. 1.

218 Baker City v. Huntington, 46 Or. 275, 79 Pac. 187.

219 Mendocino County v. Morris, 32 Cal. 145.

220 Baker City v. Huntington, 46 Or. 275, 79 Pac. 187.

221 Tidball v. Halley, 48 Cal. 610.

possession of a certain execution against the plaintiff, Richard Roe, under which he sold the property, and averring damages in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action; for the sheriff's deed conveys nothing if the property was a homestead.[222]

§ 4927. **Official bond—Judgment.**—In an action against the principal and sureties on an official bond, the court should first fix the amount of the defalcation of, or recovery from, the former, and then proceed with a separate judgment against each of the sureties for the full amount for which he has made himself liable, and that each shall be satisfied by the collection or payment of such defalcation, or recovery and costs.[223] A judgment for damages against an officer for official delinquency, which remains unsatisfied, will not prevent a subsequent action on the official bond.[224]

§ 4928. **Official bond—Liabilities of obligors.**—After a bond has been received and acted on by the county officers, the obligors are liable as if it had been approved; but this liability applies only to the duties properly appertaining to the office as such, and not to the duties belonging to a distinct office, with the execution of which such officer may be charged.[225] The sureties are not liable for money received by a constable, upon an agreement with the execution debtor not to levy the execution, and to repay the money, on determination of an appeal in the defendant's favor, since the act is beyond his power, and a violation of duty.[226] If the penal sum is changed in an official bond after the principal obligor has executed the same, and he then forwards it for approval, he is liable on the bond as approved.[227] The liability is several as well as joint, unless expressed to be only joint, and the plaintiff may sue one or both sureties.[228] The sureties on a sheriff's bond are not liable for his acts or omissions in the service of a precept which by law he was not authorized

222 Kendall v. Clark, 10 Cal. 18, 70 Am. Dec. 691.

223 People v. Rooney, 29 Cal. 642.

224 State v. Kruttschnitt, 4 Nev. 178.

225 People v. Edwards, 9 Cal. 286.

226 Feller v. Gates, 40 Or. 543, 91 Am. St. Rep. 492, 67 Pac. 416, 56 L. R. A. 630.

227 People v. Kneeland, 31 Cal. 288.

228 Morange v. Mudge, 6 Abb. Pr. 243.

to serve,[229] nor for acts done by him during a former term of office.[230]

§ 4929. **Official bond—Sheriff's return.**—The sheriff's return on an execution, stating a levy upon money and the amount, is conclusive against him in an action on the bond.[231]

§ 4930. **Conclusiveness of judgment on bond.**—If the contract holds the owner harmless from negligence of the contractor, and notice of suit for damages on account of injury sustained on account of such negligence be served on the contractor, any judgment obtained is conclusive against the contractor and his sureties as to the injury being caused by his negligence.[232] The guarantor may plead judgment rendered in a former suit in favor of his principal, and if he does not, and judgment is secured against him, he cannot come onto his principal for reimbursement.[233] The principal who has put up collateral security with a bonding company cannot plead lack of notice when he was in court as a witness and knew of the suit against the company on the bond.[234]

§ 4931. **Notice to sureties.**—If an action be brought against a sheriff for an act done by virtue of his office, and he gives seasonable written notice thereof to the sureties on his bond of indemnity received by him and permits them to conduct the defense of such action, the judgment recovered therein shall be conclusive evidence against the persons so notified; and the court may on motion of the defendant, upon notice of five days, and upon proof of such bond or covenant, and notice and permission, enter judgment against them for the amount so recovered, and costs.[235] This rule is founded upon the principle that the action, under such circumstances, is in substance against the indemnitor, the real party in interest, and that he has in that action an opportunity to make any defense that may exist.[236] Notice not being

229 Dane v. Gillmore, 51 Me. 544.

230 Work v. Kinney, 8 Idaho, 771, 71 Pac. 477.

231 Breckenridge Mercantile Co. v. Bailif, 16 Colo. App. 554, 66 Pac. 1079; Blyth v. People, 16 Colo. App. 526, 66 Pac. 680.

232 City of Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140.

233 City of Seattle v. Northern Pacific Ry. Co., 47 Wash. 552, 92 Pac. 411.

234 American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282.

235 Cal. Code Civ. Proc., § 1055 as amended 1907. See Tunstead v. Nixdorf, 80 Cal. 647, 22 Pac. 472.

236 Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

given, the judgment is only *prima facie* evidence of the amount the sheriff is entitled to recover.[237] Where, therefore, the indemnitor has been so notified, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as the real party defendant to the first action.[238]

Under the Montana code providing that a judgment against the indemnified person shall be conclusive against the indemnifying person, if he had reasonable notice of the action, and otherwise shall be presumptive only, the burden is on the indemnifying person to rebut the presumption.[239]

§ 4932. **Remedy.**—When an indemnity bond is given to a sheriff to hold him harmless, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not.[240]

§ 4933. **Sale under execution.**—A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution, in violation of an order enjoining its sale, is void, because an unlawful contract.[241]

§ 4934. **Trespass.**—An agreement to indemnify a party for a willful trespass about to be committed is void, as against public policy.[242]

§ 4935. **Void contract.**—An agreement to indemnify a person against an act thereafter to be done is void, if the act be known by such person at the time of doing it to be unlawful.[243] But an agreement to indemnify against an act already done is valid, even though the act was known to be wrongful, unless it was a felony.[244]

237 Whinnery v. Wiley, 38 Colo. 203, 88 Pac. 171.

238 Carroll v. Nodine, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

239 City of Butte v. Cook, 29 Mont. 88, 74 Pac. 67; Mont. Rev. Codes, § 5654; Mont. Civ. Code, § 3586.

240 White v. Fratt, 13 Cal. 521.

241 Buffendeau v. Brooks, 28 Cal. 641.

242 Stark v. Raney, 18 Cal. 622.

243 Cal. Civ. Code, § 2773.

244 Cal. Civ. Code, § 2774.

§ 4936. **Consideration.**—In Montana, the promise of a lessor to the lessee to protect him against the suit of an adjoining owner is not binding unless supported by some other consideration than the covenants of the lease.[245]

§ 4937. **Marshal's bond.**—In an action on a marshal's bond, it is not necessary to aver that the penalty has not been paid. The usual averment of the breach of the condition is sufficient.[246] To an action on a marshal's bond, for taking insufficient security on a replevin bond, a plea in bar that a levy was made on goods and chattels, lands and tenements, sufficient to satisfy the judgment, is good.[247]

§ 4938. **Official bond—Ministerial duties.**—It is only for a breach of his duty in the execution of his ministerial offices, that the sheriff and his sureties are liable upon his bond.[248] He should not be required to come prepared to justify his whole official conduct.[249]

§ 4939. **Official bond—Misjoinder of causes of action.**—A cause of action on an official bond against the principal and his sureties cannot be united with a cause of action for damages against the principal alone.[250]

§ 4940. **Official bond—Non-payment of money.**—Declaring on a sheriff's bond for the non-payment of money received by him for military fines, it is not necessary to name who paid the money to him or issued the warrants on which it was collected; a reference to the statute makes the breach certain enough.[251]

§ 4941. **Official bond—Notice.**—No averment of notice to the defendant is requisite in the complaint, where the matters assigned as breaches lie as much in the knowledge of one party as the other.[252]

245 McMillan v. Frank, 30 Mont. 61, 75 Pac. 685.

246 Sperring v. Taylor, 2 McLean, 362, Fed. Cas. No. 13235. Compare Hazel v. Waters, 3 Cranch C. C. 420, Fed. Cas. No. 6283.

247 Sedam v. Taylor, 3 McLean, 547, Fed. Cas. No. 12608.

248 South v. State, 18 How. 396, 15 L. Ed. 433.

249 People v. Brush, 6 Wend. 454; People v. Russell, 4 Wend. 570.

250 State v. Kruttschnitt, 4 Nev. 178.

251 People v. Brush, 6 Wend. 454.

252 People v. Edwards, 9 Cal. 292. See Tomlinson v. Rowe, Hill & D. Supp. 410.

§ 4942. **Receiver's bond.**—The sureties on a receiver's bond are only bound from the date of the bond; and if the bond bears date some months after the official term of the receiver commenced, the declaration is defective if it omits to show the receipt of the money after the date of the bond and before the expiration of his official term. A declaration which charged a receiver of public moneys with not paying over moneys which came into his hands on the day after his bond expired is bad on demurrer.[253]

§ 4943. **Request or demand.**—Where a county treasurer has embezzled and converted money of the county, it is not necessary for the supervisors to make a request or demand before a suit on his bond.[254]

§ 4944. **Retaining commissions.**—In an action on an official bond of a county treasurer, if the complaint avers only a breach, by failure of the treasurer to keep the money in the county safe, and by withdrawal of the same and conversion to his own use, a recovery cannot be had for a failure of the treasurer to pay into the treasury his commissions retained on payments made to the state.[255]

§ 4945. **Retaining money.**—An averment in a complaint on a county treasurer's official bond, that he received money belonging to the county and retains it, and refuses to deliver it to his successor in office, is a sufficient averment of a breach of its conditions.[256]

§ 4946. **Treasurer's bond.**—A complaint in an action against a treasurer for a failure to pay his successor money which came into his hands should allege that it remained in his hands at the expiration of his term.[257] And where the treasurer has paid over to his successor the amount found due against him, he is still liable for all moneys actually received by him as such treasurer, and by mistake not charged to him in such accounting.

253 United States v. Spencer, 2 McLean, 405, Fed. Cas. No. 16368.

254 Supervisors v. Van Campen, 3 Wend. 48.

255 Sacramento County v. Bird, 31 Cal. 67.

256 Mendocino County v. Morris, 32 Cal. 145.

257 Pickett v. State, 24 Ind. 366.

The liability of the sureties continues till he has rendered a just and true account of such moneys.[258]

Where the complaint shows that the defendant received money as treasurer, and failed to deliver it to his successor in office, it is not necessary to allege that the money belonged to the county whose officer he was.[259] In an action by a county against the sureties on an official bond of the county treasurer, to recover money for which the treasurer was in default, an averment that the county commissioners complied with all the requirements and conditions of said bond, and the requirements of all acts of the legislature pertaining to the official bonds of the county officers, is sufficient, and the complaint need not specifically aver a performance of the several acts required to be performed by the county commissioners.[260]

§ 4947. Sheriff's bond—Trespass.—A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the sheriff's malfeasance.[261] In trespass for taking goods, against a sheriff, who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversation between himself and the plaintiff. On cross-examination, he stated that "he was deputy sheriff, and under bonds to the sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest. It was held that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make him interested.[262] If the complaint in an action against a sheriff and his official bondsmen alleges only a cause of action against him as a trespasser, and against his sureties as signers of the bond, and not otherwise, there is a misjoinder of causes of action. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which merely avers that the sureties are the securities on his official bond, and that the same was duly filed, executed, and recorded, does not state a

258 Jefferson County v. Jones, 19 Wis. 51.

259 Crook County v. Bushnell, 15 Or. 169, 13 Pac. 886.

260 White Pine County v. Herrick, 19 Nev. 34, 5 Pac. 276.

261 Ghirardelli v. Bourland, 32 Cal. 585.

262 Towdy v. Ellis, 22 Cal. 650.

cause of action on the bond.[263] In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property.[264]

§ 4948. **Bond of executor or administrator.**—In an action under section 1571 of the California Code of Civil Procedure, to recover on the bond of an executor or administrator, for his neglect or misconduct in the proceedings in relation to a sale of the real estate of the deceased, the complaint must show that the plaintiff has been actually damaged by the sale. And where the complaint contains no averments with respect to any proceedings in the probate court subsequent to the confirmation of the sale, and affirmatively shows that the land was sold for its full value, no damage is alleged, and the plaintiff will be left to his remedy in the probate court.[265]

An action cannot be maintained against an administrator and his sureties until there has been a final accounting in the probate court and a failure to pay the amount found due.[266] But in a case of an administrator or guardian absconding or dying, the proper method in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties.[267]

§ 4949. **Executor's bond—Extent of liability.**—Sureties on the executor's bond are liable for a personal debt which he owes to the estate, though the debt was not known to them, nor the fact that he was insolvent at the time they signed the bond.[268] A minor heir has a right of action against the administrator and his bondsmen for damages sustained on account of failure of the administrator to bring suit to obtain certain lands within the period of the statute of limitations.[269] The sureties are bound to the extent that their principal is bound.[270]

263 Ghirardelli v. Bourland, 32 Cal. 585.

264 Hunt v. Robinson, 11 Cal. 262.

265 Weihe v. Statham, 67 Cal. 245, 7 Pac. 673.

266 Reed v. Hume, 25 Utah, 248, 70 Pac. 998; Greer v. McNeal, 11 Okla. 526, 69 Pac. 893.

267 Reither v. Murdock, 135 Cal. 197, 67 Pac. 784.

268 United Brethren etc. v. Akin, 45 Or. 247, 77 Pac. 748, 66 L. R. A. 654.

269 Jenkins v. Jensen, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

270 Greer v. McNeal, 11 Okla. 526, 69 Pac. 893.

Where one surety on an administrator's bond dies, and a new bond is filed, though the order of the court recites that the second bond is introduced as a substitute for the former one, if it does not expressly order that it be substituted, but merely orders that it be accepted, the second bond is merely cumulative, and the sureties on the first bond are liable.[271]

Under section 1543 of the Civil Code of California, declaring that a release of one joint debtor does not extinguish the obligation of any of the others, an order releasing a surety on an administrator's bond, upon application of the heirs at law, does not release a co-surety, though section 1403 of the Code of Civil Procedure authorizes the release of a surety only on his own application.[272] The liability of the sureties on an administrator's bond cannot be terminated by the filing of a void bond as a substitute for the original one.[273]

§ 4950. **Interest.**—The fact that a complaint does not contain a demand for interest upon funds of the estate in the hands of the administrator, who has failed to pay, does not prevent the court from allowing interest in its decree.[274]

§ 4951. **Cross-complaint.**—A cross-complaint of a surety alleging that the administrator died seised of real estate, and praying that the same may be sold and applied to the debts of plaintiff, is no bar to recovery by plaintiff on the pleadings.[275]

§ 4952. **Guardian's bond.**—It is held by the Colorado court, that it is not essential to a recovery against sureties on a guardian's bond, in an action against them on behalf of the minors for breaches of its conditions by the guardian, that the guardian be made a party to the action, or that a judgment should first have been obtained against him which he had failed to satisfy. The instrument itself stipulates for the faithful discharge by the guardian of the obligations imposed on him by statute, which provides that it may be put in suit against all or any one of the obligors to the use and benefit of any person entitled by breach thereof. Proceedings for accounting or orders of court need not

271 Elizalde v. Murphy, 146 Cal. 168, 79 Pac. 866.

272 Id.

273 Id.

274 Rutenic v. Hamakar, 40 Or. 444, 67 Pac. 196.

275 Conway v. Carter, 11 N. Mex. 419, 68 Pac. 941.

precede an action for a breach of the bond.[276] If the guardian dies before settlement of his accounts, a single action may be maintained against the sureties on his bond and the administrator of his estate, first to settle his account, and then for judgment for the amount due against the sureties, where the bond is joint and several.[277]

§ 4953. **Guardian's bond—Complaint.**—If the complaint in an action by a ward against the administrator of the estate of her guardian and the sureties on his bond alleges the appointment of the guardian, the giving of the bond, and its conditions, and that a certain sum came into his possession for which he never accounted or paid for her benefit, and prays an accounting with the administrator and judgment against the sureties for the amount found due, it is sufficient without an allegation that the administrator has not paid the sum, especially in absence of a special demurrer.[278] Nor is it necessary, in a similar case, to aver that a second guardian or the administrator of the first guardian had not had a final accounting and complied therewith.[279]

§ 4954. **Guardian's bond—Time to sue.**—The three years from "discharge or removal" of a guardian, in which time suit may be brought on his bond, applies to a removal by order of court, and not to a termination of the guardianship by the coming of age of the ward.[280] An action on a guardian's bond, brought before expiration of the sixty days within which an appeal might be taken from the order of the probate court settling the final account, is prematurely brought.[281]

§ 4955. **Defense—Liability.**—Where, upon the dissolution of two copartnerships, the defendant executed an agreement to indemnify and keep L. (one of the partners) "harmless from and against all debts due and owing from the late firms," it was held

276 Gebhard v. Smith, 1 Colo. App. 342, 29 Pac. 303.

277 Cal. Code Civ. Proc., § 383; Zurfluh v. Smith, 135 Cal. 644, 67 Pac. 1089.

278 Zurfluh v. Smith, 135 Cal. 644, 67 Pac. 1089.

279 McDonald v. People, 29 Colo. 503, 69 Pac. 703.

280 Cal. Code Civ. Proc., § 1805; Cook v. Ceas, 143 Cal. 221, 77 Pac. 65.

281 Cal. Code Civ. Proc., § 1049; Cook v. Ceas, 143 Cal. 221, 77 Pac. 65.

that under this clause of the agreement the covenantor was not liable until something had been paid by L.[282]

§ 4956. **Negligent defense.**—Where one holding an indemnity against all actions and all damage, by reason of a certain claim, is sued thereon, and having a probably ample defense, undertakes to defend it without calling on the obligor in the indemnity, and omits to set up such defense, and by utter neglect fails in the suit, he cannot afterwards enforce the indemnity.[283]

§ 4957. **Defense—Release.**—Defendant made a valid agreement with three partners not to do business in a certain place; two of said partners sold out to the third and left said place; said third resold the business to defendant and released said agreement. It was held that the other two partners could not sue for a breach, as the agreement was incident only to the business.[284]

§ 4958. **Defense—Discharge by offer of surety.**—Where an offer is made by one of the sureties on an attachment bond to return the property attached, all of which is in his possession, a refusal to accept the offer discharges all liability on the bond.[285]

Whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same the sureties are discharged from their obligation on the undertaking.[286] Such tender is equivalent to payment or release by said plaintiff. The sureties are likewise discharged where the principal tenders to the plaintiff the full amount of his debt and costs, and the plaintiff refuses to receive the tender.[287]

§ 4959. **Defense—Assignment.**—Where a clerk of a court was sued upon his official bond, and the breach alleged was that he had surrendered certain goods without taking a bond with good and sufficient securities, and the plea was that the bond which had

282 In re Negus, 7 Wend. 499; Wright v. Whiting, 40 Barb. 235.

283 Bridgeport Fire & Marine Ins. Co. v. Wilson, 7 Bosw. 427.

284 Gompers v. Rochester, 56 Pa. St. 194.

285 Rider v. Thomas Crowe Machinery Co., 36 Colo. 366, 85 Pac. 696.

286 Hayes v. Josephi, 26 Cal. 535.

287 Curiac v. Packard, 29 Cal. 194.

been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond, this plea was sufficient, and a demurrer to it was properly overruled.[288]

§ 4960. **Defense — Avoidance.** — Matters in avoidance of a sealed instrument must be pleaded specially.[289] A plea which alleges that the bond sued on was obtained fraudulently; that its consideration was the price of a chattel sold at auction, on which the seller, in order to induce bids by others, bid five hundred dollars, well knowing that the said chattel was unsound, and that the defendant offered to return the chattel, is good.[290] One securing an injunction restraining a minor from selling property cannot defend an action on the bond on the ground that no order of court was obtained for the sale, or that the property was being held to defraud creditors of the true owner.[291]

§ 4961. **Defense—Consideration controverted.**—The law imports a consideration to a sealed instrument from its seal. At common law a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The California statute has not altered the presumption of a consideration, which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer.[292] If the defendant relies upon a want of consideration, he must plead it.[293]

§ 4962. **Defense—Date of payment.**—A bond for the performance of a duty, and for an indemnity, is not within the provision of that statute which allows the plea of payment after the day.[294] A plea of payment of part of a bond, and acceptance in full, is good.[295]

§ 4963. **Defense—Want of jurisdiction.**—No action can be brought upon a bond conditioned to satisfy a judgment in a court

288 Bevans v. Ramsey, 15 How. 179, 14 L. Ed. 652.

289 Greathouse v. Dunlap, 3 McLean, 303, Fed. Cas. No. 5742.

290 Casey v. Smales, 4 Mo. 77.

291 Slack v. Stephens, 19 Colo. App. 538, 76 Pac. 741.

292 McCarty v. Beach, 10 Cal. 461; Wills v. Kempt, 17 Cal. 98. Cal. Civ. Code, § 1629, abolishes all distinctions between sealed and unsealed instruments.

293 County of Montgomery v. Auchley, 92 Mo. 126, 4 S. W. 425.

294 Hart v. Meeker, 1 Sandf. 623.

295 Cal. Civ. Code, § 1524; Dederick v. Leman, 9 Johns. 333.

that has not jurisdiction;[296] but want of jurisdiction is no defense to an action on an injunction bond.[297]

§ 4964. **Defense—Defective answer.**—A general denial of defendant's claim of ownership in a suit on an attachment delivery bond for a redelivery of the property is not sufficient to enable plaintiff to prove his lien as a purchaser in good faith by virtue of his attachment.[298] In an action on an undertaking executed by and on behalf of the defendants, in a judgment in ejectment, conditioned to pay the value of the use and occupation of the premises pending the appeal, an answer setting up that pending the appeal the plaintiff conveyed a part of the premises to one or more of the defendants in the judgment, and has leased portions to other parties, does not state facts sufficient to constitute a defense. Such answer failing to show when the conveyance was made, it will be deemed not to have been made until the last day the appeal was pending.[299] Such answer is also defective in not stating that the use and occupation of the portions of the premises conveyed and leased was of any value.[300] In an action on an undertaking given in suing out an injunction, the defendants cannot object by way of defense that the business which they enjoined was a public nuisance.[301] Conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and in a suit thereon the plaintiff would be entitled to the full amount.[302] Insanity is not a defense on an injunction bond, it not appearing that plaintiff knew the fact.[303] A defendant cannot plead that the only evidence of a breach of bond consists in a certain paper, and then proceed to show that such paper does not prove a breach. He is not allowed to make the case turn on his allegation concerning the proofs of his adversary.[304] An answer in a suit on an injunction bond which pleads a settlement of the original suit, which by its terms was limited to such controversies as then existed, is no defense to an

296 Robinson v. Bonjour, 16 Colo. App. 458, 66 Pac. 451.

297 City of Boise v. Randall, 8 Idaho, 119, 66 Pac. 938.

298 Flegel v. Koss, 47 Or. 366, 83 Pac. 847.

299 De Castro v. Clarke, 29 Cal. 11.

300 De Castro v. Clarke, 29 Cal. 11.

301 Cunningham v. Breed, 4 Cal. 384.

302 Swain v. Grave, 8 Cal. 549.

303 Behrens v. McKensie, 23 Iowa, 333, 92 Am. Dec. 428.

304 United States v. Girault, 11 How. 22, 13 L. Ed. 587.

action on the injunction bond, the cause of action upon which subsequently arose, and a motion to strike out the answer is proper.[305]

§ 4965. **Defense—Duplicity.**—In an action on a bond for the payment of certain sums of money at Amsterdam, the plea was that the money was paid. Replication, that the sum paid was not accepted in satisfaction by the agents of the plaintiff; that the sum was not paid on the day appointed; and that damages and interest due for non-payment were not paid. The pleas were bad for duplicity.[306] In an action against a surety, one plea alleged a discharge of defendant by the neglect of the plaintiff to sue the principal upon notice so to do; another plea set up a discharge owing to an extension of the time of payment. It seems that the pleading was bad for duplicity.[307]

§ 4966. **Defense—False representations.**—A false representation made by the principal to a surety on a bond before his signing the same, that a party whose name appeared thereon as surety had signed said bond, will discharge said surety.[308]

§ 4967. **Defense—Former action.**—In an action upon a sheriff's official bond, the pendency of a former action upon the same bond may be pleaded in bar; and if found by the verdict, the plea is good.[309] This, however, was under a special statute authorizing but one suit on an official bond, and giving to all persons having several interests the right to join in that suit, or to make use of the judgment recovered if their cause of action accrued after the judgment.

§ 4968. **Defense—Joint plea.**—A plea which is entire cannot be good in part and bad in part, an entire plea not being divisible; and consequently, if the matter pleaded be insufficient as to one of the parties, it is so *in toto*. On a joint plea, therefore, of *non est factum* to a bond, if the bond is the deed of any of the de-

305 Silcox v. Lang, 78 Cal. 118, 20 Pac. 297.

306 United States v. Gurney, 1 Wash. C. C. 446, Fed. Cas. No. 15271; affirmed, 4 Cranch, 338, 2 L. Ed. 638.

307 Taylor v. Davis, 38 Miss. 493. See, however, Cal. Code Civ. Proc., § 441; Bell v. Brown, 22 Cal. 678; Buhne v. Corbett, 43 Cal. 264.

308 Chamberlin v. Brewer, 3 Bush, 561.

309 Commonwealth v. Cope, 45 Pa. St. 161.

fendants, the plea is bad as to all, and the plaintiff is entitled to judgment.[310]

§ 4969. **Defense—Novation.**—Taking a note from the obligor in a bond payable in terms at the same time as the bond, and for the same debt, discharges the sureties on the bond, because the days of grace have to be added before the note is payable, and so time is given to the principal.[311] Where an answer contains an allegation of alteration in an instrument, it must state that such alteration was made with the knowledge or consent, or by the authority, of the plaintiff.[312] A material alteration will not invalidate a written instrument when made by a stranger to the contract.[313] If plaintiff brings suit upon a second bond given to the sheriff for the release of attached property, in lieu of a prior bond, such action is a ratification of the sheriff's act, and estops plaintiff from suing on the first bond.[314]

§ 4970. **Defense—Positive averments—Essential allegations.**—Every plea in discharge or avoidance of a bond should state positively and in direct terms the matter in discharge or avoidance, and not leave the defense relied on to be inferred.[315] A plea seeking to avoid a bond for being illegally taken *in colore officii* should specially state all the facts which show that illegality.[316] In an action upon an undertaking which was given upon issuing an injunction, and was conditioned to pay all damages sustained thereby, "if the court shall finally decide that the plaintiff (in the injunction suit) was not entitled thereto," if the complaint avers that judgment has been rendered in the injunction suit in favor of the defendants, but does not disclose the ground of the judgment, nor aver in terms that the court has decided that the plaintiff therein was not entitled to the injunction, an answer

310 United States v. Linn, 1 How. 104, 11 L. Ed. 64.

311 Appleton v. Parker, 15 Gray, 173.

312 Humphreys v. Crane, 5 Cal. 173.

313 Murray v. Peterson, 6 Wash. 418, 33 Pac. 969; Gleason v. Hamilton, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210.

314 Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156.

315 United States v. Bradley, 10 Pet. 343, 9 L. Ed. 448. Compare Mayor of Alexandria v. Moore, 1 Cranch C. C. 440, Fed. Cas. No. 185; Wood v. Franklin, 3 Cranch C. C. 115, Fed. Cas. No. 17946; Tucker v. Lee, 3 Cranch C. C. 684, Fed. Cas. No. 14221.

316 United States v. Sawyer, 1 Gall. 86, Fed. Cas. No. 16227.

merely denying that it has been so decided, and the present plaintiff has been damnified, and that defendant is indebted to him, is not irrelevant, and raises a material issue.[317] Nor is it shown to be sham by an affidavit stating that the complaint in the injunction suit was dismissed, but not disclosing on what ground.

§ 4971. **Defense—Replevin.**—In an action on the bond, the fact that defendant brought his action before an incompetent tribunal is no defense, and the plea that the title of property so replevied is in him is bad.[318] Where the defendant in a replevin suit failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which was paid, it was held that the payment of the judgment as taken was a complete discharge of plaintiffs' sureties on the undertaking.[319]

§ 4972. **Defense on attachment bond.**—It is no defense that the damage might have been avoided by putting up the statutory bond for the release of attached property.[320] The recitals in a bond to release attached property are conclusive, and the contrary facts cannot be pleaded and proved as a defense in suit on the bond.[321]

§ 4973. **Defense—Seals not affixed.**—A plea alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with the knowledge or by the authority or direction of the plaintiffs, is not sufficient.[322]

§ 4974. **Defense—Estoppel of sureties.**—A subcontractor and surety on bond to protect the owner from liens cannot defend and at the same time enforce a lien of his own, because it is contrary to his obligation under the bond of indemnity.[323] It is true that a surety may sue to enforce his own mechanic's or materialman's lien, but the obligee may assert such surety's liability under the

317 See McHenry v. Hazard, 45 Barb. 657.
318 McDermott v. Isbell, 4 Cal. 113.
319 Chambers v. Waters, 7 Cal. 390.
320 McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 Pac. 175.
321 Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.
322 United States v. Linn, 1 How. 104, 11 L. Ed. 64.
323 Todd v. Fransvog, 44 Wash. 520, 87 Pac. 831.

bond as a set-off or counterclaim.[324] Sureties in an undertaking to release attached property are estopped by the recitals therein from asserting that no property was levied on by virtue of the writ.[325]

§ 4975. **Defense—Set-off.**—In an action on an appeal-bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they have purchased and now hold against J. R. D. and J. T. R., and eleven other defendants in that suit, upon the ground that J. R. D. and J. T. R. are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset are insolvent, it was held that the set-off cannot be allowed; and further, that the matter set up in the answer is not a defense, legal or equitable, in any other sense than as being purely an offset; and therefore such matter cannot be relied on as an equitable defense independent of and beyond the right of offset given by the Practice Act.[326]

§ 4976. **Defense—Counterclaim.**—A counterclaim for damages for the wrongful issuance of an attachment on defendant's property cannot be pleaded in answer to the complaint in the original action on dissolution of the attachment, under the code provision that a counterclaim must exist and arise out of the same transaction sued on, or be connected with the subject of the action.[327]

§ 4977. **Defense—Void contract.**—Whenever a contract or obligation under seal is void *ab initio*, the general plea of *non est factum* is proper. Where it is merely voidable, a special plea setting forth the special circumstances is necessary.[328] On the plea of *non est factum* in an action on a bond, the present validity of the instrument is in issue, and every circumstance that goes to show that it is not the deed or contract of the party is provable.[329]

324 Prescott Nat. Bank v. Head (Ariz.), 90 Pac. 328.

325 Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

326 Duff v. Hobbs, 19 Cal. 646.

327 Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 Pac. 801.

328 Bull. N. P. 172; Somers v. Skinner, 16 Mass. 348; Bottomley v. United States, 1 Story C. C. 135, Fed. Cas. No. 1688.

329 Speake v. United States, 9 Cranch, 28, 3 L. Ed. 645; American Button-Hole etc. Co. v. Burlack, 35 W. Va. 647, 14 S. E. 319.

FORMS—ACTIONS ON INDEMNITY BONDS AND UNDERTAKINGS.

§ 4978. Complaint on bond for payment of money only.

Form No. 1374.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [state, not the penalty, but the amount named in the condition] on the . . . day of . . . , 19.. , with interest from, [etc.; or as follows: . . . dollars thereof on the . . . day of . . ., 19.. , and . . . dollars thereof on the . . . day of . . . , 19.. , with interest on each of said sums from, etc., or otherwise, according to the condition].

II. That no part of the same has been paid, [except the sum of, etc.].

Wherefore, the plaintiff demands judgment against the defendant for the sum of [state the amount due].

§ 4979. Complaint on undertaking given in action—Short form.

Form No. 1375.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.. , at . . ., the defendant made an undertaking, a copy of which is hereto annexed as a part of this complaint, marked "Exhibit A."

II. That thereafter, at . . ., judgment was duly given in the action therein mentioned against the [plaintiff] therein, for the sum of . . . dollars, no part whereof has been paid.

III. That on the . . . day of . . . , an execution thereon against the property of . . . , was issued to the sheriff of said county, which was, on the . . . day of . . . , 19.. , returned wholly unsatisfied.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking.]

§ 4980. Complaint on an undertaking for costs of appeal.

Form No. 1376.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., judgment was rendered by the superior court of the county of . . ., state aforesaid, in favor of the above-named plaintiffs, against one C. D., for the sum of . . . dollars; and that on the . . . day of . . ., 19.., the said C. D. appealed to the supreme court of said state from the said judgment.

II. That upon said appeal the defendants made and filed with the clerk of said court, for the use of these plaintiffs, their written undertaking and justification therein, of which the following is a copy: [Copy undertaking.]

III. That on the . . . day of . . ., 19.., the judgment appealed from was by the said supreme court affirmed, and the sum of . . . dollars, costs and damages on the appeal, was awarded against the appellant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4981. Complaint on undertaking for costs.

Form No. 1377.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore one M. N. commenced an action in this court [or, in the . . . court] against this plaintiff, wherein such proceedings were had as that on the . . . day of . . ., 19.., the defendants above named executed and duly filed with the clerk of said court, for the benefit of this plaintiff an undertaking whereby they undertook and agreed [set forth conditions of undertaking; or, an undertaking of which a true copy is annexed hereto, made part of this complaint and marked "Exhibit A."]

II. That such proceedings were thereafter had in said action as that this plaintiff, on the . . . day of . . ., 19.., recovered judgment therein against the said M. N. for . . . dollars, his costs and expenses of defending said action.

III. That on the . . . day of . . ., 19.., at . . ., this plaintiff duly demanded payment of the said judgment from the said M. N. but no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 4982. Complaint for costs and damages on an arrest.

Form No. 1378.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore an action was commenced in the superior court of the county of . . ., state aforesaid [or otherwise state the court], against this plaintiff, wherein the said A. B. made application to the Hon. C. D., judge of said court, for an order of arrest against this plaintiff, whereupon the defendants, on the . . . day of . . ., 19 . ., at . . ., executed and filed with the clerk of said court, for the benefit of this plaintiff, pursuant to law, a written undertaking, of which the following is a copy: [Copy undertaking.]

II. That thereupon, pursuant to said application and undertaking, an order was made by the judge of said court for the arrest of this plaintiff, and thereby the said A. B. required the sheriff of . . . county to arrest this plaintiff, and hold him to bail in the sum of . . . dollars.

III. That this plaintiff was, on the . . . day of . . ., 19. . , arrested by the sheriff of said county, under said order, and was unjustly detained and deprived of his liberty thereunder for the space of . . . days, to his damage in the sum of . . . dollars.

IV. That such proceedings were afterwards had in said action that this plaintiff, on the . . . day of . . ., 19. . , recovered a judgment therein, which was rendered by said court against the defendant A. B., for . . . dollars.

V. That on the . . . day of . . ., 19. . , at . . ., this plaintiff demanded payment of said judgment and damages from the defendant.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4983. Complaint on undertaking, on release from arrest.

Form No. 1379.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., under an order of arrest duly granted by A. B., a judge of the . . . court, against one C. D., in an action brought in the said court by the plaintiff herein against the said C. D., the said C. D. was arrested by the sheriff of the county of . . .

II. That on the . . . day of . . ., 19. . , at . . ., the defendants undertook, in the sum of . . . dollars, that the said C. D. should, if released, render himself at all times amenable to the process of the court during the pendency of the said action, and to such as might be issued to enforce the judgment therein, a copy of which undertaking is hereto annexed, marked "Exhibit A."

III. That thereupon the said C. D. was released.

IV. That on the . . . day of . . ., 19. . , judgment was rendered for the plaintiff in the said action, for . . . dollars.

V. That on the . . . day of . . ., 19. . , execution was issued against the property of the said C. D., under the said judgment, but the sheriff has made return that no property was found.

VI. That on the . . . day of . . ., 19. . , execution was issued against the person of the said C. D., under the said judgment, but the sheriff has made return that he could not be found.

VII. That the said judgment has not been paid, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking.]

§ 4984. Complaint on undertaking for costs and damages on attachment.

Form No. 1380.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore an action was commenced in this court by the defendant, A. B., for the recovery of money, against this plaintiff, wherein the said A. B. made application to the clerk of the said court for a writ of attachment against the property of this plaintiff, whereupon the defendant, on the . . . day of . . ., 19. . , at . . ., executed and filed with the clerk of said court, for the benefit of this plaintiff, pursuant to section 539 of the Code of Civil Procedure, a written undertaking, of which the following is a copy: [Copy of the undertaking.]

II. That pursuant to said application and undertaking, the clerk of said court issued a writ of attachment, directed to the sheriff of said county, whereby the said sheriff was required to attach and safely keep sufficient property of this plaintiff to satisfy the demand of the said A. B. in said action, to-wit, the sum of . . . dollars, together with costs and expenses.

III. That at the time of the issuing of said attachment, this plaintiff was engaged as a merchant in selling hardware at wholesale, at No. . . . street, in the city of . . . , in said county; that the sheriff of said county, pursuant to said writ of attachment, entered said store and removed the property of this plaintiff, and thereby the business of this plaintiff was utterly broken up, and the goods attached became unmarketable and useless, and this plaintiff's credit became thereby greatly injured, to his damage in the sum of . . . dollars.

IV. That such proceedings were had in the suit aforesaid that this plaintiff, on the . . . day of . . . , 19.. , recovered judgment therein, which was rendered by said court against the said A. B., plaintiff therein, for the sum of . . . dollars, his costs of defending said action.

V. That on the . . . day of . . ., 19.. , at . . ., this plaintiff demanded payment of said judgment from said A. B.

VI. That he has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 4985. Complaint on undertaking given to procure discharge of attachment.

Form No. 1381.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , an attachment against the property of C. D. was issued out of the . . . court, by the clerk thereof, in an action commenced by A. B., the plaintiff herein, against the said C. D., the defendant herein, to recover [state what].

II. That afterwards, on the . . . day of . . ., 19.. , at . . ., the said C. D. appeared in said action, and applied for a discharge of said attachment, and that the defendants herein, E. F. and G. H., thereupon executed and delivered to this plaintiff a written undertaking pursuant to law, a copy of which is hereto annexed and made a part of this complaint, marked "Exhibit A."

III. That upon delivery of said undertaking the said attachment was discharged and the property was released, and that subsequently, on the . . . day of . . ., 19.. , said plaintiff recovered judgment against the said C. D., which was rendered in said action, for . . . dollars, damages and costs, which judgment was entered

and docketed in the office of the clerk of . . . county, on the . . . day of . . ., 19. . , and that said judgment has not been paid.

IV. That on the . . . day of . . ., 19. . , this plaintiff demanded of the defendants herein payment of said judgment, which was by each and all of them refused.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking.]

§ 4986. Complaint on an undertaking given in claim and delivery.

Form No. 1382.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore this plaintiff commenced an action in the . . . court, against A. B., to recover possession of specific personal property.

II. That in the course of said action such proceedings of claim and delivery under and pursuant to the statute were had, that on the . . . day of . . ., 19. . , the defendants made and delivered to the sheriff for the use of this plaintiff, pursuant to the statute, their written undertaking, of which the following is a copy: [Copy of the undertaking.]

III. That the personal property referred to in said undertaking was delivered [or, released] to the said A. B., defendant in said action, pursuant to said undertaking, and to a requisition of said A. B., defendant in said action, made pursuant to law, and said undertaking was thereupon delivered to this plaintiff.

IV. That such proceedings were afterwards had, that on the . . . day of . . ., 19. . , a verdict in the superior court of the county of . . . was rendered against the said A. B., wherein the value of the said property was found to be . . . dollars, whereupon judgment was rendered against A. B., the defendant therein, that the plaintiff recover possession of said property, or the sum of . . . dollars, in case a delivery could not be had.

V. That the defendant has not returned said property, nor otherwise paid or satisfied said judgment.

VI. [State demand, where that is necessary.]

VII. That this plaintiff thereafter caused execution to be issued on said judgment against the said defendant, A. B., which execution has been returned wholly unsatisfied.

VIII. That the defendant has not paid said judgment, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 4987. Complaint on undertaking given in injunction.

Form No. 1383.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , in an action brought by C. D. against this plaintiff, an injunction issued out of this court, was served on this plaintiff, enjoining him from [state effect of injunction].

II. That upon the issuing of the said injunction, the defendants gave an undertaking required by section 529 of the Code of Civil Procedure [or, by law], of which the following is a copy: [Copy of undertaking.]

III. That such proceedings were had in the said action that it was finally decided by the court, and thereby adjudged, that the said C. D. was not entitled to the said injunction.

IV. That the damages sustained by this plaintiff, by reason of the said injunction, amounted to the sum of . . . dollars, and interest thereon from the . . . day of . . . , which the court on that day awarded to this plaintiff.

V. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 4988. Complaint on bond or undertaking, condition only set forth.

Form No. 1384.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [state the penalty].

II. That said obligation was upon the express condition thereunder written, that if [etc.; set forth the words of the condition], the said obligation was to be void; otherwise, to remain in full force.

III. [Allege breaches as in other cases.]

[DEMAND OF JUDGMENT.]

§ 4989. **Complaint on arbitration bond—Refusal to comply with award.**

Form No. 1385.

[TITLE.]

The plaintiff complains, and alleges:

I. That in consideration of certain questions in difference between plaintiff and defendant, and of a certain bond executed by this plaintiff to the defendant, the defendant, on the . . . day of . . ., 19.., at . . ., made and delivered to the plaintiff an undertaking, conditioned to abide the award of . . . upon said question of difference; a copy of which undertaking is hereto annexed, marked "Exhibit A."

II. That said . . . undertook the arbitration thereof on the . . . day of . . ., 19.., at . . ., and duly published their award in writing upon the matter submitted, and delivered the same to the parties, and thereby awarded that the defendant should [state terms of the award], a copy of which award is hereto annexed as a part of this complaint, marked "Exhibit B."

III. That the plaintiff duly performed all the conditions of said bond and of said award on his part.

IV. That on the . . . day of . . ., 19.., notice of said award was given to the defendant.

V. That the defendant has not [state the breach].

[DEMAND OF JUDGMENT.]

[Annex copies of exhibits "A" and "B."]

§ 4990. **Assignment of breach for revoking arbitrator's power.**

Form No. 1386.

That thereafter, and before the matters aforesaid were finally passed upon by said arbitrator, the defendants, by writing under their hands and seals, delivered to . . . revoked the powers of the arbitrators, and notified said . . . that they would not abide by the award of said arbitration.

§ 4991. **Complaint on bond for faithful accounting of agent.**

Form No. 1387.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., it was agreed between this plaintiff and one A. B., that the said A. B. should solicit

and collect subscriptions for a [state what], and that the plaintiff should pay to the said A. B. [state terms of payment] for such service, and that the said A. B. should faithfully account to this plaintiff for all [property] intrusted to him, and should faithfully pay over all moneys collected by him under authority of said agreement.

II. That in consideration of said agreement, the defendant made and delivered to the plaintiff an undertaking in writing, under his hand and seal, conditioned for the faithful performance by said A. B. of the terms of said agreement on his part; a copy of which undertaking is hereto annexed, marked "Exhibit A."

III. That thereafter the said A. B. did solicit, collect, and receive divers sums of money, in the course of his employment under the aforesaid agreement, which sums he has failed to render up, account for, or pay over to the plaintiff.

IV. That on the . . . day of . . ., 19.., at . . ., the plaintiff requested the said A. B. to account for and pay over to the plaintiff such sums, and thereupon demanded payment from him of the same, according to the terms of said undertaking.

V. That no part thereof has been paid.

[Demand of Judgment.]

[Annex copy of "Exhibit A."]

§ 4992. Complaint on bond for fidelity of clerk.

Form No. 1388.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff being then about to employ one A. B. as a clerk, the defendant covenanted with the plaintiff, under his hand and seal, that if the said A. B. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt, or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding . . . dollars.

II. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., the said A. B. received moneys and other property, amounting to the value of . . . dollars, for the use of the plaintiff, for which he has not accounted to him.

[Demand of Judgment.]

§ 4993. Complaint on official bond.

Form No. 1389.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the . . . day of . . ., 19.., at . . ., made and delivered his bond or written obligation, sealed with his seal, of which the following is a copy: [Copy bond.]

II. [Set forth breach.]

[DEMAND OF JUDGMENT.]

§ 4994. Allegation of breach for neglect of sheriff to levy.

Form No. 1390.

That said sheriff did not execute said process, but although there was then within his county real and personal property of which he might have levied the moneys thereby directed to be levied, he neglected and refused so to do [although duly requested by plaintiff], whereby the plaintiff lost his said debt.

§ 4995. Allegation of breach for neglect to sell after levy.

Form No. 1391.

That the said sheriff by virtue thereof on the . . . day of . . ., levied on the goods of the said A. B., of the value of . . . dollars; but he neglected to advertise and sell the goods so levied on by him as aforesaid, and no part of the moneys directed to be collected on the relator's said execution has been received by the relator.

§ 4996. Allegation of breach for neglect to return.

Form No. 1392.

Who by virtue thereof, on the . . . day of . . ., levied on the goods of said A. B., of the value of . . . dollars, but although more than sixty days elapsed after its delivery to him and before this action, wholly neglected and failed to make return of said execution, and no part of the moneys directed to be collected thereby has been received by the relator.

§ 4997. Allegation of breach of treasurer's bond.

Form No. 1393.

That said treasurer between the . . . day of . . ., and the . . . day of . . ., 19.., received various sums of money, as such

treasurer, amounting to about the sum of . . . dollars [being a part of the tax raised in his county for the year . . .], and that he fraudulently and in breach of his trust converted and appropriated to his own use said sum.

§ 4998. Complaint by creditor on administration bond.

Form No. 1394.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., one [intestate] died a resident of said county of . . ., and that on or about the . . . day of . . ., 19.., A. B., [administrator], was by order of the . . . court of said county duly appointed administrator of the estate of said [intestate.]

II. That on the . . . day of . . ., 19.., the said [administrator], together with the defendants [sureties], executed and delivered to J. K., judge of the . . . court of said county, their joint and several obligation in writing, of which a true copy is attached hereto, made part of this complaint, and marked "Exhibit A."

III. That the said instrument was thereupon duly approved by the . . . judge aforesaid, and letters of administration were thereafter, and on the . . . day of . . ., 19.., issued by said court to the said [administrator], who thereupon entered upon the duties of his said trust and took possession of the property and assets of the estate of said [deceased], amounting in all to the sum of . . . dollars.

IV. That the said [intestate] was during his lifetime indebted to the said plaintiff in the sum of . . . dollars, with interest from . . ., 19.., and that on the . . . day of . . ., 19.., the said claim of this plaintiff was upon due presentation adjusted and allowed by the said . . . court of . . . county, at the sum of . . . dollars.

V. That thereafter, and on the . . . day of . . ., 19.., an order was duly made and entered by the said . . . court of . . . county, ordering and requiring the said [administrator] to pay to this plaintiff the said sum of . . . dollars; and that on the . . . day of . . ., 19.., this plaintiff demanded payment thereof from the said [administrator], but that said administrator then refused, and still refuses, to pay the same.

VI. [That thereafter, and on the . . . day of . . . , 19.. , upon application duly made therefor, the said . . . court of . . . county,

by written order, granted permission to the plaintiff to prosecute this action in his own name.]

Wherefore, the plaintiff demands judgment against the said defendants for the sum of . . . dollars, with interest from [date of demand], with the costs of this action.

E. F., Plaintiff's Attorney.

[Annex copy of "Exhibit A."]

§ 4999. Complaint by legatee on executor's bond.

Form No. 1395.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., one [testator] died a resident of said county of . . ., leaving his last will and testament duly executed, by the terms of which the said [testator] bequeathed to this plaintiff the sum of . . . dollars. [Or, a copy of which will is hereto annexed, marked "Exhibit A," and made a part of this complaint.]

II. That thereafter and on the . . . day of . . ., 19.., upon application duly made for that purpose, the said last will and testament was by the judgment and decree of the . . . court of . . . county duly admitted to probate as and for the last will and testament of the said deceased, and the defendant [executor] was by order of said court appointed executor of said last will and testament, and of the estate of said deceased.

III. That on the . . . day of . . ., 19.., the said [executor], together with the defendants [sureties], executed and delivered to J. K., judge of the . . . court of said county, their joint and several obligation in writing, of which a true copy is attached hereto, and made part of this complaint, and marked "Exhibit B."

IV. That the said instrument was thereupon duly approved by the . . . judge aforesaid, and letters testamentary were thereafter, and on the . . . day of . . ., 19.., duly issued by said court to the said [executor], who thereupon entered upon the duties of his said trust, and took possession of the property and assets of the estate of said [deceased], amounting in all to the sum of . . . dollars.

V. That said [executor] collected and received assets belonging to said estate amounting to . . . dollars, and converted the same

to his own use, and refused and neglected to account therefor to the said court, or to any court having jurisdiction thereof.

VI. That on the . . . day of . . . , 19.. , a decree of said court was duly made and entered whereby said [executor] was ordered to pay to the plaintiff the sum of . . . dollars, as his distributive share of said estate, which said sum plaintiff did demand from said executor on the . . . day of . . . , 19.. ; but said [executor] refused to pay the same or any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of exhibits.]

§ 5000. Complaint by retiring partner, on remaining partner's promise to indemnify him against damage.

Form No. 1396.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff and defendant, being partners in trade under the firm name of A. & B., dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him, on account of any indebtedness of the said firm.

II. That the plaintiff duly performed all the conditions of the said agreement on his part.

III. That on the . . . day of . . . , 19.. , a judgment was recovered against the plaintiff and defendant by one John Doe, in the . . . court of this state, upon a debt due from the said firm to the said Doe, and on the . . . day of . . . , 19.. , the plaintiff paid . . . dollars in satisfaction of the same.

IV. That the defendant has not paid the same to the plaintiff, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5001. Complaint against sureties in partner's bond of indemnity against liability.

Form No. 1397.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the plaintiff and one A. B. were copartners in business as merchants, in the city of

. . ., under the firm name of A. B. & Co., and thereafter on the same day they dissolved their connection as such copartners, and thereupon entered into an agreement in writing, of said date, duly executed and signed by them respectively, whereby it was, among other things, mutually agreed that the said A. B. should retain and keep to his sole and separate use all and singular the partnership property of every name and character, whether in action or possession, and wheresoever situated; and in consideration thereof, that he should pay and discharge the debts so due by the said firm, to the extent of . . . dollars, from his own individual resources, and to the like extent hold the plaintiff harmless and indemnified, of and from and by reason of any and all claims or liabilities due by said firm, a copy of which agreement is hereto annexed as a part of this complaint, marked "Exhibit A."

II. That the defendants, in consideration of said agreement between the said A. B. and the plaintiff, and of one dollar to each of them then paid by the plaintiff, entered into an agreement executed and signed by them respectively, a copy whereof is annexed hereto as a part of this complaint, and marked "Exhibit B," whereby they severally undertook and bound themselves to the plaintiff, for the faithful performance by the said A. B. of the covenants in said agreement, to be kept and performed on said A. B.'s part.

III. That said A. B., under his said agreement with the plaintiff, retained and kept to his sole and separate use all the partnership property of the firm; but has not, pursuant thereto, paid and discharged the debts due by said firm to the extent aforesaid; and has failed to hold this plaintiff harmless and indemnified to the like extent, of and from and by reason of any claims or liabilities due by the said firm.

IV. That at the time of the dissolution of the partnership, and of the making of the agreement aforesaid, the said firm was indebted to the firm of R. & Co., of . . ., for merchandise sold and delivered, in the sum of . . . dollars, which was then due and payable; which indebtedness formed a part of the . . . dollars, debts of A. B. & Co., and was included among such debts, to be paid by the said A. B., under his agreement aforesaid with the plaintiff; but the said A. B., although requested, would not pay R. & Co. their said demand or any part thereof.

V. That on the . . . day of . . . last, an action was commenced by the plaintiff in the [state the court], to recover upon and by

virtue of the aforesaid agreement, from the said A. B., the said amount, with interest, then due by the said A. B. & Co. to the said firm of R. & Co., amounting to . . . dollars, and interest thereon; and such proceedings were thereupon had that on the . . . day of . . ., 19.., judgment was rendered in such action in favor of the plaintiff against the said A. B. for the sum of . . . dollars, including costs; upon which judgment execution was at once issued against the said A. B. and returned wholly unsatisfied.

VI. That the plaintiff has paid . . . dollars, the amount of said judgment, and other necessary costs, disbursements, and attorney's fees therein, amounting to . . . dollars.

VII. That he has demanded from the defendants payment of the said amounts, but they have not paid the same.

[DEMAND OF JUDGMENT.]

[Annex copies of exhibits "A" and "B."]

§ 5002. Complaint of surety against principal for indemnity against liability as surety.

Form No. 1398.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, in consideration that the plaintiff would become surety for him, by executing an undertaking, of which a copy is annexed as a part of this complaint, and marked "Exhibit A," agreed with the plaintiff that he would indemnify him, and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

II. That the plaintiff, confiding in such promise of the defendant, executed and delivered such undertaking.

III. That the defendant did not indemnify the plaintiff, and save him harmless from such damages, costs, and charges; but on the contrary, the plaintiff, under a judgment, on the . . . day of . . ., 19.., rendered against him by the . . . court, at . . ., in an action brought against him upon said undertaking, paid, on the . . . day of . . ., . . . dollars to . . ., in satisfaction and discharge of said undertaking, and also necessary costs and expenses in said action and on account of said undertaking, to the amount of . . . dollars.

IV. That notice thereof was given to the defendant, and that the plaintiff duly performed all the conditions of the said agreement on his part.

V. That the defendant has not paid the same to the plaintiff.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking.]

§ 5003. Complaint of subtenant against his immediate lessor.

Form No. 1399.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the defendant held certain premises [describe them], as tenant thereof to one A. B., at a monthly rent of . . . dollars, payable by the defendant to said A. B. on the [state time of payment].

II. That on the . . . day of . . ., 19.., in consideration that the plaintiff then became the tenant to the defendant of said premises, at a monthly rent of . . . dollars, payable to him by the plaintiff, the defendant gave to the plaintiff an agreement to indemnify him, of which the following is a copy: [Copy agreement.]

III. That the defendant, contrary to his agreement, failed to pay the rent for the month of . . ., which was during the tenancy of the plaintiff under said agreement.

IV. That by reason thereof, said A. B., on the . . . day of . . ., 19.., in the . . . court, commenced proceedings to recover possession of said premises, which were then occupied by the plaintiff under said agreement, for the non-payment of said rent; and thereby the plaintiff, on the . . . day of . . ., 19.., at . . ., was compelled to pay to said A. B., to the use of the defendant, the sum of . . . dollars, the amount of said rent, together with . . . dollars, the costs, disbursements, and attorney's fees therein.

V. That he has demanded from the defendant payment of the said amounts, but he has not paid the same.

[DEMAND OF JUDGMENT.]

§ 5004. Complaint on agreement of indemnity to plaintiff for defending action for surrender of property.

Form No. 1400.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., one A. B. deposited with the plaintiff . . . dollars.

II. That afterwards, on the . . . day of . . ., 19.., the plaintiff, at the request of the defendant, delivered to him the said sum of money so deposited by A. B., which money the defendant claimed; and that the plaintiff did not know to whom the same belonged.

III. That afterwards, on the said . . . day of . . ., 19.., the plaintiff, at the request of the defendant, agreed with the defendant that he would defend any action which the said A. B. should commence against him for the said money; and the defendant, in consideration of the premises, then promised the plaintiff to indemnify and save him harmless from the consequences of such an action.

IV. That the said A. B., on the . . . day of . . ., 19.., commenced an action against the plaintiff in the [state the court], for the recovery of the said sum of money, of which the defendant then had notice.

V. That the plaintiff, with the privity of the defendant, and to the best of his ability, defended the said action; but the said A. B., on the . . . day of . . ., 19.., at a general term of said court, recovered a judgment against the plaintiff in said action, to the amount of . . . dollars; and, afterwards, an execution was issued, upon the said judgment, against the property of the plaintiff, who, on the . . . day of . . ., 19.., paid the said sum of . . . dollars, and also the sum of . . . dollars, for officers' fees, and other expenses upon the said writ. And the plaintiff was also, by means of the premises, compelled to pay other charges and expenses, for costs and disbursements and counsel fees, amounting to the sum of . . . dollars, in defending the said action.

VI. That the defendant has not paid the same to the plaintiff.

[DEMAND OF JUDGMENT.]

§ 5005. Complaint by surviving obligee in joint bond.

Form No. 1401.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant covenanted with the plaintiff and one C. D., under his hand and seal, to pay to the plaintiff and said C. D., jointly, the sum of

[state, not the penalty, but the amount named in the condition], on the . . . day of . . ., 19. . , with interest from [etc.; or otherwise, according to the condition].

II. That on the . . . day of . . ., at . . ., said C. D. died.

III. That no part of the said sum has been paid [except, etc.].

[DEMAND OF JUDGMENT.]

§ 5006. Complaint on negotiable corporate bond.

Form No. 1402.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is now, and was at the times hereinafter mentioned, a corporation organized and existing under the laws of the state of . . .

II. That on the . . . day of . . ., 19. . , said defendant, by its proper agents and officers, executed its negotiable commercial bond, bearing date on said day, in the sum of . . . dollars, payable to bearer [or, to A. B., or order; or, to A. B., or his assigns] . . . years after date, at the . . . bank, in the city of . . ., a copy of which bond is hereto attached and made part of this complaint, and marked "Exhibit A."

III. That thereafter, and before the maturity of said bond, plaintiff purchased the same for a valuable consideration, and is still the owner thereof.

IV. That no part of said bond has been paid, but there is due thereon from defendant to plaintiff the said sum of . . . dollars, with interest thereon from the . . . day of . . ., 19. .

[DEMAND OF JUDGMENT.]

[Annex copy of "Exhibit A."]

§ 5007. Answer—Allegation of failure of consideration.

Form No. 1403.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That he gave said undertaking to said A. B. solely in consideration of the performance by said A. B. of the covenants and conditions, upon his part, in an agreement then made between them, of which agreement a copy is annexed as a part of this answer.

II. That this defendant duly performed all the conditions thereof on his part.

III. That the said plaintiff [allege breach as in an action upon the contract.]

§ 5008. Denial of performance.

Form No. 1404.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That the plaintiff performed the conditions, or any of the conditions, on his part in the said agreement referred to in the complaint.

II. [Allege negligence in defending the action for which he was sued, and want of notice to the defendant of the pendency of the same.]

CHAPTER CXXII.

PENALTIES CREATED BY STATUTE.

§ 5009. **Attorney practicing without license.**—An attorney practicing without a license may be punished as in other cases of contempt. The right to practice is not "property," nor in any sense a "contract," within the constitutional meaning of those terms.[1] The right to practice is not a constitutional right, but a statutory privilege. But the authority of an attorney to appear will be presumed where nothing to the contrary appears.[2]

§ 5010. **License-tax.**—While the state corporation license-tax becomes delinquent by the first Monday in August, the penalty does not attach until the governor has made his proclamation upon the delinquent list furnished him by the secretary of state.[3]

§ 5011. **Copyright.**—A declaration for the penalty imposed for putting the imprint of a copyright upon a work not legally copyrighted, in the name of two persons, is bad on general demurrer.[4]

§ 5012. **Failure to pay assessment.**—The failure of one partner in a ditch to pay his proportion of the expenses of the concern does not forfeit his right in the common property.[5] Where forfeiture is claimed under a mining regulation or custom, this regulation or custom will be most strictly construed under the claim of forfeiture.[6]

§ 5013. **Ferries and toll-bridges.**—In an action brought to recover damages by the owners of a licensed ferry against a party

1 Cohen v. Wright, 22 Cal. 293. See People v. MacCabe, 18 Colo. 186, 36 Am. St. Rep. 270, 32 Pac. 280, 19 L. R. A. 231; Ex parte Harrison, 112 Ind. 329, 14 N. E. 225.

2 Hayes v. Shattuck, 21 Cal. 51; Willson v. Cleaveland, 30 Cal. 192; Holmes v. Rogers, 13 Cal. 191; Turner v. Caruthers, 17 Cal. 431; State v. California Mining Co., 13 Nev. 203; Vorce v. Page, 28 Neb. 294, 44 N. W. 452.

3 Cal. Stats. 1905, p. 493; Ukiah Guaranty Co. v. Curry, 148 Cal. 256, 82 Pac. 1048.

4 Ferrett v. Atwill, 1 Blatchf. 151, Fed. Cas. No. 4747.

5 Kimball v. Gearhart, 12 Cal. 27.

6 Colman v. Clements, 23 Cal. 245; Wiseman v. McNulty, 25 Cal. 230.

alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family, and that the omission of these allegations was fatal.[7]

§ 5014. **Forfeiture under statute.**—When a forfeiture is purely the creation of statute, no other process or procedure can be made use of to enforce the forfeiture than that which the statute prescribes.[8] In an action to enforce a penalty or forfeiture imposed by statute, the claim is to be strictly construed.[9] Forfeiture of a liquor license for violation of its terms is constitutional, and not depriving the holder of his property without due process of law.[10] If there be any rule requiring the payment of a debt, the rule cannot apply to the case of a judgment rendered for a penalty under the penal statute.[11] An action founded on a statute to recover a penalty, where no penalty is imposed, cannot be sustained.[12] In order to have a forfeiture take place, there must be some person who is entitled to receive the benefit of the forfeiture.[13]

§ 5015. **Construction of the penal statutes.**—Statutes which impose non-contractual liabilities are penal in nature, and must be strictly construed.[14] The rule laid down by section 4 of the California Penal Code, that all the provisions of such code are to be construed according to the fair import of their terms, with a view to effect its objects, and to promote justice, applies to penal statutes not a part of the code.[15]

§ 5016. **Forfeiture of title to real estate.**—No forfeiture of real estate can take place for non-performance of conditions precedent or subsequent, unless there are two contracting parties who have at the same time, or successively, an interest in the estate upon which

7 Hanson v. Webb, 3 Cal. 236.

8 Reed v. Omnibus R. R. Co., 33 Cal. 212.

9 Askew v. Ebberts, 22 Cal. 263; People v. Belknap, 58 Hun, 241, 12 N. Y. Supp. 143; Hoeberg v. Newton, 49 N. J. L. 617, 9 Atl. 751; People v. Utica Cent. Co., 22 Ill. App. 159.

10 Krueger v. Town of Colville, 49 Wash. 295, 95 Pac. 81.

11 Chester v. Miller, 13 Cal. 558.

12 Board of Health v. Pacific Mail S. S. Co., 1 Cal. 197.

13 Wiseman v. McNulty, 25 Cal. 230; The Palmyra, 12 Wheat. 1, 6 L. Ed. 531.

14 Steck v. Prentice, 43 Colo. 17, 95 Pac. 552.

15 In re Mitchell, 1 Cal. App. 396, 82 Pac. 347.

the condition is reserved.[16] No forfeiture accrues to a title otherwise good, by failure to present it to the board of land commissioners.[17] The United States, after the treaty of Guadalupe Hidalgo, did not become vested with any authority to prosecute a claim for forfeiture or escheat that had accrued in California to the Mexican government.[18]

§ 5017. **Gaming.**—An allegation in a complaint that the parties kept a saloon for the purpose of gaming, and selling liquors and cigars, does not raise the presumption that the gaming was necessarily unlawful, or that the saloon was a common gaming-house, as the word might apply to lawful games, as billiards, etc.[19] The police may properly be vested with power to seize and destroy gambling devices which are public nuisances and intended for use in the commission of crime.[20]

§ 5018. **Marks and brands.**—In an action for a penalty for altering the inspector's marks on barrels of flour, it is necessary to set out the marks and the manner of the alteration.[21]

§ 5019. **Office and officers.**—In an action against an officer to recover a penalty imposed by a general statute, it is sufficient to refer to such statute, though the particular duty in question was created by a subsequent statute.[22]

§ 5020. **Jurisdiction of justice of the peace.**—Debt is the proper remedy at common law for the recovery of a fifty-dollar penalty imposed upon a corporation for refusing to permit its stockholders to inspect its books, and the justice has jurisdiction of an action therefor.[23]

§ 5021. **Penalty on tenant.**—The termination of implied tenancy from month to month is secured by giving a month's notice.[24] If the forfeiture is solely on account of the non-payment of the rent, the judgment must be satisfied, and the tenant restored, on

16 Wiseman v. McNulty, 25 Cal. 230.

17 Gregory v. McPherson, 13 Cal. 562.

18 People v. Folsom, 5 Cal. 373.

19 Whipley v. Flower, 6 Cal. 632.

20 Mullen & Co. v. Moseley, 13 Idaho, 457, 121 Am. St. Rep. 277, 90 Pac. 986, 12 L. R. A. (N. S.) 394.

21 Cloud v. Hewitt, 3 Cranch C. C. 199, Fed. Cas. No. 2904.

22 Morris v. People, 3 Denio, 381.

23 Dwyer v. Smelter City State Bank, 30 Colo. 315, 70 Pac. 323.

24 Cal. Civ. Code, § 1946.

payment of the rent, with interest and costs, into court within the five days during which execution is stayed; and this though the judgment itself be for treble the rent found due.[25]

§ 5022. **Penalties on corporations.**—A penalty is generally imposed upon officers of a corporation for making false and exaggerated reports to stockholders and others dealing with the company.[26] And directors are sometimes made personally liable for all debts incurred during the period they are in default for failing to file the statutory reports required to be filed with the recorder of deeds.[27] That the violation was unintentional is no defense.[28]

§ 5023. **Railroad companies—Excessive fare.**—In an action against a railroad company for breach of duty by such company, in not conveying a passenger, it is not necessary for plaintiff to allege in his complaint a strict legal tender of his fare. It is sufficient to allege that plaintiff was ready and willing, and offered to pay such sum of money as the defendant was legally entitled to charge. The transportation and payment of the fares are contemporaneous acts.[29] In an action against the New York Central Railroad Company, to recover a statutory penalty for exacting an excessive fare, it was held that it was not necessary that the complaint should set out the various enactments consolidating the several companies which make up the New York Central Railroad Company so as to show that the latter company is restricted to a fare of two cents per mile for each passenger; but that it was enough to allege that the defendants had been duly organized, that they were entitled to demand and receive of passengers a certain rate of fare, and that they had demanded and received a higher rate.[30] A statute forbidding a railroad to collect fare when it has neglected or refused to deliver a baggage-check is constitutional, and not a taking of property without due process of law.[31]

25 Cal. Code Civ. Proc., § 1174; Owen v. Herzihoff, 2 Cal. App. 622, 84 Pac. 274.

26 Wash. Laws 1903, p. 141; State v. Merchant, 48 Wash. 69, 92 Pac. 890.

27 Colo. Mills. Stats., § 491 (repealed, Colo. Laws 1901, p. 121); Cavanaugh v. Patterson, 41 Colo. 158, 91 Pac. 1117.

28 City of Emporia v. Becker, 76 Kan. 181, 90 Pac. 798, 12 L. R. A. (N. S.) 946.

29 Tarbell v. Central Pacific R. R. Co., 34 Cal. 616.

30 Nellis v. New York Cent. R. R. Co., 30 N. Y. 505.

31 Tarr v. Oregon S. L. R. R. Co., 14 Idaho, 192, 125 Am. St. Rep. 151, 93 Pac. 957.

A complaint in an action by a shipper against a carrier which substantially alleges that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from the same point than another merchant, but which does not allege that the charge to the plaintiff was unreasonable and excessive, does not state a cause of action at common law, and an allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge.[32] A state law fixing the maximum rate of transportation does not apply in case of interstate commerce.[33]

§ 5024. **Telegraph messages.**—Where a telegraph company fails to transmit a message upon compliance by the person contracting with it with the conditions required by law, an action lies for the penalty; and the party who contracts is entitled to the penalty,[34] and this is a constitutional provision.[35] Exemplary damages are recoverable against a telegraph company by the sender of a death message, for gross negligence of the agents of the company.[36]

§ 5025. **Theatrical exhibitions.**—A complaint which charges that the defendant "did willfully and unlawfully, on the first day of the week, commonly called Sunday, to-wit, on the Sabbath-day, get up, and in getting up and opening of a theater," contains a sufficient statement of the facts constituting the offense of getting up a theater on the Sabbath-day.[37]

§ 5026. **Statutory action—Allegations.**—In an action on a statute, the party prosecuting must allege every fact necessary to make out his title and his competency to sue.[38] Thus, where the statute giving the cause of action prescribes what the plaintiff shall state in his complaint, and requires a reference to be made

32 Cowden v. Pacific Coast S. S. Co., 94 Cal. 470, 28 Am. St. Rep. 142, 29 Pac. 873, 18 L. R. A. 221.

33 Missouri etc. Ry. Co. v. Sinclair, 77 Kan. 228, 94 Pac. 123.

34 Thurn v. Alta Tel. Co., 15 Cal. 472.

35 Western Union Tel. Co. v. Austin, 67 Kan. 208, 72 Pac. 850.

36 Western Union Tel. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283.

37 People v. Maguire, 26 Cal. 635. For complaint, see People v. Koll, 3 Keyes, 236.

38 Fleming v. Bailey, 5 East, 313; Cole v. Smith, 4 Johns. 193; Bigelow v. Johnson, 13 Johns. 428; Fairbanks v. Town of Antrim, 2 N. H. 105; Ferrett v. Atwill, 1 Blatchf. 151, Fed. Cas. No. 4747; Austin v. Goodrich, 49 N. Y. 266.

to the statute, the requirement must be complied with, or the plaintiff cannot recover.[39] But if a statute gives a new defense, or authorizes the introduction of evidence not previously admissible, the defendant may so shape his pleas as to avail himself of the benefits of the new law, and the old rules of pleading must yield to the statute.[40] The essential facts must be alleged, and not be left to be inferred.[41] In order to maintain a statutory action it is necessary to show a strict compliance with the requirements of the statute.[42] In an action, under the Colorado statute,[43] to determine and settle a disputed boundary-line between counties, after one has been run out and established by the state engineer, the complaint must contain affirmative and positive allegations showing the proceedings to have been such as to confer jurisdiction.[44]

§ 5027. **Penal statutes—Allegations in actions on.**—In penal actions founded on a statute a reference to the statute is usually, but not necessarily, made [45] for the purpose of informing the defendant distinctly of the nature and character of the offense.[46] And in cases where no general form of complaint is given, the plaintiff must set forth the particular acts or omissions which constitute the cause of action.[47] But omitting to refer to the statute is a defect of form only.[48] A complaint to recover a statutory penalty which states facts constituting a cause of action need not refer to the statute.[49] In declaring on a penal statute, it is sufficient to pursue the words of the statute, and not essential to conclude "against the form of the statute."[50] The declaration must aver that the act complained of was done contrary to the statute.[51] A declaration founded exclusively upon a statute, and not maintainable at common law, must conclude "against the

39 Schroeppell v. Corning, 2 N. Y. 132. See Avery v. Slack, 17 Wend. 85.

40 Cutts v. Hardee, 38 Ga. 350.

41 State v. Androscoggin R. R. Co., 76 Me. 411.

42 Martin v. Pittman, 3 Colo. App. 220, 32 Pac. 840.

43 Sess. Laws 1887, p. 238.

44 Board of Commissioners Routt County v. Board of Commissioners Grand County, 4 Colo. App. 306, 35 Pac. 1061.

45 Brown v. Harmon, 21 Barb. 510.

46 Shaw v. Tobias, 3 N. Y. 190.

47 Avery v. Slack, 17 Wend. 86; People v. Brooks, 4 Denio, 469; Bigelow v. Johnson, 13 Johns. 428.

48 O'Maley v. Reese, 6 Barb. 658.

49 Madera v. Holdrege, 4 Colo. App. 126, 35 Pac. 52.

50 People v. Bartow, 6 Cow. 290; Lee v. Clark, 2 East, 333.

51 Parker v. Haworth, 4 McLean, 373, Fed. Cas. No. 10738. That the statute must be referred to with certainty, see N. Y. Code Civ. Proc., § 1897; Fish v. Manning, 31 Fed. 340;

form of the statute."[52] A declaration, if founded on an amendatory act, which refers to and contains a former one, should conclude "against the statute," and not "statutes."[53] A complaint on a penal statute need not aver the uses to which the forfeiture is to be applied.[54] Nor need it allege to whom the penalty is to go.[55] And non-payment of the penalty need not be alleged.[56]

Where a number of penalties are incurred in one act, they may all be included in one count. In an action against an officer to recover a penalty imposed by a general statute for any neglect or refusal to perform a duty, it is enough to refer to such statute, though the particular duty in question was created by a subsequent statute.[57] Judgment in ejectment as a penalty for failure to comply with a court rule is unconstitutional, as taking property without due process of law.[58]

Where a penalty is given by statute, and no remedy is provided, debt will lie.[59] And this although it is uncertain.[60] It has been held that penalties may be recovered by indictment or information, where this mode is not excluded by statute.[61] In an action for debt, brought to recover several penalties (under section 1 of the act of 1790) against the master of a vessel for ship-

People v. Grand Rapids etc. Ry. Co., 64 Mich. 618, 31 N. W. 546.

52 Chit. Pl. 246, 405; Sears v. United States, 1 Gall. 257, Fed. Cas. No. 12592; Smith v. United States, 1 Gall. 261, Fed. Cas. No. 13122, 1 Saund. 135, note; Jones v. Vanzandt, 2 McLean, 611, Fed. Cas. No. 7502. That it is essential, see Sears v. United States, 1 Gall. 257, Fed. Cas. No. 12592.

53 Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4620.

54 Sears v. United States, 1 Gall. 257, Fed. Cas. No. 12592

55 State v. Willis, 78 Me. 70, 2 Atl. 848; State v. Thrasher, 79 Me. 17, 7 Atl. 814.

56 Western Union Tel. Co. v. Young, 93 Ind. 118. As to sufficiency of complaint following the language of the statute as to a forfeiture, see State v. Adams, 78 Me. 486, 7 Atl. 269; State v. Owsley, 17 Mont. 94, 42 Pac. 105. As to complaint in action for penalty for failure by directors of corporation to file annual reports, see Rose v. Chadwick, 41 N. Y. Supp. 190, 9 App. Div. 311; or to post monthly reports, see Chapman v. Doray, 89 Cal. 52, 26 Pac. 605.

57 Morris v. People, 3 Denio, 381. For exacting excessive fare on railroad, see Nellis v. New York Cent. R. R. Co., 30 N. Y. 505. For complaint against railway company for not ringing bell on approaching a crossing, see Wilson v. Rochester etc. R. R. Co., 16 Barb. 167.

58 Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 Pac. 281; Shook v. Sexton, 37 Wash. 509, 79 Pac. 1093.

59 Jacob v. United States, 1 Brock. Marsh. 520, Fed. Cas. No. 7157; City of Chicago v. Enright, 27 Ill. App. 559.

60 Washington v. Eaton, 4 Cranch C. C. 352, Fed. Cas. No. 17228.

61 State v. Wabash etc. R. R. Co., 89 Mo. 562, 1 S. W. 130; United States v. Howard, 17 Fed. 638, 9 Sawy. 155; United States v. Grant, 55 Fed. 414.

ping seamen without articles, a single count for all the penalties is sufficient.[62] So, also, if an agreement contain a penalty, the plaintiff may bring debt for the same and for no more, or covenant, and recover more or less damages than the penalty,[63] and for several penalties incurred in one act, plaintiffs may declare generally in one count.[64] But only one penalty can be enforced for the same act.[65] Thus, under an ordinance forbidding both the sale of a thing and its exposure to sale, a single act of selling cannot be separated so as to impose therefor two penalties. In case of an actual sale, the exposure to sale is merged in the sale.[66] Where two or more concur in the act of aiding, and but one penalty attaches, they may be sued together.[67] In an action for a statute penalty, intent to violate the law must be shown; but a neglect may be so gross as to amount to a criminal intent.[68] The penalty for obstructing a highway cannot be recovered in an action for injunction resting on the general equity power of the court.[69] The repeal of a law imposing a penalty determines the action.[70]

§ 5028. Provisos and exceptions.—It is a general rule that in pleading under a statute it is sufficient to use the language of the statute; and though there are exceptions requiring specific facts to be stated where general language is used in the statute, yet it is not necessary in a civil proceeding to add to the language of the statute other general language which does not make the pleading any more specific, because such other language was technically required in a common-law indictment.[71] But when a pleading is filed under a statute where there is an exception in the enacting clause, it must negative the exception; but where there is no exception to the enacting clause, but an exception

62 People v. M'Fadden, 13 Wend. 396; Wolverton v. Lacy, 8 Law R. (N. S.) 672.

63 Martin v. Taylor, 1 Wash. C. C. 1, Fed. Cas. No. 9166.

64 People v. M'Fadden, 13 Wend. 396.

65 Driskill v. Parish, 3 McLean, 631, Fed. Cas. No. 4089.

66 City of Brooklyn v. Toynbee, 31 Barb. 282.

67 Partridge v. Naylor, Cro. Eliz. 480; F. Moore, 453; Rex v. Clark, Cowp. 610; Barnard v. Gostling, 2 East, 569; Warren v. Doolittle, 5 Cow. 678. Compare Marsh v. Shute, 1 Denio, 230; Ingersoll v. Skinner, 1 Denio, 540; Mayor of New York v. Ordrenan, 12 Johns. 122. See, also, Palmer v. Conly, 4 Denio, 374.

68 Sturges v. Maitland, Anth. N. P. 208.

69 Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418.

70 People v. Board of Police, 40 Barb. 626, 16 Abb. Pr. 473.

71 Jarvis v. Hamilton, 16 Wis. 574.

in the proviso thereto, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant.[72] A public statute need not be recited or referred to in pleading, and all that seems material is that enough be stated to bring the case within the statute.[73]

§ 5029. **Statutes, how proved.**—As to whether an act is passed by the requisite vote, the printed statutes are presumptively correct, and the original on file conclusive.[74]

§ 5030. **Venue in California.**—Actions for the recovery of a penalty or forfeiture imposed by statute shall be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial.[75]

§ 5031. **Witness refusing to answer.**—An action lies at common law against a witness refusing to answer or attend under a subpœna.[76] The complaint must aver that the witness fees were paid or tendered to him. It would seem that a general allegation that he was legally subpœnaed is insufficient.[77] In an action under section 1992 of the California Code of Civil Procedure, providing for a forfeit of one hundred dollars and damages for failure of a witness to attend, the complaint must allege the nature of the case in which the subpœna was issued, or that the witness would have testified to some material matter.[78]

§ 5032. **Essential allegations.**—In general, the by-laws of all corporate bodies, including municipal corporations, must be set forth in the pleading when they are sought to be enforced by an

72 Washburn v. Franklin, 28 Barb. 27; Great Western R. R. Co. v. Hanks, 36 Ill. 281; Lynch v. People, 16 Mich. 472; Faribault v. Hulett, 10 Minn. 30; Clough v. Shepherd, 31 N. H. 490; McGlone v. Prosser, 21 Wis. 273. But see Farwell v. Smith, 16 N. J. L. (1 Har.) 133. As to negativing exception in statute, see Fish v. Manning, 31 Fed. 340; Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398; People v. Briggs, 114 N. Y. 56, 20 N. E. 820.

73 McHarg v. Eastman, 7 Rob. (N. Y.) 137, 35 How. Pr. 205; Bretz v. Mayor, 35 How. Pr. 130, 4 Abb. Pr. (N. S.) 258; reversing 3 Abb. Pr. (N. S.) 478.

74 People v. Commissioners of Highways, 54 N. Y. 276, 13 Am. Rep. 581; People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377.

75 Cal. Code Civ. Proc., § 393.

76 King v. Inhabitants etc., Dougl. 561; Gorham v. Thompson, Peake, 60; Warner v. Lucas, 10 Ohio, 336.

77 McKeon v. Lane, 1 Hall, 356.

78 Nolan v. Gride, 135 Cal. 49, 67 Pac. 9.

action or set up as a protection.[79] In Indiana, a copy of the by-law or ordinance should be made a part of the complaint.[80] But the authority to enact may be averred in general terms.[81]

§ 5033. Time to sue.—In Colorado, actions for a penalty or forfeiture shall be commenced within one year after the offense is committed, and the limitation begins to run on the liability of the directors of a corporation from the time of their default in not filing an annual report, and not from the time the cause of action accrues to the creditor against the corporation for the collection of the debt.[82] The statute of limitations does not apply in an action to revoke a physician's license for unprofessional conduct involving moral turpitude, there being no time limit under the statute providing for such revocation.[83]

FORMS—ACTIONS ON STATUTORY PENALTIES.

§ 5034. Complaint for penalties under the statute—General form.

Form No. 1405.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant [here state acts constituting a violation of the statute, either following the words of the statute, or setting forth the facts more specifically], against the form of the statute [or, statutes, as the case may be], in such case made and provided.

II. That hereby the defendant became indebted in the sum of [amount of penalty] to [one for whose use the action is given], whereby an action accrued to the plaintiff according to the provisions of [describing the statute in such terms as the case may require.]

[DEMAND OF JUDGMENT.]

79 Wilcox on Municipal Corporations, 1, § 430; Harker v. Mayor etc. of New York, 17 Wend. 199; People v. Mayor etc. of New York, 7 How. Pr. 81. See Kehlenbeck v. Logeman, 10 Daly, 447.

80 Green v. Indianapolis, 22 Ind. 192.

81 Stuyvesant v. Mayor of New York, 7 Cow. 603.

82 Hazelton v. Porter, 17 Colo. App. 1, 67 Pac. 170.

83 State Medical Exam. Board v. Stewart, 46 Wash. 79, 123 Am. St. Rep. 915, 89 Pac. 475, 11 L. R. A. (N. S.) 557.

§ 5035. Complaint for selling liquor without a license.

Form No. 1406.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant sold to one A. B. [or, to divers persons] strong liquors [or, spirituous liquors, or wines], in quantities less than by the bottle [or otherwise, according to the terms of the ordinance or statute].

II. That the defendant had not then a license to sell liquors as required by the act entitled "An act" [etc., giving title of act in full], passed on the . . . day of . . ., 19..

III. That thereby the defendant became, and is indebted to the plaintiff in the sum and penalty of . . . dollars, for said act of selling [or, each and every of said acts of selling], whereby this action has accrued to the plaintiff, according to the provisions of said act, for the said sum of . . . dollars. [Or, if more than one penalty is claimed: for the aggregate amount or sum of . . . dollars.]

[DEMAND OF JUDGMENT.]

§ 5036. Complaint against witness for disobeying subpœna.

Form No. 1407.

[TITLE.]

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff caused the defendant to be duly served with a subpœna commanding him to attend as a witness in . . . court, in and for the county of . . ., in this state, on the . . . day of . . ., 19.., there to give testimony on behalf of the plaintiff in an action in said court pending, wherein this plaintiff was the plaintiff, and one C. D. was defendant. [Or, otherwise, designate the proceedings.]

II. That at the same time the plaintiff caused . . . dollars, the lawful fees of said witness, to be paid [or, tendered] to him.

III. That defendant failed to attend as commanded, whereby the defendant became indebted to the plaintiff in the amount of . . . dollars, according to the provisions of the statute. [Describe the statute.]

IV. That by reason of the premises, the defendant forfeited to the plaintiff the sum of . . . dollars.

[If special damages are claimed, add:] V. And for a second cause of action, the plaintiff alleges that because of the said

failure of the said defendant to attend said trial as such witness as aforesaid, the plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said court to continue the said action; and the said court did continue the same, and the plaintiff was compelled to pay on said continuance, as costs thereof, . . . dollars, which sum he was so compelled to pay by reason of the said failure of the said defendant to attend as such witness as aforesaid, to the damage of the plaintiff in the said sum of . . . dollars.

[Demand of Judgment.]

§ 5037. Complaint for violation of county ordinance.

Form No. 1408.

[Title.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., the board of supervisors of the county of . . ., in pursuance of the power in them vested by law, passed a law entitled "An order, regulation or ordinance" [etc., giving title of the same], a copy of which is annexed as a part of this complaint.

II. That since the passing thereof, to-wit, on the . . . day of . . ., 19.., the defendant [here state fully wherein the defendant has disobeyed the order], contrary to the provisions of the said ordinance above mentioned.

III. That by reason of the premises, the defendant forfeited to the plaintiff the sum of . . . dollars.

[Demand of Judgment.]

[Annex copy of ordinance.]

§ 5038. Complaint in action to recover forfeiture for violation of city ordinance.

Form No. 1409.

[Title.]

The plaintiff complains, and alleges:

I. That the plaintiff is, and was at the times hereinafter mentioned, a municipal corporation organized and existing under the laws of the state of . . .

II. That heretofore, and on or about the . . . day of . . ., 19.., the board of trustees of the plaintiff city regularly passed an or-

dinance entitled [set forth title], which said ordinance, among other provisions, provides as follows: [Set forth such sections of the ordinance as cover offense charged.] [Or, a copy of which ordinance is attached to this complaint, made part thereof, and marked "Exhibit A"]; that thereafter, and on or about the . . . day of . . ., 19.., said ordinance was duly approved by the mayor of said city, and on the . . . day of . . ., 19.., went into full force and effect.

III. That thereafter, and on or about the . . . day of . . ., 19.., the defendant did, contrary to and in violation of the ordinance aforesaid, [set forth the defendant's violation of the ordinance].

IV. That by reason of the premises, defendant has become indebted to the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

CHAPTER CXXIII.

ACTIONS FOR MONEY HAD AND RECEIVED.

§ 5039. Money had and received, definition.—An action will lie to recover a sum certain whenever one has the money of another, which he in equity and good conscience has no right to retain.[1] If he knows it belongs to another, and knows it is his duty to pay it over, he may be sued for money had and received.[2] Such is the case of a first mortgagee who takes the assignment of a second mortgage for the purpose of foreclosure only.[3]

§ 5040. Demand.—It is not necessary that the plaintiff, in an action for money received by defendant for his use, should make a demand before suit, where it was the duty of the defendant to have remitted the money.[4] No demand is necessary before action brought to recover back an illegal tax;[5] so of moneys collected by sheriff.[6] Where a demand is necessary to charge the defendant with interest, the date of the demand should be inserted.[7] Even where demand is necessary, the bringing of the suit is a sufficient demand.[8]

§ 5041. Pleadings.—A complaint for money had and received, alleging that defendant was on a certain date indebted to a certain person in a certain sum for money had and received by defendant for the use and benefit of such person, while not strictly consisting of a statement of facts constituting the cause of action, is nevertheless sufficient; and an answer to such complaint, deny-

1 Allsman v. Oklahoma City, 21 Okla. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511.

2 Smith v. Farmers' etc. Bank, 2 Cal. App. 377, 84 Pac. 348.

3 Wagner v. Wedell, 3 Cal. App. 274, 85 Pac. 126.

4 Stacey v. Graham, 14 N. Y. 492; Howard v. France, 43 N. Y. 593; Keyser v. Shafer, 2 Cow. 437; Warden v. Nolan, 10 Ind. App. 334, 37 N. E. 821; Quimby v. Lyon, 63 Cal. 394; White Pine County Bank v. Sadler, 19 Nev. 98, 6 Pac. 941.

5 Newman v. Supervisors, 45 N. Y. 676.

6 Nelson v. Kerr, 59 N. Y. 224.

7 As to nature of action for money had and received, see Chapman v. Forbes, 123 N. Y. 532, 26 N. E. 3; Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606; Laflin v. Howe, 112 Ill. 253.

8 Ex parte Horwitz, 2 Cal. App. 752, 84 Pac. 229.

ing indebtedness in the sum alleged, or any other sum, for money had and received for the use and benefit of such person, or upon any account at all, is sufficient.[9] It is not necessary that the complaint allege any fictitious promise; and an allegation that defendant, an attorney, had received for the use and benefit of plaintiff, from a certain person, a certain sum of money, sufficiently shows that defendant has money belonging to plaintiff.[10] In order to prove that defendant received the money in a manner which precluded his retaining it as his attorney fee, the plaintiff must set forth the origin and character of the fund thus held by defendant.[11]

§ 5042. **Essential averments.**—The common allegation that the defendant received money "for the use of the plaintiff," is open to objection on the ground of its indefiniteness. In some cases it has been held bad on demurrer.[12] A complaint which avers "that the defendant received a sum of . . . dollars, belonging to or on account of the plaintiff, and which is now due him," states facts sufficient to constitute a cause of action.[13] Thus, where the complaint charges that A. being indebted to the plaintiff in a sum of money, it was agreed between the plaintiff and defendant that A. should pay the same to plaintiff at the request of plaintiff, and thereafter A. paid to defendant said sum in gold coin of the United States, and for the use and benefit of plaintiff, and the defendant refused to pay the same to the plaintiff upon request duly made, an action to recover said sum in gold coin is an action for money had and received, and defendant is not charged as a bailee.[14] A mere allegation that defendant received the money on plaintiff's account, without alleging a promise to pay, or that it was for his use, is a sufficient allegation to sustain a judgment for money received.[15]

When a person recovers the money of another, and applies it to his own use, the law implies a promise to repay it.[16] Where one receives at the request of another a sum for a third person, with directions to pay the same over, it is equivalent to an ex-

9 McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090.

10 Waite v. Willis, 42 Or. 288, 70 Pac. 1034.

11 Dobbs v. Campbell, 66 Kan. 805, 72 Pac. 273.

12 Lienan v. Lincoln, 2 Duer, 670.

13 Betts v. Bache, 14 Abb. Pr. 279.

14 Wendt v. Ross, 33 Cal. 650.

15 Keene v. Eldriedge, 47 Or. 179, 82 Pac. 803.

16 Dumond v. Carpenter, 3 Johns. 183.

press promise to pay the same, and the latter may maintain an action for money had and received.[17] And no consideration need be shown.[18] Where one receives the money of another, and has not the right conscientiously to retain it, a privity between the true owner and the receiver will be implied, as well as a promise to pay it.[19] Such implied promise to pay is a fiction which need not be alleged.[20] The complaint must plead facts showing that the money justly belonged to the plaintiff.[21] And it must allege the failure of the defendant to pay the money, which constitutes the breach of the contract, and, failing to make such averment, it is insufficient as a complaint for money had and received.[22] But a complaint which alleges a demand of payment of the amount sued for, and that "defendant has refused, and still refuses, to account for or pay the same, or any part thereof," while subject to special demurrer, for not definitely and certainly alleging non-payment of the money, does not so entirely fail to allege non-payment as to be subject to a general demurrer for not stating facts sufficient to constitute a cause of action.[23] A common-law count for money had and received is proper in an action to recover a deposit of money wrongfully obtained from the plaintiff by the defendants, and which they wrongfully refused to pay the plaintiff upon demand.[24] A complaint which alleges a request to expend money, and a promise to repay what should be expended as requested, and a compliance with the request, is sufficient as against a general demurrer.[25]

§ 5043. Nature of action—When it lies.—The general rule is that an action for money received lies whenever money has been received by the defendant which *ex æquo et bono* belongs to the plaintiff;[26] or which in equity and conscience he has no right

17 Weston v. Barker, 12 Johns. 276, 7 Am. Dec. 319; Therusson v. McSpedon, 2 Hilt. 1; Delaware etc. Co. v. Westchester County Bank, 4 Denio, 97. But see Seaman v. Whitney, 24 Wend. 260, 35 Am. Dec. 618; Turk v. Ridge, 41 N. Y. 201; Williams v. Everett, 14 East, 590, where distinctions are taken.

18 Judson v. Gray, 17 How. Pr. 289; Berry v. Mayhew, 1 Daly, 54.

19 Caussidiere v. Beers, 2 Keyes, 198.

20 Byxbie v. Wood, 24 N. Y. 607. See Roldan v. Power, 35 N. Y. Supp. 697.

21 Buchanan v. Beck, 15 Or. 563, 16 Pac. 422.

22 London etc. Fire Ins. Co. v. Liebes, 105 Cal. 203, 38 Pac. 691.

23 Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094.

24 Dashaway Assoc. v. Rogers, 79 Cal. 211, 21 Pac. 742.

25 Jaffe v. Lilienthal, 86 Cal. 91, 24 Pac. 835.

26 Tutt v. Ide, 3 Blatchf. 249, Fed. Cas. No. 14275b.

to retain,[27] whether there be any privity between the parties or not. For it has been held there need be no privity of contract between the parties in order to support this action, except that which results from one man's having another's money, which he has not a right conscientiously to retain.[28] One who, through design or misdirection of another, receives money belonging to a third person cannot retain it to apply on his own debt due from the one who gave it to him.[29] In an authoritative case, it has been decided that this action lies—1. Wherever the defendant has received money which he is bound in justice and equity to refund; 2. Where an agent is not the mere carrier or instrument for transmitting the fund, but has the power of retaining it, and before he has paid over the money has received notice of the plaintiff's claim, and a warning not to part with the fund; 3. Where there exists a privity between the plaintiff and defendant.[30]

§ 5044. Nature of action—Duress—Protest.—That money extorted under duress may be recovered back in this form of action has been long established. In such action the complaint must state that it was wrongfully obtained, and not state a mere conclusion of law; but the facts should be fully detailed, so that the court may see from the facts that the payment was compulsory.[31] It is not sufficient to allege compulsion in a general way. Money extorted by duress of goods may be recovered.[32]

Thus a complaint in an action to recover money wrongfully obtained, under color of judicial proceedings, must contain such averments as will exclude the idea that the money could have

27 Kreutz v. Livingston, 15 Cal. 344.

28 Mason v. Waite, 17 Mass. 560; Buel v. Boughton, 2 Denio, 91; Lockwood v. Kelsea, 41 N. H. 185. See, also, Webb v. Meyers, 64 Hun, 11, 18 N. Y. Supp. 711; Drake v. Whaley, 35 S. C. 187, 14 S. E. 397; Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Drovers' Nat. Bank v. O'Hare, 18 Ill. App. 182; White Pine County Bank v. Sadler, 19 Nev. 98, 6 Pac. 941; Sparrow v. Hosack, 40 Ohio St. 253; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348; Seehorn v. Hall, 130 Mo. 257, 51 Am. St. Rep. 562, 32 S. W. 643; Duncanson v. Walton, 111 Cal. 516, 44 Pac. 174.

29 People's Nat. Bank v. Myers, 65 Kan. 122, 69 Pac. 164.

30 Cary v. Curtis, 3 How. 236, 11 L. Ed. 576.

31 Commercial Bank v. Rochester, 41 Barb. 341.

32 Astley v. Reynolds, 2 Stra. 915; Bates v. Johnson, 3 Johns. Cas. 238; 4 T. R. 485, 561; Chase v. Dwinal, 7. Greenl. 134, 20 Am. Dec. 352; Chase v. Taylor, 4 Harr. & J. 54; Little v. Gibson, 39 N. H. 508; Tutt v. Ide, 3 Blatchf. 249, Fed. Cas. No. 14275b; McMillen v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

been lawfully obtained.[33] But the influence exerted by a provision of the statutes of the United States, requiring stamps to be placed on passage-tickets by steamer from San Francisco to New York, does not constitute the kind of coercion or compulsion which the law recognizes as sufficient to render the payment therefor involuntary.[34] Generally, to constitute compulsion or coercion, so as to render a payment involuntary, there must be some actual or threatened exercise of power, possessed or supposed to be possessed by the party exacting or receiving the money.[35] The object of the protest is to take from the payment its voluntary character, and conserve to the party the right to recover it back. The fact that a party pays money under protest does not change the character of the transaction or enable him to recover it back, unless the payment was under duress or coercion, or where undue advantage was taken of his situation.[36]

Where money was not credited on an account upon which judgment by default was rendered, it may be recovered back.[37] Where a special contract remains open, the remedy is on the contract; but if the contract has been put an end to, an action for money had and received lies to recover any payment that has been made under it.[38]

§ 5045. Nature of action—When it does not lie—Voluntary payments.—The simple facts that A., owing money to B., chose to pay it to C., under the impression that C. was entitled to control the services of B., and to receive all compensation therefor, do not entitle B. to maintain an action against C. for money had and received.[39] Under a count for money had and received, a surety cannot recover of his principal for money paid by the

33 Funkhouser v. How, 17 Mo. 225; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367.

34 Garrison v. Tillinghast, 18 Cal. 404.

35 Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176. See Adams v. Schiffer, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; Adams v. Irving Nat. Bank, 116 N. Y. 606, 15 Am. St. Rep. 447, 23 N. E. 7, 6 L. R. A. 491.

36 Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Kansas etc. R. R. Co. v. Wyandotte Co., 16 Kan. 587.

37 Parker v. Danforth, 16 Mass. 306; Richardson v. Maine Ins. Co., 6 Mass. 102, 4 Am. Dec. 92; Loring v. Mansfield, 17 Mass. 394; Whitcomb v. Williams, 4 Pick. 228; Gary v. Hull, 11 Johns. 441; Cobb v. Curtis, 8 Johns. 470; Phillips on Evidence (Cow. & H.) 832. Contra, Tilton v. Gordon, 1 N. H. 33; Mitchell v. Sanford, 11 Ala. 695; Binck v. Wood, 43 Barb. 315.

38 Chesapeake etc. Canal Co. v. Knapp, 9 Pet. 541, 9 L. Ed. 222.

39 Murphy v. Ball, 38 Barb. 362.

surety on account of his liability as such.[40] To sustain a count for money had and received, it must appear that the defendant had received money due to the plaintiff, or something which he had really or presumptively converted into money before suit brought, or which he had received as money, and instead of it.[41] Money voluntarily paid upon a claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability.[42] Money voluntarily paid cannot be recovered back, even though it could not have been enforced by law.[43] So money advanced on part performance of an agreement cannot be recovered back.[44]

§ 5046. **Statute of limitations.**—The statute commences to run from the time the money was received.[45] Where the promise is laid of a day more than two years prior to the commencement of the action, the complaint is demurrable on the ground that it shows the demand to be barred by the statute of limitations.[46]

§ 5047. **Liability of attorney and agent.**—An attorney is not liable for moneys collected until after a demand or instructions to remit.[47] But the right to a demand may be waived. And where an attorney set up a claim against his client to a larger amount, it was held a waiver of a demand.[48] Attorneys as partners are liable, although it was paid to one of them, and has been demanded from him only.[49] A person not an attorney, who collects a note at the request of another, is liable for the

40 Child v. Eureka etc. Works, 44 N. H. 354.

41 Hatten v. Robinson, 4 Blackf. 479; Mason v. Waite, 17 Mass. 560; Ainslie v. Wilson, 7 Cow. 662, 17 Am. Dec. 532.

42 Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176.

43 Corkle v. Maxwell, 3 Blatchf. 413, Fed. Cas. No. 3231; Commercial Bank v. Rochester, 42 Barb. 488. See Chicago v. Fidelity etc. Sav. Bank, 11 Ill. App. 165; Gould v. McFall, 118 Pa. St. 455, 4 Am. St. Rep. 606, 12 Atl. 336; City of Camden v. Green, 54 N. J. L. 591, 33 Am St. Rep. 686, 25 Atl. 357.

44 Hansbrough v. Peck, 5 Wall. 497, 18 L. Ed. 520.

45 Whittle v. Whittle, 5 Cal. App. 696, 91 Pac. 170.

46 Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78.

47 Beardsley v. Root, 11 Johns. 464, 6 Am. Dec. 386; Stafford v. Richardson, 15 Wend. 302; Taylor v. Bates, 5 Cow. 376; Walradt v. Maynard, 3 Barb. 584; Anderson v. Hulme, 5 Mont. 295, 5 Pac. 865. See McRaven v. Dameron, 82 Cal. 57, 23 Pac. 33.

48 Id. See Satterlee v. Frazer, 2 Sandf. 141.

49 McFarland v. Crary, 6 Wend. 297. Compare Ayrault v. Chamberlin, 26 Barb. 83.

amount, after a reasonable time, without demand.[50] Money collected by a subagent may be recovered;[51] or money paid to an agent, if before it be paid to the principal notice be served upon the agent that it will be reclaimed.[52]

The agent is not a necessary party in a suit to recover money deposited by him to the credit of plaintiff.[53] Alleging that defendant, as agent, sold for plaintiff, and upon demand refuses to pay over the money so realized, states a cause of action.[54]

§ 5048. **Demand essential.**—A count in a complaint in such an action is bad when it is not alleged that a demand has been made on defendant; as a party receiving money for the use of another is rightfully in possession till the same is demanded.[55] One who has received money, standing in the position of trustee,—e. g. a collecting agent,—is in general not liable in an action for money received until demand is made or some breach of trust or duty committed.[56] As where a bank receives money it cannot be sued until after it has been drawn for.[57] But a deposit with a stockholder, or an alleged wager, may be sued for without a previous demand, where the money has been paid over before the action.[58]

§ 5049. **Sufficient allegations.**—A complaint which alleges that the defendant was employed as plaintiff's agent for the purchase of stock, and in settlement between the seller and defendant the former was found to be indebted to the latter, as the plaintiff's agent, in a certain sum, which he paid, but which the defendant refuses to pay to the plaintiff, states a sufficient cause of action.[59] Where an agent has made sales for his principal under a contract allowing him commissions, and the principal has collected certain sums of money as the proceeds of such sales, the agent cannot

50 Hickok v. Hickok, 13 Barb. 632.

51 Wilson v. Smith, 3 How. 763, 11 L. Ed. 820.

52 Wood v. United States, Dev. (Ct. Cl.) 55.

53 Smith v. Farmers' etc. Bank, 2 Cal. App. 377, 84 Pac. 348.

54 Wagner v. Wedell, 3 Cal. App. 274, 85 Pac. 126.

55 Reina v. Cross. 6 Cal. 31; Greenfield v. Steamer "Gunnell," 6 Cal. 68.

56 Walrath v. Thompson, 6 Hill, 540.

57 Downes v. Phœnix Bank, 6 Hill, 297.

58 Ruckman v. Pitcher, 1 N. Y. 392. See Johnson v. Russell, 37 Cal. 670.

59 Bates v. Cobb. 5 Bosw. 29. See, also, Fletcher v. Cummings, 33 Neb. 793, 51 N. W. 144; Cohn v. Beckhardt, 63 Hun, 333, 18 N. Y. Supp. 84.

recover his commissions in an action for money had and received.[60] A complaint against an agent for money received, who pretends to have been robbed thereof, may properly allege simply that the defendant being in possession of the plaintiff's property, as his agent, converted the same to his own use.[61] That defendant, as such agent, had collected from divers persons divers sums, either stating the aggregate or asking an accounting, is sufficient;[62] but alleging collection from one, and proving collections made from another, is a fatal variance.[63] In an action by a corporation to recover funds received by the treasurer thereof, if the complaint shows the relation of the parties, and gives a statement of the moneys received by him, and that the defendant is indebted, it is sufficient. A demand will be inferred, and if none was made, defendant should pay the debt, but not the costs.[64]

§ 5050. **Who may recover.**—An action for money had and received is proper, when a recovery is sought of money which defendant has received and refused to pay on demand to the plaintiff, who is entitled to it.[65] Where an agent or servant applies money of his employer in his hands to discharge the debt of a third person, the employer may recover it from the payee as money received to his use, if the payee received it with a knowledge of the facts;[66] and the agent is not a necessary party to the action.[67] Either one of the several joint owners of claims against a third person, they not appearing to be partners, may maintain an action against an agent to recover his share of money had and received by the latter from the debtor.[68] An assignee to recover a surplus collected by a creditor, or of the assignor, must give notice of the assignment, and make a demand.[69]

§ 5051. **Notes received.**—Under a complaint in an action against an agent for money had and received, the plaintiff may recover where it appears that the defendant received notes which

60 Park v. Mighell, 3 Wash. 737, 29 Pac. 556.

61 Frost v. McCargar, 29 Barb. 617.

62 West v. Brewster, 1 Duer, 647.

63 Soden v. Murphy, 42 Colo. 352, 94 Pac. 353; Colo. Code Civ. Proc., § 49.

64 Second Avenue R. R. Co. v. Coleman, 24 Barb. 300.

65 Stanwood v. Sage, 22 Cal. 517.

66 Amidon v. Wheeler, 3 Hill, 137.

67 Smith v. Farmers & Merc. Bank, 2 Cal. App. 377, 84 Pac. 348.

68 Allen v. Brown, 51 Barb. 86.

69 Sears v. Patrick, 23 Wend. 528.

were good and collectible, and by his transactions he released the debtor and deprived his principal of all remedy except against himself.[70]

§ 5052. When the action lies.—Money paid under a mutual mistake of facts may be recovered back.[71] But money paid by mistake of law cannot be recovered back, there being no difference between money paid in ignorance of law and money paid by mistake of law.[72]

§ 5053. Essential averments—Demand.—Where money is paid by mistake, notice of the mistake and demand of repayment before suit to recover it back are not necessary. The party receiving the money under such circumstances is not a bailee or a trustee. But such a demand may affect the question of interest.[73] The facts constituting the mistake must be alleged.[74] A direct averment of mistake is unnecessary, if the facts upon which it is founded are stated.[75] An allegation of fraud will not support evidence of mistake, nor *vice versa*.[76]

In an action against an agent for an accounting, etc., a request to account and pay over must be alleged and proved.[77] An express demand should be alleged.[78] In an action against a factor for the proceeds of goods sold, of which he apprised his principal, a demand must be shown, unless he had instructions to remit, or the usage of his business made it his duty to do so without instructions.[79] If the complaint in an action for the price of goods

70 Corlies v. Cumming, 6 Cow. 183, note; Floyd v. Day, 3 Mass. 403, 3 Am. Dec. 171; Beardsley v. Root, 11 Johns. 464, 6 Am. Dec. 386; Allen v. Brown, 51 Barb. 86.

71 Burr v. Veeder, 3 Wend. 412; Wheadon v. Olds, 20 Wend. 174; Canal Bank v. Bank of Albany, 1 Hill, 287; Bank of Commerce v. Union Bank, 3 N. Y. 230; Duncan v. Berlin, 60 N. Y. 151; Manchester v. Burns, 45 N. H. 482; Lane v. Pere Marquette Boom Co., 62 Mich. 63, 28 N. W. 786; Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442, 37 N. E. 755; Olmstead v. Dauphiny, 104 Cal. 635, 38 Pac. 505.

72 Schlesinger v. United States, 1 Nott & H. 16; Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373.

73 Utica Bank v. Van Gieson, 18 Johns. 485.

74 Finch v. Hollinger, 47 Iowa, 173; Stephens v. Murton, 6 Or. 193; Schoonover v. Dougherty, 65 Ind. 463; Evarts v. Steger, 5 Or. 147.

75 Welles v. Yates, 44 N. Y. 525; Maher v. Hibernia Ins. Co., 67 N. Y. 283.

76 Stephens v. Murton, 6 Or. 193; Leighton v. Grant, 20 Minn. 345.

77 Bushnell v. McCauley, 7 Cal. 421.

78 Baird v. Walker, 12 Barb. 298; Halden v. Crafts, 4 E. D. Smith, 490.

79 Cooley v. Betts, 24 Wend. 203;

sent on commission alleges that defendant sold, but did not account to plaintiff, the plaintiff must prove that a sale actually took place.[80]

§ 5054. **Election of remedy—Waiver of tort.**—Under a complaint which contained a count for indebtedness from the defendant to the plaintiff for property sold and delivered and money received to the plaintiff's use, the plaintiff may prove a tortious taking by the defendant, and the sale of the property by him, and the receipt of the money, and the waiver of the tort, and sue for the money had and received, or for the value of the property, as for goods sold and delivered. If the wrongdoer sells the property, and receives the money therefor, an action lies at the suit of the owner for money had and received, and such an action is a waiver of the tort.[81] In such an action it is not necessary to state how, or under what circumstances, the money came to the defendant's hands. The receipt of the money to the plaintiff's use is the fact which constitutes the cause of action.[82] Where one person converts to his own use the personal property of another, the latter may waive the tort, and sue in *assumpsit* for the value thereof.[83] Thus, if a guardian sells personal property belonging to his ward, and denies the right of the ward to any interest therein or in the proceeds, he is guilty of a conversion, and the ward may waive the tort and sue in *assumpsit* for the purchase money.[84]

§ 5055. **Default of purchaser.**—It is unnecessary for the plaintiff to aver that the purchaser was in default; nor is it necessary to aver a demand on him, though it might be otherwise if the factors guaranteed the payment of a price to be collected by the principal.[85] An action for money had and received is not sup-

Ferris v. Paris, 10 Johns. 285; Halden v. Crafts, 4 E. D. Smith, 490.

80 Elbourne v. Upjohn, 1 Car. & P. 572.

81 Putnam v. Wise, 1 Hill, 234, 240, note a, 37 Am. Dec. 309; Schroeppel v. Corning, 6 N. Y. 112; Roth v. Palmer, 27 Barb. 652.

82 Scovil v. New, 12 How. Pr. 326; Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Harpending v. Shoemaker, 37 Barb. 270. Compare Byxbie v. Wood, 24 N. Y. 607.

83 Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; Doon v. Ravey, 49 Vt. 293.

84 Lataillade v. Orena, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924. See Tuttle v. Campbell, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384.

85 1 Parsons on Contracts, 78; Milliken v. Byerly, 6 How. Pr. 214.

ported by proof that the plaintiff had paid the defendant certain sums of money upon a written contract for the conveyance of land, which had been rescinded by the plaintiff on the ground that the defendant had failed to deliver a deed to said land within the time prescribed by the contract.[86]

§ 5056. **Demand.**—In New York, the rule is settled that a foreign factor is not liable to an action for the proceeds of sales made by him for account of his principal on commission, until a demand made by the principal, or instructions to remit.[87]

§ 5057. **Unauthorized sale.**—For selling without authority stock which the broker had purchased for the plaintiff, if this fact be shown in the complaint, and that it was to be delivered to him within a specified time at his option, but that he sold it meanwhile against his express instructions, a demand and tender on the part of the plaintiff need not be alleged.[88] Money paid as purchase price for property to which the seller has no legal title can be recovered.[89] The plaintiff cannot recover in an action improperly brought as one for money had and received, although the real cause of action may be disclosed by the answer and reply.[90]

§ 5058. **Interest.**—While a mere deposit of public funds in a bank is not a felony of converting public funds to private use, or loaning them with or without interest, yet in case of failure of the bank such a public officer is not entitled to interest in his own right upon such public funds until he has fully reimbursed the public treasury and has become the private owner of the claim.[91]

§ 5059. **Gambling transactions.**—The action given by section 26 of article 4 of the California constitution, to recover money paid on contracts for sale of stocks on margin, lies in favor of the principal against the broker who procures the stock for him,

86 Distler v. Dabney, 3 Wash. 200, 28 Pac. 335.

87 Walden v. Crafts, 2 Abb. Pr. 301; Halden v. Crafts, 4 E. D. Smith, 490; Ferris v. Paris, 10 Johns. 285; Lillie v. Hoyt, 5 Hill, 395, 40 Am. Dec. 360.

88 Clark v. Meigs, 13 Abb. Pr. 467.

89 Jensen v. McCormick, 26 Utah, 142, 72 Pac. 630.

90 Clark v. Sherman, 5 Wash. 681, 32 Pac. 771.

91 Baker v. Williams etc. Banking Co., 42 Or. 213, 70 Pac. 711.

although he purchases it from another broker for the principal's account; and a balance standing to plaintiff's credit upon another separate transaction does not constitute a part payment or credit on the sum sued for.[92] A "bucket-shop" dealer, making sales for others upon margins, cannot set up the illegality of the contract when sued by the seller for his profits.[93] Under the statute providing for a recovery of any money lost at any game of cards or gambling device, including election bets, the right of action lies against any party into whose hands the property has been delivered as well as against the winner of the bet.[94]

§ 5060. **Defense of coverture.**—A husband and wife being joint payees, she may receive the money and spend it for the necessaries of life.[95]

FORMS—ACTIONS FOR MONEY HAD AND RECEIVED.

§ 5061. **Complaint—Promise of third person to pay money to plaintiff.**

Form No. 1410.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., one A. B. was, and ever since has been, indebted to the plaintiff in the sum of . . . dollars.

II. That on that day, the said A. B. was the holder of a bill of exchange [describe it], then indorsed, and delivered the same to the defendant; in consideration of which the defendant then and there promised A. B. that he would endeavor to collect the same, and that when collected, he would apply the proceeds in payment of said indebtedness of said A. B. to the plaintiff.

III. That afterwards, on the . . . day of . . ., 19.., the defendant collected and received the same.

IV. That no part thereof has been paid to the plaintiff.

[DEMAND OF JUDGMENT.]

92 Stillwell v. Cutter, 146 Cal. 657, 80 Pac. 1071.

93 Overholt v. Burbridge, 28 Utah, 408, 79 Pac. 561.

94 Armstrong v. Aragon, 13 N. Mex. 19, 79 Pac. 291.

95 Whittle v. Whittle, 6 Cal. App. 696, 91 Pac. 170.

§ 5062. Complaint—Common form.

Form No. 1411.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., [or, at sundry times between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., at . . .], the defendant received the sum of . . . dollars from one A. B., to and for the use of the plaintiff.

II. That thereafter, on the . . . day of . . ., 19.., [or, before the commencement of this action], the plaintiff demanded payment thereof from the defendant.

III. That the defendant has not paid the same, nor any part thereof [except, etc.].

[DEMAND OF JUDGMENT.]

§ 5063. Complaint against attorney or agent with demand.

Form No. 1412.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at the county of . . ., state of . . ., the defendant received from the plaintiff, as the agent of said plaintiff, the sum of . . . dollars, to the use of the said plaintiff.

II. That thereafter, and before this action, the said plaintiff demanded payment thereof from said defendant.

III. That the defendant has not been paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5064. The same—Another form.

Form No. 1413.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., the defendant was the agent of the plaintiff in [stating generally the employment]; that he collected and received as such agent, from divers persons, certain sums of money for and on account of the plaintiff, amounting in the whole to the sum of . . . dollars, no part of which has been paid by defendant to the plaintiff.

II. That on the . . . day of . . ., 19. . , at . . ., the plaintiff demanded payment of the same from the defendant.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5065. Complaint in action for money received by defendant through mistake.

Form No. 1414.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant presented to the plaintiff an account of mutual dealings theretofore had between them, which said account set forth a balance due from the plaintiff to the defendant of the sum of . . . dollars.

II. That the plaintiff, believing said account to be correctly stated, then paid said sum of . . . dollars to the defendant.

III. That in fact said account was not correctly stated, but that it overcharged the plaintiff with the sum of . . . dollars by an error in adding up the items thereof [or otherwise, specifying the error].

IV. That defendant has not paid the said sum of . . . dollars to the plaintiff, though requested so to do.

[DEMAND OF JUDGMENT.]

§ 5066. Complaint against factor for price of goods sold.

Form No. 1415.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant, in consideration of his reasonable commissions, agreed with plaintiff to sell for plaintiff certain goods [fifty barrels of flour].

II. That on the . . . day of . . ., 19. . , at . . ., he delivered to defendant [fifty barrels of flour], for sale upon commission.

III. That on the . . . day of . . ., 19. . , [or, on some other day unknown to the plaintiff, before the . . . day of . . ., 19. .], the defendant sold the said merchandise for . . . dollars.

[IV. That the commission and expenses of the defendant thereon amounted to . . . dollars.]

V. That on the . . . day of . . ., 19. . , the plaintiff demanded from the defendant the proceeds of the said merchandise.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5067. Complaint against factor for price of goods sold on credit.

Form No. 1416.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff employed the defendant to sell certain goods and merchandise, of the value of . . . dollars, upon commission, and delivered the same to the defendant, who then promised to sell them and be responsible to the plaintiff for the price thereof.

II. That on the . . . day of . . ., 19.., as the plaintiff is informed and believes, the defendant sold said goods and merchandise for the sum of . . . dollars, on a credit of . . . months from that date, which credit expired before the commencement of this action.

III. That the commission and expenses of the defendant thereon amount to . . . dollars.

IV. That plaintiff further alleges, on information and belief, that the sum of . . . dollars is the price of said goods and merchandise, after deducting said charges.

V. That on the . . . day of . . ., 19.., at . . ., the plaintiff demanded of the defendant payment of the said sum of . . . dollars.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5068. Complaint against broker for proceeds of note discounted.

Form No. 1417.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff employed the defendant to negotiate a promissory note, the property of the plaintiff, made by one A. B. [describe the note], and thereupon he delivered the same to the defendant, who undertook to negotiate the same for a reasonable commission, and to pay the proceeds over to the plaintiff.

II. The plaintiff further alleges, on information and belief, that on the . . . day of . . ., 19.., the defendant procured said note to be discounted at the . . . bank, and received as the proceeds thereof the sum of . . . dollars.

III. That the commission and expenses of the defendant thereon amount to . . .

IV. That on the . . . day of . . ., 19.., at . . ., the plaintiff demanded of the defendant . . . dollars, the balance of the proceeds of said note after deducting said expenses and commission.

V. That he has not paid the same.

[DEMAND OF JUDGMENT.]

§ 5069. Complaint in action for money paid on contract for services not performed.

Form No. 1418.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the plaintiff entered into an agreement with defendant, whereby defendant undertook to render his services to the plaintiff as . . . for the term of . . ., in consideration of the sum of . . . dollars, to be paid therefor by the plaintiff.

II. That on the . . . day of . . ., 19.., the plaintiff paid to defendant, on account of his services to be rendered thereafter, in pursuance of said agreement, the sum of . . . dollars.

III. That defendant wholly neglected and refused to render said services [or, refused to render any services after . . ., 19..], although this plaintiff has been ready to receive and pay for the same; and that no part of said sum has been repaid to plaintiff, although frequently demanded by plaintiff prior to the commencement of this action.

[DEMAND OF JUDGMENT.]

§ 5070. Complaint in action for money paid on contract to purchase real estate, not performed.

Form No. 1419.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant and plaintiff entered into a contract in writing, subscribed by defendant, for the purchase by plaintiff of the defendant of certain real estate in the city of . . ., for the sum of . . . dollars, to be paid therefor by plaintiff, a true copy of which agreement is attached hereto and marked "Exhibit A."

II. That plaintiff then and there deposited in the hands of said defendant the sum of . . . dollars, as a part of the said purchase money of said real estate, in case such sale should be completed and a deed conveying good title should be delivered by defendant as in said agreement specified, but to be returned to him if defendant should fail to fulfill said agreement.

III. That plaintiff duly performed all the conditions of said contract on his part, and on the . . . day of . . ., 19.., duly offered the defendant to receive a deed of said premises and pay the balance of the purchase money therefor.

IV. That defendant, on said . . . day of . . ., 19.., failed and refused to deliver to plaintiff a deed of the premises pursuant to the agreement, and has ever since refused to deliver said deed.

V. [Allege demand for repayment and refusal.]

[DEMAND OF JUDGMENT.]

[Annex copy of agreement.]

§ 5071. Complaint in action for money paid on contract to purchase real estate, void by statute of frauds.

Form No. 1420.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., and prior thereto, defendant owned certain real estate described as follows: [insert description]; and that on said . . . day of . . ., 19.., plaintiff and defendant entered into a verbal agreement by which defendant agreed to sell and convey to plaintiff the said real estate for the sum of . . . dollars, and said plaintiff agreed to purchase the same and pay therefor the said sum of . . . dollars.

II. That plaintiff then and there paid defendant the sum of one hundred dollars as part of the purchase price of said real estate, and defendant received said sum upon said verbal agreement.

III. That no part of said agreement was ever reduced to writing, nor was any memorandum thereof made or signed by either of said parties, and that plaintiff did not at any time take possession of said real estate, nor did defendant surrender possession thereof.

IV. That said verbal agreement was and is null and void, and that no part of the same was ever carried out, except that said one hundred dollars was paid by plaintiff to defendant.

V. That on the . . . day of . . ., 19.., the plaintiff demanded

repayment from defendant of the said sum of one hundred dollars, but that defendant refused to repay the same.

[DEMAND OF JUDGMENT.]

§ 5072. Complaint by pledgor of collateral to recover excess of money collected by pledgee.

Form No. 1421.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , the plaintiff, being then indebted to defendant in the sum of . . . dollars, indorsed and delivered to said defendant, as a collateral security for the payment of the same, a certain promissory note [describe note].

II. That at its maturity the note was collected by defendant, and by the application of the moneys so received by him said indebtedness was wholly paid and extinguished.

III. That after payment of said indebtedness there remained in the hands of the defendant a balance of . . . dollars, belonging to this plaintiff, payment of which plaintiff demanded of defendant on the . . . day of . . ., 19 . ., but no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 5073. Complaint in action to recover amount paid on a judgment afterwards reversed.

Form No. 1422.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19 . ., defendant recovered a judgment against this plaintiff in the . . . court, in and for the county of . . ., in an action wherein the defendant was plaintiff and this plaintiff was defendant, for the sum of . . . dollars.

II. That on the . . . day of . . ., 19 . ., the plaintiff was compelled to pay, and did pay, to defendant the sum of . . . dollars in satisfaction thereof.

III. That thereafter plaintiff duly appealed from said judgment to the . . . court, and thereafter, on the . . . day of . . ., 19 . ., by the judgment of said last-named court, said first-mentioned judgment was duly reversed; but that no part of the sum paid in satisfaction thereof has been repaid to this plaintiff.

[DEMAND OF JUDGMENT.]

CHAPTER CXXIV.

ACTIONS FOR MONEY LOANED.

§ 5074. Essential averments.—Every material fact must be alleged with certainty; and all those facts which are necessary to distinguish the transaction in question from every other like transaction are material. These details are often immaterial, in the sense that no issue can be made upon them; yet are material as matter of description. For instance, if to the plaintiff's allegation that "at San Francisco he lent," the defendant should answer that he never borrowed any money from the plaintiff at San Francisco, the answer would be frivolous. Time is not ordinarily material, except the order of occurrences, and to fix the date when interest began. When no time is fixed for the repayment of the loan, the presumption is that it was to be paid immediately.[1] Nor is it necessary to show that the debt had become payable at the commencement of the action, as that is matter of defense to be set up in the answer.[2] But whenever time is material, as in the case of demand and notice to charge an indorser, it must be directly and truly stated.[3]

It has been held that an allegation that the money was lent at the defendant's request may be omitted,[4] although it is necessary to prove a request in order to constitute a loan.[5] But, in general, a request in such case will be implied.[6] Where a special request is necessary to be averred, the general allegation of "though often requested" is not sufficient.[7] The defect, however, is cured by verdict.[8] In an action to recover money loaned, if the complaint charges the indebtedness, the manner in which it accrued, the promise to pay, and the refusal, it is sufficient.[9]

1 Peets v. Bratt, 6 Barb. 662.

2 Smith v. Holmes, 19 N. Y. 271; Maynard v. Talcott, 11 Barb. 569; Wise v. Hogan, 77 Cal. 187, 19 Pac. 278; Doe v. Sanger, 78 Cal. 151, 20 Pac. 366; Kraner v. Halsey, 82 Cal. 210, 22 Pac. 1137; Curtiss v. Ætna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211.

3 Castro v. Wetmore, 16 Cal. 379.

4 Victors v. Davis, 1 Dowl. & L. 984.

5 Brown v. Garnier, 6 Taunt. 389.

6 See Victors v. Davis, 1 Dowl. & L. 984. See, also, in this connection, Brown v. Garnier, 6 Taunt. 389, 1 Eng. Com. L. R. 421, where it was held that "hired" implies a request.

7 Bush v. Stevens, 24 Wend. 256; Whitton v. Whitton, 38 N. H. 127, 75 Am. Dec. 163.

8 Leffingwell v. White, 1 Johns. Cas. 99, 1 Am. Dec. 97.

9 Williams v. Glasgow, 1 Nev. 533.

It is not necessary to state when the debt was to be repaid, except for the purpose of fixing a date for interest. The presumption of law is that it was to be paid immediately.[10] Nor was it necessary to show that the debt was due at the commencement of the action. If it was not, that is matter of defense, to be set up in the answer.[11] Where the count, in an action for money lent and advanced, sets forth a demand for a certain sum, and the jury find a verdict for a larger sum, it is not erroneous, if the declaration covered the larger sum in the *ad damnum*.[12] It may be doubted whether the allegation of non-payment is necessary.[13]

In an action where the complaint sets out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, but did not aver that after paying the draft he canceled it and delivered it up to the defendant, it was held that the defects were fatal in this form of action.[14]

§ 5075. **Payments made on account.**—The plaintiff need not state payments made on account, as this is matter of defense. But where the complaint is verified there is a necessity to do so; and in such case he should briefly state what amount has been paid.[15] As any payments must be pleaded, it is certain that the most general form of averring non-payment is sufficient. It is not necessary to add "or any part thereof." Although not necessary, it is highly proper to credit the defendant with any payments.

Money advanced, either as a loan or on joint account, to be used for gambling purposes, if so used, cannot be recovered back.[16]

§ 5076. **Evidence.**—Where the loan is admitted, and the ownership of the loan alone is in dispute, a variance of two years between the pleadings and the proof is immaterial.[17] Notes made payable to plaintiff by a third party, on direction of defendant's

10 Peets v. Bratt, 6 Barb. 662.

11 Smith v. Holmes, 19 N. Y. 271.

12 Mills v. Bank of United States, 11 Wheat. 431, 440, 6 L. Ed. 512.

13 See Lansing v. Carpenter, 20 N. Y. 458; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696.

14 Lambert v. Slade, 3 Cal. 330.

15 Van Demark v. Van Demark, 13 How. Pr. 372; Giles v. Betz, 15 Abb. Pr. 285.

16 Shaffner v. Pinchback, 30 Ill. App. 355; Tyler v. Carlisle, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356; Waugh v. Beck, 114 Pa. St. 422, 60 Am. Rep. 354, 6 Atl. 923. See Raymond v. Leavitt, 46 Mich. 447, 41 Am. Rep. 170, 9 N. W. 525; Miles v. Andrews, 40 Ill. App. 155. That money advanced as margins cannot be recovered back, see Dows v. Glaspel, 4 N. Dak. 251, 60 N. W. 60.

17 Kitchen v. Holmes, 42 Or. 252, 70 Pac. 830.

trustee, without the knowledge or authority of defendant, are not admissible against defendant for money loaned.[18] Money loaned to two may be recovered from one of them on his promise to repay the same.[19] If there is a contention that repayment of the loan was conditioned upon the receipt of commissions, plaintiffs' custom with numerous other agents may be shown.[20]

§ 5077. **Defense—Discharge in bankruptcy.**—In an action of *assumpsit,* for money had and received, the defendant pleaded a discharge in bankruptcy. The plaintiff replied that, in the proceedings of the defendant in obtaining his discharge, the defendant was guilty of fraud, and of the willful concealment of his property and rights of property. The defendant rejoined, traversing the fraud and the willful concealment, and concluding to the country. It was held, on demurrer, that the rejoinder was bad; that the replication was bad also, in attempting to put in issue several distinct matters; and that the plea was good, notwithstanding that it contained no specific averments that the debt was one provable under the bankruptcy, or that the defendant had received a certificate of discharge, or that notice of a hearing was given to the creditors before the discharge was granted.[21]

§ 5078. **General denial—Insufficient denials.**—An allegation in the complaint that the defendants sold plaintiff's property for a certain sum, and that they "have had the use of and interest upon said money since it was received by the defendants for the plaintiff's use," is sufficiently controverted by a denial in defendants' answer that they sold the plaintiff's property, or that they received therefor any money whatever to the plaintiff's use.[22] If the complaint avers that the defendant is indebted to the plaintiff in the sum of three thousand dollars gold coin, for so much money received by defendant for plaintiff's use, and the answer denies that the defendant received three thousand dollars in gold coin for plaintiff's use, it is only a denial of its receipt in gold coin, and does not raise an issue.[23]

18 Tague v. John Caplice Co., 28 Mont. 51, 72 Pac. 297.

19 Bacome v. Black, 137 Cal. xix, 70 Pac. 620.

20 Perrin v. Carbone, 1 Cal. App. 295, 82 Pac. 222.

21 Weld v. Locke, 18 N. H. 141.

22 Robinson v. Corn Ex. Ins. Co., 1 Abb. Pr. (N. S.) 186.

23 Leffingwell v. Griffing, 31 Cal. 231.

§ 5079. **Statute of limitations.**—When a promise to pay a debt is relied on to take a case out of the statute of limitations, it is not necessary, in pleading, to allege that it was in writing, signed by the party.[24] It is otherwise in California.[25] In that state it is held that where the acknowledgment is made while the contract is a subsisting liability,—that is, before it has become barred by the statute,—it establishes a continuing contract; but when made after the bar of the statute, a new contract is created. It is not held that the statute raises a presumption of payment, but bars the remedy; therefore, when the creditor sues after the statute has barred the original contract, his cause of action is not upon the original contract, but upon the new promise, whether it be in form a new promise or an implied promise arising from the acknowledgment, the consideration being the original contract, which, though barred by the statute, is binding *in foro conscientiæ*;[26] that the statute acts only on the remedy, and does not raise a presumption of payment.[27] In New York, it has been held that where there is a new promise to pay a debt barred by the statute of limitations, it is not necessary to count upon this as a new contract; but the action may be brought upon the original obligation.[28] The time of such new promise must be definitely averred; an averment of repeated acknowledgments will not suffice.[29] The acknowledgment must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay.[30] When the new promise is coupled with a condition, it should be so alleged, and performance must be averred.[31]

§ 5080. **Assignment of claim.**—To an action for money due, a plea on equitable grounds that plaintiff assigned the debt to D., who notified defendant that assignment is still in force; that

24 Lynch v. Musgrave, Hayes & J. 821.

25 Porter v. Elam, 25 Cal. 291, 85 Am. Dec. 132.

26 McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Chabot v. Tucker, 39 Cal. 438. See, also Biddel v. Brizzolara, 56 Cal. 374, 64 Cal. 354, 30 Pac. 609; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Osment v. McElrath, 68 Cal. 466, 58 Am. Rep. 17, 9 Pac. 731; Gruenberg v. Buhring, 5 Utah, 414, 16 Pac. 486; Howes v. Lynde, 7 Mont. 545, 19 Pac. 249; Wilcox v. Williams, 5 Nev. 213.

27 See Johnson v. Albany etc. R. R. Co., 54 N. Y. 416, 13 Am. Rep. 607.

28 Van Alen v. Feltz, 9 Abb. Pr. 277; Sands v. St. Johns, 23 How. Pr. 140.

29 Bloodgood v. Bruen, 8 N. Y. 362.

30 McCormick v. Brown, 36 Cal. 185, and cases there cited, 95 Am. Dec. 170.

31 Wait v. Morris, 6 Wend. 394.

defendant is still liable to pay D.; that the action is not brought for the benefit nor with the consent of D.; that if the plaintiff recovered, the defendant would still be obliged to pay D., is good.[32] In an action to recover money alleged to be due from the defendant to the plaintiff, a defense alleging that a third person had given defendant notice that he was owner of such moneys, and of any cause of action therefor, and demands payment to himself by virtue of an assignment from the plaintiff, is irrelevant.[33] When A., by agreement between him and B., assented to by C., becomes liable to pay the latter a debt originally due to him from B., the assignee of C. may maintain an action for the debt in his own name against A.[34] Defendant being indebted to E. M. & Co., and they to plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the company to plaintiff. This was an equitable assignment, and the only mode of enforcing it is by action in the name of the assignee to recover the debt.[35]

§ 5081. **Defense—Failure of consideration.**—A county warrant drawn by the auditor, directing the treasurer to pay H. E. Co. nine hundred and sixty-five dollars for services as county printer, was, for a valuable consideration, indorsed by H. E. Co. to F., and by F. transferred to plaintiff for nine hundred and sixty-five dollars, paid by the latter. The warrant was in fact illegal and valueless, and payment being for this reason refused by the treasurer, plaintiff instituted the present action against H. E. Co. and F. to recover back the amount paid by him, setting up in the complaint the foregoing facts, and the defendants, at the time of their transfers, represented that the warrant was valid and would be paid on presentation. It was held on demurrer that the complaint stated a cause of action, and that on the facts alleged plaintiff was entitled to recover from defendants the money which he had paid for the warrant.[36]

§ 5082. **General denial.**—A general averment that defendant does not owe the money sued for, nor any part thereof, is not sufficient.[37]

32 Jeffs v. Day, L. R., 1 Q. B. 372.

33 Carpenter v. Bell, 19 Abb. Pr. 258.

34 Lewis v. Covillaud, 21 Cal. 178; McLaren v. Hutchinson, 22 Cal. 187, 83 Am. Dec. 59.

35 Wiggins v. McDonald, 18 Cal. 126.

36 Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78.

37 Sapington v. Jeffries, 15 Mo. 628.

§ 5083. **Sufficient plea.**—Where an attorney claims a sum of money paid for another, to procure the passage of an act of the legislature, and alleges that the expenditure was made in good faith, was necessary, and was authorized by his principal, a reply that the expenditure was unlawful and corrupt, and was used and squandered to corrupt the legislature, and to exert upon it a secret, undue, and personal influence by lobbying; that the same was not necessary; that the act was honestly passed, and was not secured by corrupt means, is not demurrable.[38]

FORMS—ACTION FOR MONEY LOANED.

§ 5084. **Complaint by lender against borrower.**

Form No. 1423.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . , at . . . , he lent to the defendant, at his request, . . . dollars.

II. That the defendant has not paid the same, nor any part thereof.

Wherefore, the plaintiff demands judgment for . . . dollars, with interest from the . . . day of . . . , 19 . . , and costs of this action.

§ 5085. **The same—No time for payment agreed on.**

Form No. 1424.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . , he loaned the defendant, for his accommodation, and at his request, and without any time being agreed on for repayment, the sum of . . . dollars.

II. That he has demanded payment of the same, but the defendant has not paid said sum of . . . dollars, nor any part thereof.

[If interest is desired, state date of demand.]

Wherefore, plaintiff demands judgment for . . . dollars, with interest from [give date of demand], and costs of this action.

38 Judah v. Trustees Vincennes University, 23 Ind. 273.

§ 5086. Complaint by assignee of lender against borrower.

Form No. 1425.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19 . ., at . . ., the defendant was indebted to one A. B., in the sum of . . . dollars, on an account for money lent by said A. B. to the defendant.

II. That on the . . . day of . . ., 19 . ., at . . ., the said A. B. assigned said indebtedness to the plaintiff, of which assignment defendant had due notice.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5087. Complaint—Partners lenders, against partners borrowers.

Form No. 1426.

[TITLE.]

A. B. and C. D., the plaintiffs, complain of E. F. and G. H., the defendants, and allege:

I. That plaintiffs, A. B. and C. D., are, and at all times herein mentioned have been, copartners engaged in business under the firm name of [state name of firm].

II. That defendants, E. F. and G. H., are, and at all times herein mentioned have been, holding themselves out to the public as copartners engaged in business under the firm name of [state name of firm].

III. That on the . . . day of . . ., 19 . ., at . . ., the plaintiffs loaned to the defendants, at their request, the sum of [five hundred] dollars, on condition that it should be repaid on demand, with interest from that date, at . . . per cent per month.

IV. That plaintiffs have demanded payment thereof.

V. That defendants, or either of them, have not paid said sum, and the interest, or any part thereof.

And for a second cause of action, the said plaintiffs allege:

I. That on the . . . day of . . ., 19 . ., at . . ., the plaintiffs, at the special instance and request of the said defendants, paid, laid out, and expended for the said defendants, and to and for their use and benefit, the sum of [five hundred] dollars; in consideration whereof, the said defendants promised the said plaintiffs to pay unto the said plaintiffs the sum of [five hundred] dollars on demand, together with interest thereon.

II. That on the . . . day of . . ., 19 . ., at . . ., the plaintiffs demanded payment thereof.

V. That the defendants, or either of them, have not paid the same, the interest or any part thereof; except, etc. [State briefly the total payments.]

[DEMAND OF JUDGMENT.]

§ 5088. Complaint in action for money paid at defendant's request.

Form No. 1427.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19 . ., at the request of defendant, the plaintiff paid to one E. F. . . . dollars.

II. That in consideration thereof the defendant promised to repay the same to plaintiff [on demand].

III. That [on the . . . day of . . ., 19 . ., plaintiff demanded payment of the same from defendant, but] he has not repaid the same.

[DEMAND OF JUDGMENT.]

§ 5089. Complaint in action for money paid to discharge another's debt.

Form No. 1428.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19 . ., the plaintiff paid to one E. F., for the use of defendant, and at his request, the sum of . . . dollars, the same being the amount of a certain promissory note then owing by defendant to said E. F. [or otherwise, describe the debt].

II. That defendant then and there agreed to repay the same upon demand.

III. That this plaintiff on the . . . day of . . ., 19 . ., at . . ., duly demanded payment of the same from defendant, but no part thereof has been paid [or, no part thereof has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 5090. Complaint in action by accommodation maker of note, having paid it.

Form No. 1429.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19 . ., the plaintiff made and delivered to defendant his promissory note, of which the following is a copy: [Insert exact copy of note.]

II. That plaintiff received no consideration therefor, but the same was an accommodation note given to defendant at his request and upon his promise to pay at maturity.

III. That, as plaintiff is informed and believes, defendant thereafter, and before its maturity, negotiated said note for value.

IV. That defendant did not pay said note at maturity, and that plaintiff was thereupon compelled to, and did, on the . . . day of . . . , 19. . , pay the sum of . . . dollars in discharge of said note, and that no part of the said sum has been paid to the plaintiff.

[DEMAND OF JUDGMENT.]

ANSWERS.

§ 5091. Denial of receipt.

Form No. 1430.

[TITLE.]

The defendant answers to the complaint:

That he has not received the money mentioned in the said complaint, nor any part thereof.

§ 5092. The same—Accounting and payment.

Form No. 1431.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on the . . . day of . . ., 19 . ., at . . ., he accounted with and paid over to the plaintiff all money received by him up to that day, as such agent of the plaintiff.

§ 5093. For money lent—Denial of loan.

Form No. 1432.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff did not lend him the money mentioned in the complaint, nor any part thereof.

§ 5094. For money paid—Denial of request by defendant.

Form No. 1433.

[TITLE.]

The defendant answers to the complaint:

I. That he never requested the plaintiff to pay any money to A. B.

II. That he never promised to pay any money to the plaintiff, on account of any money paid to the said A. B., or at all.

§ 5095. Allegation of payment by sale of collateral.

Form No. 1434.

The defendant alleges that on or about the . . . day of . . ., 19 . ., he delivered to the plaintiff [describe the property], as collateral security for the repayment of the said loan [or, to indemnify the said plaintiff against all liability arising from the execution of the undertaking], described in the complaint, and that on or about the . . . day of . . ., 19 . ., the plaintiff sold the said [describe collateral], and realized upon such sale, and still retains, the sum of . . . dollars, which sum is greater than the amount of said loan [or, the amount paid by the plaintiff upon said undertaking], with interest thereon up to the time of such sale. [If the amount received be less than the plaintiff's claim, state the fact as a partial defense.]

§ 5096. Allegation of usury.

Form No. 1435.

That the loan alleged in the complaint was made to the defendant by the plaintiff on the corrupt and unlawful agreement between them, that the plaintiff should reserve and secure to himself, and the defendant would pay to him, for the use of said sum, a rate of interest in excess of the rate permitted by law, to-wit, [here state the interest or compensation agreed on, and payment of it, if it has been paid].

CHAPTER CXXV.

ACTIONS FOR MONEY PAID.

§ 5097. Action—When it lies.—In this action there may be a recovery of money which an acceptor has paid for the drawer,[1] or which a surety has been obliged to pay for his principal.[2] It has been said that in order to maintain an action for money paid, the plaintiff must prove an actual payment upon request of the defendant, or a payment with the defendant's subsequent assent and approval.[3] In general, it lies upon an implied engagement by the defendant to repay.[4] But the objection that there was a special agreement cannot defeat the action for money paid, when the written contract produced contained nothing more than what the law would imply.[5] Where the plaintiff in an action omitted to state the amount of money advanced and sought to be recovered, the defect is not cured by a bill of sale filed with a petition, though it contains a statement of the amount advanced.[6] No recovery can be had of money paid on behalf of another, either as a gift or in satisfaction of some obligation, legal or moral, which he deems he owes the other.[7] In an action to recover back money received by the defendant from the plaintiff, words in the complaint charging fraud may be regarded as a matter of inducement. The fraud need not be proved.[8] Money fraudulently received from a bank may be sued for before the note given to the bank becomes due;[9] or money received on a prize drawn by fraudulent means in a lottery.[10] Where a third person receives money due from a debtor to his creditor, and does not pay it over to the creditor, in consequence of which the creditor brings an

1 Whitwell v. Brigham, 19 Pick. 121.

2 Ward v. Henry, 5 Conn. 598; 13 Am. Dec. 119.

3 Fowler v. Hall, 7 Ill. App. 332.

4 Grissell v. Robinson, 32 Eng. C. L. 15. See San Gabriel etc. Co. v. Witmer, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465; Perin v. Parker, 25 Ill. App. 465, 126 Ill. 201, 9 Am. St. Rep. 571, 18 N. E. 747, 2 L. R. A. 336; Norton v. Colgrove, 41 Mich. 544, 3 N. W. 159.

5 Gibbs v. Bryant, 1 Pick. 118.

6 Allen v. Shortridge, 1 Duval, 34.

7 Holly St. Land Co. v. Beyer, 48 Wash. 422, 93 Pac. 1065.

8 Harpending v. Shoemaker, 37 Barb. 270.

9 Gibson v. Stevens, 3 McLean, 551, Fed. Cas. No. 5401.

10 Catts v. Phalen, 2 How. 376, 11 L. Ed. 306.

action against the debtor and recovers his demand, the debtor may sue such third person to recover back the former payment.[11]

§ 5098. **Essential allegations — Demand — Promise.** — No demand is necessary. It is mentioned here only with reference to the mode of alleging demand when it is desired to fix a date for the commencement of interest. An allegation of promise is not absolutely necessary, as the law will imply a promise; but as an express promise is almost always made in such cases, it is better to state it. If no express promise is made, none should be pleaded.[12] In cases of purchase of stocks for another, the promise or request should be alleged to make a cause of action.[13] A complaint stating the payment of a sum of money by the plaintiff at the special instance and request of the defendant, for which money so paid the defendant is indebted to him, and has refused to pay the money, or any part of it, is sufficient, without averring a promise by the defendant to repay the money, since the law implies such a promise.[14] The statute of frauds prescribes that "every special promise to answer for the debt, default, or miscarriage of another," is void if not in writing. But it need not be alleged in the complaint that the promise was "in writing." Money paid upon a contract which is invalid under the statute of frauds, cannot be recovered back so long as the other party is ready and willing to perform on his part.[15]

§ 5099. **Essential allegations—Demand—Request.**—The allegation of demand is not in general necessary, except for the purpose of fixing the time for interest thereon. An averment of payment upon request is necessary in a complaint for money paid.[16] But it may be either express or implied; and if implied, the facts raising it must be alleged.[17]

§ 5100. **Essential allegation—Liability to repay, how created.** —The defendant's legal liability to pay the debt which the plain-

11 Priest v. Price, 3 Keyes, 222.

12 Farron v. Sherwood, 17 N. Y. 227; Berry v. Fernandes, 1 Bing. 338.

13 Donovan-McCormick Co. v. Sparr, 34 Mont. 237, 85 Pac. 1029.

14 Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137. See, further, as to sufficiency of complaint in such action, Rodgers v. Wittenmyer, 88 Cal. 553, 26 Pac. 369; Hurlbutt v. Saw Co., 93 Cal. 55, 28 Pac. 795; Moulton v. Loux, 52 Cal. 81; Jaffe v. Lilienthal, 86 Cal. 91, 24 Pac. 835.

15 Allis v. Read, 45 N. Y. 142.

16 2 Greenleaf on Evidence, 93. See Curtis v. Parks, 55 Cal. 106.

17 Durnford v. Messiter, 5 Man. & S. 446.

tiff has paid is an essential fact in an action to recover the money paid, unless there be an express promise by defendant to repay the plaintiff.[18] But a party who pays an illegal claim, without duress of person or of goods, or fraud on the part of the claimant, although he makes such payment under protest, cannot maintain an action to recover back the money so paid.[19] If a man pays money in satisfaction of a claim, in order to recover it back he must allege facts justifying such recovery, and, if the facts are denied, he must prove them. If he relies upon deception and fraud, he must allege them. If he alleges simply that he paid a sum of money, and asks that he may recover it back, without showing any good reason in law why it should be returned to him, he states no cause of action.[20]

§ 5101. **Essential allegations—When action lies.**—Money paid on a reversed or suspended judgment may be recovered back.[21] In such action it must be shown that the judgment was reversed; it cannot be stated as erroneous.[22] The award of a *venire de novo*, to be issued by the court below, and an order that the costs of reversal abide the event of the suit, are no bar to the action to recover back the money paid.[23] An action lies to recover back money paid under the award of a public officer, when such award was obtained by fraud and imposition, and where the payment was made before discovering the fraud.[24]

§ 5102. **Essential allegations—Custom—Demand.**—It is well to set forth the custom of brokers in such transactions.[25] A custom of insurance brokers to take dividends declared by mutual companies in lieu of all other compensation is bad.[26] The plaintiff must aver that he demanded payment of the price, and offered

18 2 Greenleaf on Evidence, 103, § 114, note; San Gabriel etc. Co. v. Witmer, 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465; Clanton v. Coward, 67 Cal. 373, 7 Pac. 787.

19 Flower v. Lance, 59 N. Y. 603. See McDermott v. Mitchell, 53 Cal. 616.

20 Adams v. Smith, 19 Nev. 259, 9 Pac. 337, 10 Pac. 353.

21 Raun v. Reynolds, 18 Cal. 276.

22 Bank of Washington v. Bank of United States, 4 Cranch C. C. 86, Fed. Cas. No. 947. Compare McDaniel v. Riggs, 3 Cranch C. C. 167, Fed. Cas. No. 8745; Bank of Washington v. Neale, 4 Cranch C. C. 627, Fed. Cas. No. 951; White v. Ward, 9 Johns. 232; Roth v. Schloss, 6 Barb. 308.

23 Sturges v. Allis, 10 Wend. 355.

24 State v. Phœnix Bank, 33 N. Y. 9; modifying 7 Bosw. 20.

25 Whitehouse v. Moore, 13 Abb. Pr. 142.

26 Minnesota C. R. R. Co. v. Morgan, 52 Barb. 217.

to deliver the goods.[27] A complaint alleging that the plaintiff, as a commission broker, advanced a specified sum of money for the defendants, at their instance and request, in the purchase of produce, and that the defendants promised to pay the same to the plaintiff, but although often requested so to do, neglected, and still neglects, to pay the same to the plaintiff, is neither uncertain nor ambiguous, and sets forth all that is required.[28]

§ 5103. **Recovery of earnest money.**—The purchaser is entitled to a return of earnest money, unless the vendor has a cause of action against him for default;[29] but not so if a forfeiture is provided for, and vendee is in default.[30] If the vendee defaults, time being of the essence of the contract, before the vendor repudiates the contract, the vendee cannot recover money paid.[31]

§ 5104. **The same—Complaint—Parties.**—A good complaint against the bank with which the earnest money was deposited, setting up the terms of the contract and the receipt of the money by the bank with full knowledge of such terms, becomes a good complaint against the other party to the contract, upon the bank's paying the money into court and substitution of such other party in place of the bank.[32] The person holding and conveying the legal title, not having any equitable interest, and not being an actual party to the sale, is not a necessary party in an action to rescind the contract and recover earnest money on a sale.

§ 5105. **When action lies—Vendor and vendee.**—Upon failure of the vendor to be ready with the deed and convey a good title on the day agreed, the vendee may rescind the contract, and recover back the deposit;[33] and a demand of the deposit is a rescission.[34] And if on demand the vendor positively refuses,

27 Merwin v. Hamilton, 6 Duer, 244.

28 Rogers v. Duff, 97 Cal. 66, 31 Pac. 836. See Sommer v. Smith, 90 Cal. 260, 27 Pac. 208.

29 Wells Fargo & Co. v. Page, 48 Or. 74, 82 Pac. 856.

30 Kane v. Jones, 46 Wash. 631, 91 Pac. 2; Palmer v. Washington Securities Inv. Co., 43 Wash. 451, 86 Pac. 640.

31 Jennings v. Dexter, Horton & Co., 43 Wash. 301, 86 Pac. 576.

32 Pierson v. Peirce, 42 Wash. 164, 84 Pac. 731.

33 Judson v. Wass, 11 Johns. 525, 6 Am. Dec. 392; Sugden on Vendors, 359; Van Benthuysen v. Crapser, 8 Johns. 257; Dominick v. Sayre, 3 Sandf. 555.

34 That whether or not there was a rescission of a contract of purchase is

no further demand is necessary.[35] But if by the laches of the vendee the remedy at law is barred, and the right to a specific performance is forfeited, there can be no recovery of what has been paid on the contract.[36] An action to recover back purchase money paid under an executory contract for the sale of land is based upon the theory that the contract has ceased to exist, and that the money paid may be recovered for the use of the person who paid it.[37] Thus, upon a sale by auction, if the vendor fails to complete the contract, the deposit may be recovered from the auctioneer as stakeholder;[38] and if he fails to disclose his principal, he is liable for damages as well.[39] But where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards transpires that such purchase avails the purchaser nothing, no right of legal complaint lies against the agent.[40] So, also, where a purchaser at a sale under a decree in foreclosure suit, which decree was void because the grantee of the mortgagor was not made a party, an action will not lie to recover back the money paid them on his bid.[41] But where plaintiff bought a lot and paid taxes thereon, and afterwards discovered that defendant had previously sold it, and defendant knew of this former conveyance, and that the money was fraudulently obtained, the procurement by defendant of a full title to the lot will not bar plaintiff's recovery of the purchase money and interest.[42] And where the sale of a city's property was without authority, the plaintiff is not required to surrender the property before bringing an action for recovery back of the purchase money.[43] He is not required to transfer either the property or the possession to the corporation before the commencement of the action.[44]

a question of fact, and is the ultimate and fundamental fact in an action to recover back the purchase money paid, see Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675.

35 Blood v. Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749.

36 Finch v. Parker, 49 N. Y. 1.

37 Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320.

38 Lee v. Munn, 1 Moore, 481; Curling v. Shuttleworth, 6 Bing. 121.

39 Hanson v. Robardeau, Peake N. P. C. 163; Kent Com. 630, 631; Mauri v. Heffernan, 13 Johns. 58; Bank of Rochester v. Monteath, 1 Denio, 402; 43 Am. Dec. 681; Mills v. Hunt, 20 Wend. 431.

40 Engels v. Heatly, 5 Cal. 135.

41 Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561.

42 Alvarez v. Brannan, 7 Cal. 503, 68 Am. Dec. 274.

43 McCracken v. San Francisco, 16 Cal. 591.

44 Herzo v. San Francisco, 33 Cal. 134.

§ 5106. **Consideration to third person.**—An action can be maintained upon a promise made by the defendant, upon a valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to the consideration. And a creditor can maintain an action against a person who had received money from his debtor upon a promise to pay the amount to the creditor.[45] Where A., who is indebted to B., promises in consideration of his release by B. to pay the amount to C., who is a party to the arrangement, it is a sufficient consideration to support such promise.[46]

§ 5107. **Consideration.**—In every action upon a promise to pay, a consideration must be stated.[47] Such a consideration is an essential fact to be proved, and unless proved the plaintiff cannot recover.[48] In an action upon a promise to pay money, if the complaint contains no averment of consideration, or of indebtedness, except by way of recital, it is insufficient.[49] Where a consideration is not implied, or a request is essential to the defendant's liability, it must be specially averred in pleading.[50]

§ 5108. **Essential allegations.**—In an action for a breach of an engagement to pay money to A. for the benefit of B., it is not necessary to aver that the defendant had refused to pay to B. as well as to the plaintiff.[51] But on a promise to pay money when collected, collection is a condition precedent, and must be averred.[52]

§ 5109. **Essential averment—Request.**—The allegation that plaintiff refused, etc., though then and there particularly requested to do so, is a sufficiently explicit allegation of a request to amount to a positive averment.[53] Where the agreement is to pay on request the debt of another, if he does not pay on

45 Secor v. Lord, 3 Keyes, 525. See Hecht v. Caughron, 46 Ark. 132; Davis v. Clinton Water Works, 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126.

46 Barringer v. Warden, 12 Cal. 311.

47 Bailey v. Freeman, 4 Johns. 280; Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 Pac. 583.

48 Gyle v. Shoenbar, 23 Cal. 538.

49 Shafer v. Bear River etc. Water etc. Co., 4 Cal. 295.

50 Spear v. Downing, 12 Abb. Pr. 437, Abb. Sel. Cas. 53.

51 Rowland v. Phalen, 1 Bosw. 43.

52 Dodge v. Coddington, 3 Johns. 146.

53 Supervisors of Alleghany v. Van Campen, 3 Wend. 48.

the day, a special request must be averred. The general allegation "though often requested" is not enough.[54]

§ 5110. **Essential averment—Promise made on a contingency.**—In an action on a promise made on a contingency, it is necessary to aver in the complaint the occurrence or non-occurrence, as the case may be, of the contingency upon which the promise depends. If the complaint contains the necessary averments as to the happening of the contingency, which are denied by the answer, an issue of fact is created, and a demurrer to the answer should be overruled.[55]

§ 5111. **Essential averments—Demand—Offer to perform.**—To recover back purchase money on the ground of a breach of covenant, the complaint must allege a breach of covenant.[56] It is necessary for the plaintiff to aver his readiness and willingness to fulfill at the time and place agreed.[57] But the purchaser is not bound to make an absolute tender of performance; a conditional offer to perform is sufficient.[58] An offer to perform is necessary; mere readiness is not sufficient.[59] The bringing of the action is not, however, a sufficient demand. A conveyance should be demanded and refused, and a reasonable time allowed for its execution.[60] It is incumbent upon the purchaser to offer to perform on his part, or to show that at the time performance was due on the part of the vendor he could not furnish a good title to the land.[61] And the purchaser can maintain no action upon a contract of sale which he is not entitled to rescind, without full performance on his part prior to the default of the vendor; and not having alleged or proved such performance, he cannot maintain an action to recover purchase money paid in part performance of his contract while it is still in existence

54 Bush v. Stevens, 24 Wend. 256.

55 De Wein v. Osborn, 12 Colo. 407, 21 Pac. 189.

56 Wills v. Primm, 21 Tex. 380.

57 Porter v. Rose, 12 Johns. 209, 7 Am. Dec. 306.

58 Robb v. Montgomery, 20 Johns. 15; West v. Emmons, 5 Johns. 179; Topping v. Root, 5 Cow. 404; Rawson v. Johnson, 1 East, 203; Bellinger v. Kitts, 6 Barb. 273.

59 Lester v. Jewett, 11 N. Y. 453; Williams v. Healey, 3 Denio, 363; Johnson v. Wygant, 11 Wend. 48.

60 Fuller v. Hubbard, 6 Cow. 13, 16 Am. Dec. 423; Hackett v. Huson, 3 Wend. 249; Foote v. West, 1 Denio, 544; Lutweller v. Linnell, 12 Barb. 512. To the contrary are Driggs v. Dwight, 17 Wend. 71, 31 Am. Dec. 283; Flynn v. McKeon, 6 Duer, 203.

61 Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320.

and uncompleted.[62] But when a contract of sale and purchase of land is abandoned or rescinded by the parties, the purchaser, though in default, may recover back installments paid upon the purchase money, less the actual damage to the vendor occasioned by his breach of contract.[63] And it is not necessary in order to entitle the purchaser to recover, that the complaint should state that the plaintiff was ready, able, and willing to carry out the terms of the contract, and no evidence need be introduced at the trial to prove that fact.[64]

§ 5112. Interest, when allowed.—The plaintiff may recover interest on the deposit money recovered from the time of demand;[65] and on money in his hands lying idle, ready to complete the contract.[66]

§ 5113. When action lies.—At common law, a wager made in respect to matters not affecting the feelings, interest, or character of third persons, or the public peace, or good morals, or public policy, is valid, and can be enforced. In many of the states statutes have been passed for the discouragement of gaming, which give a right of action for money lost at play or on a wager. In California, where an illegal wager is made, the parties to it may, before the wager is decided, recover their stakes from each other, or from the stakeholder. But after the money has been lost or won, and the result generally known, neither party can recover from the other, nor from the stakeholder, if he has paid over the money. In that state, betting on a horse-race is against public policy, and included within the foregoing rule.[67] There seems to be no satisfactory reason for the distinction, as made by the English cases, between actions directly between the parties to the wager and actions between the loser of a bet and the stake-

62 Easton v. Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123, 27 Pac. 280; Townsend v. Tufts, 95 Cal. 257, 29 Am. St. Rep. 107, 30 Pac. 528.

63 Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106; Phelps v. Brown, 95 Cal. 572, 30 Pac. 774; Shively v. Semi-Tropic etc. Water Co., 99 Cal. 259, 33 Pac. 848.

64 Merrill v. Merrill, 102 Cal. 317, 36 Pac. 675. See Chatfield v. Williams, 85 Cal. 518, 24 Pac. 839.

65 Farquhar v. Farley, 7 Taunt. 592.

66 Sherry v. Oke, 3 Dowl. Pr. C. 349.

67 Johnston v. Russell, 37 Cal. 672; Hill v. Kidd, 43 Cal. 615; Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110.

holder, if one has been employed.[68] But where an act makes wagers on horse-races and the holding of stakes criminal offenses, one who has deposited money with a stakeholder cannot recover it, although the race has not come off.[69]

In Kansas, money placed in the hands of a stakeholder, on an illegal bet on elections, may be recovered by the depositor, on demand, at any time before it is paid over to the winning party.[70] In Michigan, money lost at play or on a horse-race may be recovered as money had and received.[71] An action against the owners of a faro-bank may be maintained by a plaintiff for the recovery of money lost thereat by one who held the same in trust for the plaintiff.[72]

§ 5114. **Essential allegations—Demand.**—An action to recover back money lost at play is not an action for a penalty or forfeiture.[73] The complaint in such action, if founded on statute, must be special, setting out the facts, and bringing the plaintiff within the statute by force of which he claims to recover.[74] The complaint is obnoxious to a motion that it be made more definite and certain, unless it states the facts necessary to show clearly under which section of the statute the action is brought.[75] As the remedy in such action is given by statute, the plaintiff must by his complaint bring himself within its provisions.[76] The count in a complaint stating that, on a day named, the defendant received a specified sum belonging to or on account of the plaintiff, and which is now due, being contrary to the provisions of the statute designating it, is not demurrable for not stating facts sufficient to constitute a cause of action.[77] An action against a stakeholder to recover money deposited on an illegal wager may be maintained without previous demand, when the money has been paid over before the action.[78] In such an action interest is recoverable from the time of demand,—e. g. from the com-

68 Johnston v. Russell, 37 Cal. 670.

69 Sutphin v. Crozer, 32 N. J. L. 462. See Bybee v. Burbank, 2 Or. 295.

70 Reynolds v. McKinney, 4 Kan. 94, 89 Am. Dec. 602; Jennings v. Reynolds, 4 Kan. 110.

71 Grant v. Hamilton, 3 McLean, 100, Fed. Cas. No. 5695.

72 Pierson v. Fuhrmann, 1 Colo. App. 187, 27 Pac. 1015.

73 Arrieta v. Morrissey, 1 Abb. Pr. (N. S.) 439. But see Cooper v. Rowley, 29 Ohio St. 547.

74 15 Johns. 5; Moran v. Morrissey, 18 Abb. Pr. 131.

75 Arrieta v. Morrissey, 1 Abb. Pr. (N. S.) 439.

76 Langworthy v. Broomley, 29 How. Pr. 92.

77 Betts v. Bache, 9 Bosw. 614.

78 Ruckman v. Pitcher, 1 N. Y. 392.

mencement of the action.[79] In New York, in an action to recover money lost at play, since the statute gives the action only for losses exceeding twenty-five dollars at one sitting, and requires it to be brought within three months after payment, the defendant is entitled to require the plaintiff to specify in his complaint the amount lost at each sitting, and the time of payment. It is not sufficient that these facts might be called forth by requiring a bill of particulars.[80]

§ 5115. Action for taxes paid.—As against a general demurrer, an allegation that an assessment was willfully and unlawfully made, was grossly unjust and unequal, and made with the knowledge of the assessor that it would greatly wrong plaintiff, does not show a fraudulent assessment.[81] An allegation that the assessor assessed a franchise granted by a city, knowing that it was imaginary and fictitious, does not show that the assessment was in fact upon a federal franchise and not taxable.[82]

A mortgagee entitled to be subrogated to the county's lien for taxes paid by him, as against a subsequent incumbrancer, who has been accorded priority, may have judgment for the amount paid, with legal interest, but cannot recover penalties.[83]

Plaintiff is not required to show voluntary payment, or payment under protest, where there is a statute providing that taxes erroneously or illegally collected may, by order of the board, be refunded, and the board has refused to make such order.[84]

In a suit to recover for taxes paid under protest, on the ground that the assessment was not legally made, the taxpayer has the burden of showing that the acts of assessment were unauthorized; and an allegation of the answer that defendant denies that such item was added without any authorization or direction by any board of equalization sufficiently puts the issue of authorization.[85]

§ 5116. The same—Parties.—The county treasurer and county commissioners being made parties defendant in a suit to recover

79 Ruckman v. Pitcher, 20 N. Y. 9, 13 Barb. 556.

80 Arrieta v. Morrissey, 1 Abb. Pr. (N. S.) 439.

81 Kern Valley Water Co. v. Kern County, 137 Cal. 511, 70 Pac. 476.

82 Western Union Tel. Co. v. San Joaquin Co., 141 Cal. 264, 74 Pac. 856.

83 Dunsmuir v. Port Angeles Gas etc. Co., 30 Wash. 586, 71 Pac. 9.

84 Stewart Law etc. Co. v. Alameda County, 142 Cal. 660, 76 Pac. 481.

85 Savings etc. Soc. v. San Francisco, 146 Cal. 673, 80 Pac. 1086.

illegal taxes paid under protest, a portion of the taxes being county taxes, the entire petition is not subject to demurrer for failure to name township, city, and school districts as parties.[86]

§ 5116a. **The same—Evidence.**—The valuation fixed upon property for prior years is immaterial in a suit to recover illegal taxes, it being the duty of the assessor to place cash valuations on land without regard to former valuations. Remarks made by plaintiff or his agent before the board of equalization are admissible, as are also his letters on the same matter, and the testimony of the assessor as to the manner of arriving at the valuation.[87]

§ 5117. **The same—Statute of limitations.**—The statute of limitations of an action for the recovery of taxes illegally or wrongfully collected commences to run from the time of the conversion of the funds so collected, and the funds may not be converted for two years after their collection.[88]

§ 5118. **Demand.**—The lessor's right of action is perfect without a previous demand of the tenant.[89]

§ 5119. **Illegal taxes.**—In an action to recover back illegal taxes, it is not sufficient to aver that the valuation of the property is "unjust, disproportioned, and unequal." The complaint must state specifically wherein it is so.[90] An action cannot be maintained to recover back money voluntarily paid in satisfaction of an illegal tax.[91] And in the absence of acts amounting to duress or coercion, the payment of a tax is voluntary, although made under protest.[92] There being no contract, and defendant not being personally liable for the taxes levied upon a second mortgage, the holder of a first mortgage cannot recover from defendant holder of a second mortgage for money paid to redeem the land from a tax-sale for delinquent taxes on the second mortgage.[93] The statute of limitations begins to run from the time

86 St. Louis etc. R. R. Co. v. Board of Commissioners, 63 Kan. 889, 66 Pac. 1045.

87 Carlisle v. Chehalis County, 32 Wash. 284, 73 Pac. 349.

88 Marks v. Uinta County Commissioners, 11 Wyo. 488, 72 Pac. 894.

89 Garner v. Hannah, 6 Duer, 262

90 Guy v. Washburn, 23 Cal. 111. See, also, Dietrich v. Mayor of New York, 5 Hun, 421; Dewey v. Board of Supervisors etc., 2 Hun, 392.

91 Younger v. Supervisors, 68 Cal. 41, 9 Pac. 103.

92 Dear v. Varnum, 80 Cal. 86, 22 Pac. 76.

93 Henry v. Garden City Bank etc. Co., 145 Cal. 54, 78 Pac. 228.

the taxes become due, and not from the time the taxes are actually paid.[94] A demand must first be made for taxes illegally collected, but it must appear that the taxes are not equitably due from the taxpayer.[95] The complaint in an action against a tax-collector in his official capacity to recover an amount of money alleged to have been illegally collected from the plaintiff as taxes, must aver the fact of the defendant being such officer.[96] In an action to recover a special assessment of taxes, alleged to have been paid under protest to the defendant, a complaint alleging that the assessment was erroneous, that before paying the same the defendant was notified in writing that it was illegal and void, and that suit would be commenced to recover it, was held to state facts sufficient to constitute a cause of action.[97]

§ 5120. **For taxes paid.**—A void tax voluntarily paid cannot be recovered back.[98] A judgment creditor paying the taxes upon land, erroneously thinking the judgment was still a lien, does not make a voluntary payment, but has an equitable lien on the land for the taxes paid.[99] Payment of taxes by a city to protect its lien thereon is not voluntary, and can be recovered.[100] Payment under protest on the day of sale for delinquent taxes cannot be recovered for failure of the clerk and auditor to attach their affidavits to the assessment-book.[101] Taxes paid under protest upon national bank stock may be recovered.[102] The tax-collector being a mere agent, and having passed the money on to the treasurer, is not personally liable for taxes illegally collected.[103] Interest can be allowed only from the date of the judgment declaring the money due the taxpayer.[104]

94 Litchfield v. Cowley, 34 Wash. 566, 76 Pac. 81.

95 Carton v. Board of Commissioners, 10 Wyo. 416, 69 Pac. 1013. See, also, Pacific Coast Co. v. Wells, 134 Cal. 471, 66 Pac. 657; Stewart Law etc. Co. v. Alameda County, 142 Cal. 660, 76 Pac. 481; Perrin v. Honeycutt, 144 Cal. 87, 77 Pac. 776; Bakersfield etc. Oil Co. v. Kern County, 144 Cal. 148, 77 Pac. 892; Connelly v. Trego County, 64 Kan. 168, 67 Pac. 453; Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659.

96 Baldwin v. Ellis, 68 Cal. 495.

97 Guy v. Washburn, 23 Cal. 111.

98 City of Eugene v. Lane County, 50 Or. 468, 93 Pac. 255.

99 Heman v. Rinehart, 45 Wash. 1, 87 Pac. 953.

100 City of Spokane v. Security Sav. Soc., 46 Wash. 150, 89 Pac. 466; Denver v. Evans, 35 Colo. 490, 84 Pac. 65.

101 Steele v. San Luis Obispo County, 152 Cal. 785, 93 Pac. 1020.

102 Weiser Nat. Bank v. Jeffreys, 14 Idaho, 659, 95 Pac. 23.

103 Craig v. Boone, 146 Cal. 718, 81 Pac. 22.

104 Miller v. Kern County, 150 Cal. 797, 90 Pac. 119.

§ 5121. Concurrent acts.—Delivery of freight by the carrier, and payment of freight money by the owners, are concurrent acts, and neither party is bound to perform his part of the shipping contract unless the other is ready to perform the correlative act.[105]

§ 5122. When action lies—In general.—Where money is paid by one person, in consideration of an act to be done by another, and the act is not performed, the money so paid may be recovered back.[106] Contracts for carrying freight form no exception to the general law that where money is paid for an act to be done by another, and the act is not done, the money may be recovered back.[107] Thus freight paid in advance for transportation of goods is to be repaid in the event of their not being carried, unless there be a special agreement to the contrary.[108] This rule is not subject to any usage to the contrary.[109] Advanced freight can be recovered back by the charterer, in case of the loss of the ship, or non-performance of the voyage, whether by fault of the master or not.[110]

§ 5123. When action lies — Essential allegations. — Unless there is a special promise, the defendant's legal liability to pay is an essential fact. But in a suit by a surety against his principal to recover back money paid by him on a judgment against him for the debt of his principal, a transcript of the judgment need not be annexed to the complaint.[111] And where a defendant undertook to pay any judgment which M. might recover against L., and the plaintiff undertook to save him harmless from such payment to the extent of five hundred dollars, which sum he deposited with the defendant for that purpose, the relation of principal and surety did not exist between them. Under these circumstances, the deposit could not become the money of the defendant till he had paid the judgment, and the plaintiff

105 Frothingham v. Jenkins, 1 Cal. 43, 52 Am. Dec. 286. See Allen v. Cape Fear etc. R. R. Co., 100 N. C. 397, 6 S. E. 105; Randall v. Richmond etc. R. R. Co., 108 N. C. 612, 13 S. E. 137; McKibben v. Doyle, 173 Pa. St. 579, 51 Am. St. Rep. 785, 34 Atl. 455.

106 Reina v. Cross, 6 Cal. 31. See Taylor v. Beavers, 4 E. D. Smith, 215.

107 Reina v. Cross, 6 Cal. 29.

108 Phelps v. Williamson, 5 Sandf. 578; Griggs v. Austin, 3 Pick. 20, 15 Am. Dec. 175; Harris v. Rand, 4 N. H. 259, 555, 17 Am. Dec. 421, 3 Kent Com. 226.

109 Emery v. Dunbar, 1 Daly, 408.

110 Lawson v. Worms, 6 Cal. 365.

111 Harker v. Glidewell, 23 Ind. 219.

is entitled to recover the money on the payment or release of the judgment.[112] In an action by a surety on a promissory note against his principal for reimbursement, the suretyship not appearing on the face of the note, a complaint which avers that the plaintiff signed the note as a surety only, and not for the accommodation of the defendant, need not allege a request from the defendant to the plaintiff to pay the same.[113]

§ 5124. **Rescinded or void contract.**—The acceptance of an order to pay money, to be deducted from a payment to become due under a contract for work to be performed, is a promise to the payee, and the payee may recover thereon, under the common money counts.[114] Where an agreement has been rescinded on a contract for services, or performance so neglected as to entitle the plaintiff to rescind, a demand is not necessary to enable the plaintiff to recover back advances.[115] If money has been paid or services rendered in the performance of the conditions of a void contract by one party thereto, and the other party fails to voluntarily perform on his part, the injured party has no remedy at law upon the contract. He may, however, under such circumstances, disaffirm such contract, and maintain his action at law to recover back money so paid or the value of services so rendered.[116]

§ 5125. **Sufficient allegations.**—In a complaint for money expended and services performed, technical words the meaning of which is long established, rather than phrases of doubtful import, should be used. The complaint ought to state that the money was expended for the use and benefit of defendant, and at his instance and request. So in regard to the performance of labor.[117] The plaintiff must allege and prove non-performance.[118] And if the defendant has rescinded, plaintiff need not prove readiness to pay the whole contract price.[119]

112 Solomon v. Reese, 34 Cal. 35.

113 Clanton v. Coward, 67 Cal. 373, 7 Pac. 787.

114 Quin v. Hanford, 1 Hill, 84; Weston v. Barker, 12 Johns. 278, 7 Am. Dec. 319; Rockefeller v. Robison, 17 Wend. 206; McClellan v. Anthony, 1 Edm. 284.

115 Raymond v. Bearnard, 12 Johns. 274, 7 Am. Dec. 317. See Utica Bank v. Van Gieson, 18 Johns. 485.

116 King v. Brown, 2 Hill, 485; Baldwin v. Palmer, 10 N. Y. 234, 61 Am. Dec. 743; Fuller v. Reed, 38 Cal. 99.

117 Huguet v. Owen, 1 Nev. 464.

118 Wheeler v. Board, 12 Johns. 363.

119 Main v. King, 8 Barb. 535.

FORMS—ACTIONS FOR MONEY PAID.

§ 5126. Complaint for money paid, with legal interest.[120]

Form No. 1436.

[TITLE.]

For cause of action plaintiff complains, and alleges:

That within the two years last past, in the county of . . . , state of . . . , at the special instance and request of defendant, the plaintiff furnished and paid out to and for the use and benefit of defendant, the sum of . . . dollars, which defendant then and there agreed to repay to plaintiff on demand, with legal interest; that on the . . . day of . . . , 19.. , plaintiff made demand upon defendant for the payment of said money; but that defendant refused and neglected to pay the same, and has not paid said sum of money, or any part thereof, except the sum of . . . dollars; that there is now due and owing thereon from defendant to plaintiff the sum of . . . dollars, together with legal interest thereon from the . . . day of . . . , 19..

[DEMAND OF JUDGMENT.]

§ 5127. Complaint for money paid to a third party at defendant's request.

Form No. 1437.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , at the request of defendant, plaintiff paid to one A. B. . . . dollars.

II. That in consideration thereof, defendant promised to pay the same to plaintiff.

III. That on the . . . day of . . . , 19.. , the plaintiff demanded payment of the same from the defendant, but he has not paid the same nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5128. Complaint by one having paid debt of another, to be repaid on demand.

Form No. 1438.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , he paid to

120 Craig v. Dowie, 4 Cal. App. 176, 87 Pac. 250.

the use of the defendant, at his request, and on condition that the same should be repaid on demand, the sum of . . . dollars, to one A. B., for one quarter's rent of the house then occupied by the defendant [or state the character of the debt].

[II. That the plaintiff, on the . . . day of . . . , 19.., at . . . , demanded payment of the same from the defendant.]

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5129. The same—To be repaid on a specified day.

Form No. 1439.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , he paid to the use of the defendant, and at his request, the sum of . . . dollars, to one A B., the amount of a promissory note made by the defendant.

II. That defendant promised to repay said sum, with interest, to this plaintiff, on the . . . day of . . . , 19..

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5130. Complaint for repayment of money paid on a reversed judgment.

Form No. 1440.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . . , 19.., judgment was rendered against this plaintiff in the superior court, county of . . . , state of California, in an action wherein the defendant was plaintiff, and this plaintiff was defendant, for the sum of . . . dollars.

II. That on the . . . day of . . . , 19.., at . . . , the plaintiff paid to the defendant the sum of . . . dollars, in satisfaction thereof.

III. That afterwards, on the . . . day of . . . , 19.., by the judgment of the supreme court of the state of California, said first-mentioned judgment was reversed; but that no part of the said sum paid in satisfaction thereof has been repaid to this plaintiff.

[DEMAND OF JUDGMENT.]

§ 5131. Complaint by brokers for money advanced on account of their principal.

Form No. 1441.

[TITLE.]

The plaintiffs complain, and allege:

I. That the plaintiffs are partners, doing business in the city of . . . as brokers, under the firm name of A. B. & Co.

II. That, as brokers, on or about the . . . day of . . . , 19.. , they purchased for and on account of the defendant, and at his request, the following goods, wares, and merchandise [designate them], under an agreement that said goods, wares, and merchandise were to be paid for by the defendant at the expiration of . . . days from the day of purchase, with the right to the defendant to pay for said goods, wares, etc., at any time before the expiration of said . . . days.

III. That it is the custom of brokers in such cases to purchase the goods in their own names, without disclosing the name of their principal, and in case of the failure of the principal to pay for the same, to resell the goods on account of the principal.

IV. That on the . . . day of . . . , 19.. , at . . . , plaintiffs offered to deliver said goods, wares, and merchandise to the defendant, and demanded of him payment for the same.

V. That on or about the . . . day of . . . , 19.. , the defendant paid to the plaintiffs, on account of the said purchase of goods, wares, etc., . . . dollars.

VI. That at the expiration of the said . . . days, the defendant failed to pay the balance due for said goods, and the plaintiffs paid for the same, and to reimburse themselves, afterwards, on the . . . day of . . . , 19.. , sold the same on his account, at [state the price]. And that there is now due and unpaid from the defendant, to the plaintiffs, on account thereof, the sum of . . . dollars, and interest thereon from the date last aforesaid.

[DEMAND OF JUDGMENT.]

§ 5132. Complaint in action for the purchase money of land conveyed.

Form No. 1442.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff sold and conveyed to the defendant [the house and lot No. 203 . . . street, in the city of . . .].

II. That defendant promised to pay the plaintiff . . . dollars for the said [house and lot].

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5133. Allegation of new promise.

Form No. 1443.

That thereafter, on the . . . day of . . . , 19.. , at . . . , in consideration of the foregoing facts the defendant promised to the plaintiff, in writing, that he would pay such indebtedness.

§ 5134. Complaint in action for repayment of deposit on purchase of real estate.

Form No. 1444.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the plaintiff and the defendant made their contract in writing, subscribed by them, whereby it was mutually agreed that the said defendant should sell to this plaintiff, and the plaintiff should buy from the defendant, certain real estate [describe it], for the sum of . . . dollars, to be paid by the plaintiff; that the defendant should make a good title to the said premises, and deliver a deed thereof on the . . . day of . . . , 19.. ; and that the plaintiff should thereupon pay to the said defendants the said purchase money.

II. That the plaintiff, as a security, as well for the performance of said agreement on his part as to secure a performance thereof on the part of the defendant, then and there deposited in the hands of said defendant the sum of . . . dollars, as part of said purchase money, to be to and for the use of the defendant, and to be retained by him on account of the purchase money, if the plaintiff should complete his purchase and receive the deed; but to be to and for the use of the plaintiff, and to be returned to him, if the defendant should fail to fulfill his agreement to give a deed at the time and pursuant to the agreement.

III. That he has always been ready and willing to do and perform everything in the agreement contained on his part, and on the said . . . day of . . . , 19.. , was ready and willing, and offered to the defendant to accept the deed of the premises pur-

suant to the agreement, and to pay to him the balance of the purchase money due therefor.

IV. That the defendant did not on the said . . . day of . . . , 19.. , nor at any time since, give him a deed of the premises pursuant to the agreement, but refused to do so.

V. That on the . . . day of . . . 19.. , he demanded of the defendant payment of the sum of . . . dollars, deposited with him as aforesaid.

VI. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5135. Complaint in action to recover back wager.

Form No. 1445.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff deposited in the hands of the defendant, as stakeholder, . . . dollars, which was to abide the event of a wager made between the plaintiff and one A. B., on the result of [here state what, as election, race, or otherwise].

II. That such wager was in violation of the statute entitled [title of act], passed . . . , and the acts amendatory thereof and supplementary thereto.

III. That no decision has as yet been rendered upon said election [race, or otherwise]; and that the defendant still retains said money as stakeholder.

IV. That on the . . . day of . . . , 19.. , the plaintiff demanded the return of said money of the defendant.

V. That the defendant has not returned or paid back the same.

[DEMAND OF JUDGMENT.]

§ 5136. Complaint by landlord, against tenant, for repayment of tax.

Form No. 1446.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff and the defendant entered into an agreement, of which the following is a copy: [Set forth lease or agreement.]

II. That there was duly levied and assessed upon said premises for the year 19.., and while the covenants of the aforesaid agreement were in full force, and the defendant in possession of the premises by virtue thereof, a tax of . . . dollars, which the defendant neglected to pay.

III. That by reason thereof, the plaintiff was, on the . . . day of . . . , 19.., compelled to pay the said sum of . . . dollars, with . . . dollars arrearages of interest, and . . . per cent, amounting in the whole to . . . dollars.

IV. That defendant has repaid no part thereof to plaintiff.

[DEMAND OF JUDGMENT.]

§ 5137. Complaint against carrier, to recover money in excess for freight.

Form No. 1447.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant agreed with the plaintiff to transport from . . . to . . . , and to deliver to him certain goods of the plaintiff, for the sum of . . . dollars.

II. That the said sum of . . . dollars was a reasonable sum to be paid therefor.

III. That the defendant entered upon the performance of said agreement, and transported said goods.

IV. That on the arrival of said goods the plaintiff demanded said goods of the defendant, and was ready and willing, and offered to pay to the defendant for transporting the same, the said sum of . . . dollars.

V. That the defendant refused to deliver said goods to the plaintiff, unless he would pay to the defendant . . . dollars for transporting the same.

VI. That on the . . . day of . . . , 19.., at . . . , the plaintiff paid . . . dollars to the defendant to obtain delivery of said goods, which sum he paid under protest, and expressly denying the defendant's right to claim it, and otherwise performed all the conditions of said agreement on his part.

VII. That the defendant has not repaid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5138. Complaint in action to recover back freight on failure of carriage.

Form No. 1448.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the defendant agreed with the plaintiff to transport from . . . to . . . , and to deliver to him certain goods of the plaintiff, for the sum of . . . dollars.

II. That on the . . . day of . . . , 19.. , the plaintiff paid to the defendant the sum of . . . dollars, as an advance payment for said transportation, and otherwise performed all the conditions of said agreement on his part.

III. That the defendant has not transported said goods, nor delivered the same to the plaintiff.

IV. That on the . . . day of . . . , 19.. , at . . . , the plaintiff demanded of the defendant repayment of said sum of . . . dollars advanced.

V. That he has not repaid the same.

[DEMAND OF JUDGMENT.]

§ 5139. Complaint by surety against principal for payment on appeal-bond.

Form No. 1449.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , a judgment was duly given and made in the . . . court of . . . , against the defendant, in favor of one . . . , for . . . dollars, from which the said defendant appealed.

II. That on the . . . day of . . . , 19.. , at the request of defendant, the plaintiff executed an undertaking, a copy of which is hereto annexed.

III. That on the . . . day of . . . , 19.. , the said judgment was affirmed by the supreme court of this state, with . . . dollars cost and damages.

IV. That on the . . . day of . . . , 19.. , the plaintiff paid . . . dollars, upon the said undertaking, to the said . . .

V. That the defendant has not paid the same to plaintiff, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of undertaking.]

§ 5140. Complaint in action for repayment of advances on services.

Form No. 1450.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff and defendant entered into an agreement, whereby the plaintiff agreed to hire, and the defendant agreed to render his services to the plaintiff as . . . , for the term of . . . , in consideration of the sum of . . . dollars, to be paid therefor by the plaintiff.

II. That on the . . . day of . . . , 19.. , at . . . , the plaintiff paid to the defendant as an advance for his services, to be rendered thereafter, in pursuance of said agreement, the sum of . . . dollars.

III. That the defendant wholly neglected and refused to render said services, although demanded by the plaintiff so to do.

IV. That the defendant has not repaid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5141. Complaint by acceptor without funds, having paid draft.

Form No. 1451.

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant on the . . day of . . . , 19.. , became indebted to plaintiff for moneys advanced by him, and by him paid, in taking up a certain draft drawn by defendant, bearing date on the . . . day of . . . , 19.. , whereby said defendant requested this plaintiff . . . days after date to pay to one E. F. the sum of . . . dollars.

II That plaintiff duly accepted said draft, and paid the same at maturity; and that plaintiff at the time of said acceptance, and at all times thereafter, had no funds of the defendant in his hands to meet the same, and that no part of the same has been repaid by the defendant unto plaintiff.

[DEMAND OF JUDGMENT.]

§ 5142. Complaint by indorser of note, having paid part.

Form No. 1452.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the defendant made and delivered to this plaintiff his promissory note in writing, of which the following is a full, true, and correct copy: [Insert exact copy of note.]

II. That thereafter, and before maturity of said note, the plaintiff indorsed and negotiated it for value.

III. That at its maturity said note was duly presented for payment to defendant [or allege excuse for non-presentment], but was not paid, whereof this plaintiff had due notice, and that thereafter this plaintiff was compelled to pay, and did pay, on the . . . day of . . . , 19.. , to one E. F., the holder of said note, on account of the amount due thereon from defendant, the sum of . . . dollars, no part of which has been repaid to the plaintiff.

[Demand of Judgment.]

§ 5143. Complaint by one joint maker of note against the other for contribution.

Form No. 1453.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , this plaintiff and the defendant made and delivered to one E. F. their joint [or, joint and several] promissory note, in writing, of which the following is a copy: [Insert exact copy of note.]

II. That at the maturity of said note plaintiff was compelled to pay, and did pay, the whole amount due upon said note, to-wit, the sum of . . . dollars; and no part thereof has been repaid to him.

[Demand of Judgment.]

§ 5144. Complaint by surety for goods sold another.

Form No. 1454.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiff, at the request of defendant, bought of one E. F., to be by him delivered to defendant, and to and for defendant's use, certain goods, viz. . . . , of the value of . . . dollars, which were thereafter delivered to defendant; that defendant failed and refused to pay for the same, or any part thereof.

II. That on the . . . day of . . . , 19.. , in an action brought to recover from plaintiff the price of said goods, said E. F. recovered judgment in the . . . court of . . . county against the plaintiff, then defendant, for the sum of . . . dollars, being the amount of said price, with interest and costs.

III. That plaintiff was compelled to pay, and did pay, on the . . . day of . . . , 19.. , to said E. F. the sum of . . . dollars, being the amount of the said judgment, and interest thereon; and that no part of the same has been repaid to plaintiff herein by defendant herein.

[DEMAND OF JUDGMENT.]

§ 5145. Allegation of payment by sale of collateral.

Form No. 1455.

The defendant alleges:

That on or about the . . . day of . . . , 19.. , he delivered to the plaintiff [describe the property], as collateral security for the repayment of the said loan [or, to indemnify the said plaintiff against all liability arising from the execution of the undertaking], described in the complaint, and that on or about the . . . day of . . . , 19.. , the plaintiff sold the said [describe collateral], and realized upon such sale, and still retains, the sum of . . . dollars, which sum is greater than the amount of said loan [or, the amount paid by the plaintiff upon said undertaking], with interest thereon up to the time of such sale. [If the amount received be less than the plaintiff's claim, state the fact as a partial defense.]

§ 5146. Denial of request to pay money to another.

Form No. 1456.

I. This defendant denies that he at any time requested the plaintiff to pay any money to said [naming the person to whom, or object for which, the payment is alleged to have been made].

II. This defendant denies that he at any time promised to pay any money to the plaintiff on account of any money paid to the said M. N.

CHAPTER CXXVI.

ACTIONS FOR SERVICES, WORK, AND LABOR.

§ 5147. When action lies.—The action for work, labor, and services lies upon the contract. If nothing remains to be done by the contractor but payment of the stipulated price, plaintiff may rest upon the duty raised by the law on the part of defendant to pay the price agreed, or he may plead the express agreement, and allege performance;[1] or excuse for non-performance, and allege part performance,[2] if the contract has been abandoned by agreement, or rescinded by the wrongful act of a party, or its execution is incomplete by reason of an excuse.[3] Where, however, there has been a written contract, it must be produced on the trial, or its absence accounted for.[4] Where by the terms of a contract parties performing labor under it are to be paid at the end of each month, for the labor performed to that time, and they are not paid at the stipulated time, and are, by reason thereof, compelled to abandon the work, they have the right to do so, and are entitled to recover for the work done and not paid for, *pro tanto*, at the contract price.[5] On a contract not specifying the amount or time of payment of wages, they do not accrue monthly.[6]

§ 5148. When action lies—Services of a substitute.—The plaintiff may recover for work and services done by his substitute under a contract made by defendant with him, provided that the services of a particular person were not contracted for, and that no other person could, under the contract, fill the place of the employee.[7] Under a general complaint for work and

1 Farron v. Sherwood, 17 N. Y. 227.

2 Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388.

3 Farron v. Sherwood, 17 N. Y. 227; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388.

4 Clark v. Smith, 14 Johns. 326, and cases there cited; Champlin v. Butler, 18 Johns. 169; Wood v. Edwards, 19 Johns. 205; Smith v. Smith, 1 Sandf. 206; Ladue v. Seymour, 24 Wend. 60; Sherman v. New York Cent. R. R. Co., 22 Barb. 239; Adams v. Mayor, 4 Duer, 295. But see Chew Farng v. Keeler, 103 Cal. 46, 36 Pac. 1032.

5 Dobbins v. Higgins, 78 Ill. 440.

6 Mixer v. Mixer, 2 Cal. App. 227, 83 Pac. 273.

7 Lect v. Wilson, 24 Cal. 398.

labor, the plaintiff may recover on proof of a special contract fully completed.[8] Where there is a special contract between principal and agent, by which the entire compensation is regulated and made contingent, there can be no recovery on a count for a *quantum meruit*.[9]

§ 5149. **Service for the public.**—Where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced.[10]

§ 5150. **No servant's lien.**—A person who makes, alters, or repairs personal property of another, or improves it, may have a special lien thereon, and may retain its possession until paid. This creates a lien in favor of a bailee for hire, who imparts such additional value,[11] but does not create a lien in favor of one acting as mere servant.[12]

§ 5151. **Entire contract.**—Where a person agrees to work for a certain period, at a certain price, or to perform certain services for such an amount, he cannot break off at his own pleasure, and sue upon the contract for the work so far as he has gone. In such case, performance is a condition precedent to payment.[13] In a suit to recover for services for half a year, under a contract to work a whole year, plaintiff having quit, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover.[14] A contract may be entire where payment is stipulated to be made monthly, where a note was to be given by the employer for the last four months' labor yet to be done, on a contract of eight months' duration.[15] Where one is employed by another under a contract, at a stated salary, payable monthly, or at a stated time, as clerk or business agent, and the employee neglects his business, the employer is not precluded from suing for damages for neglect, by payment in full of employee's wages, or by not setting up a counterclaim in an

8 Hurst v. Litchfield, 39 N. Y. 377.

9 Marshall v. Baltimore etc. R. R. Co., 16 How. 314, 14 L. Ed. 952.

10 Anderson v. Board of Commissioners, 25 Ohio St. 13.

11 Cal. Civ. Code, §§ 3051, 3052.

12 Michaelson v. Fish, 1 Cal. App. 116, 81 Pac. 661.

13 Hutchinson v. Wetmore, 2 Cal. 311, 56 Am. Dec. 337.

14 Hogan v. Titlow, 14 Cal. 255.

15 Hutchinson v. Wetmore, 2 Cal. 311, 56 Am. Dec. 337.

action by employee for his wages.[16] Where a party contracts for a consideration in money to find a purchaser for certain lands, it is a contract of employment, and not a contract for the sale of land within the meaning of the statute of frauds.[17] But where a part of the remuneration was to be land, the contract was entire, and if void as to part under the statute of frauds, is void *in toto*, and could not be enforced.[18] But if services have been performed on such a void contract, the injured party may disaffirm the contract, and maintain his action at law for services rendered.[19]

§ 5152. **Quantum meruit.**—An architect, working under a contract, being stopped in a certain part of the work, cannot recover on *quantum meruit*, if the work was not done at the owner's request.[20] One stopped by wrongful act of his employer from fulfilling a contract of labor, to be paid for on shares, may abandon the contract and sue in *quantum meruit*.[21] Recovery cannot be had on *quantum meruit*, for the partial installment of a heating plant, which is an indivisible obligation, and the property-owner's retention of the partially installed plant is presumed to be involuntary.[22] Recovery may be had, either on contract or *quantum meruit*, where a statement of account for the labor done has been rendered between the parties.[23]

The presumption of a contract, which the law implies upon proof of labor done, ceases to exist upon showing in defense that the services were such only as a friend would perform in time of sickness,[24] or upon showing that defendant refused to give plaintiff a contract or permission to do the work, and notified him to cease trespassing.[25]

A contractor may sue upon a *quantum meruit*, leaving it to the owner to insist upon the contract to limit recovery to the stipulated price, or damages for non-compliance with the contract;

16 Stoddard v. Treadwell, 26 Cal. 294.

17 Heyn v. Philips, 37 Cal. 529.

18 Crawford v. Morrell, 8 Johns. 255; Van Alstine v. Wimple, 5 Cow. 164.

19 King v. Brown, 2 Hill, 485; Baldwin v. Palmer, 10 N. Y. 232, 61 Am. Dec. 743; Fuller v. Reed, 38 Cal. 99.

20 De Prosse v. Royal Eagle Distillery Co., 135 Cal. 408, 67 Pac. 502.

21 Jenson v. Lee, 67 Kan. 539, 73 Pac. 72.

22 Riddell v. Peck-Williams Co., 27 Mont. 44, 69 Pac. 241.

23 Wright v. Lake, 48 Wash. 469, 93 Pac. 1072.

24 Dallman v. Frank, 1 Cal. App. 541, 82 Pac. 564.

25 Erickson v. Hochbrune, 47 Wash. 33, 91 Pac. 485.

or he may sue upon the contract and a *quantum meruit* in separate counts; or he may sue to recover the amount due without specially declaring upon the contract.[26] But recovery on *quantum meruit* cannot be had where the terms of the contract are deliberately ignored and violated as to the time and manner of doing the work.[27] If the one receiving the benefit of the labor stop the work, recovery may be had for what has been done, at the rate of the contract price, or, in absence of a fixed price, on a *quantum meruit*.[28]

An employee continuing in service after the expiration of the term of his original hiring, without any new agreement as to compensation, cannot recover on *quantum meruit* more than the salary of the original contract, it being presumed that the same compensation was intended.[29] But *quantum meruit* may be had for services rendered on request outside the sphere of employment.[30]

Where defendant railroad company fails to make monthly payments for certain contract work according to agreement, the plaintiff may refuse to do further work, and may sue on a *quantum meruit* for the labor performed.[31] Suit on *quantum meruit* is a waiver of any profits arising under the contract.[32]

§ 5153. **Physician and surgeon.**—Where it is unlawful to practice medicine without a state license, an allegation in a bill of particulars "that plaintiff is a physician and surgeon duly entitled to practice" does not sufficiently allege such qualification and authority at the time the services were rendered, some months prior to the time the action was commenced;[33] but where the physician is defendant in a damage suit for malpractice, an allegation that defendant is a physician engaged in the practice of medicine, and has been for several years past, is sufficient without alleging that he was a physician at the time of treating the patient in question.[34] A paragraph of a complaint by a physician to recover for professional services and medicines furnished,

26 Foulger v. McGrath, 34 Utah, 86, 95 Pac. 1004.

27 Fish v. Correll, 4 Cal. App. 521, 88 Pac. 489.

28 Limerick v. Lee, 17 Okla. 165, 87 Pac. 859.

29 Perry v. J. Noonan Furniture Co., 8 Cal. App. 35, 95 Cal. 1128.

30 Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 Pac. 86.

31 Cook & Woldson v. Gallatin R. R. Co., 28 Mont. 509, 73 Pac. 131.

32 Foulger v. McGrath, 34 Utah, 86, 95 Pac. 1004.

33 Westbrook v. Nelson, 64 Kan. 436, 67 Pac. 884.

34 Bower v. Self, 68 Kan. 825, 75 Pac. 1021.

which alleges a promise by the defendant to pay for the services and medicines, but fails to aver a breach of the promise, is bad, and subject to a demurrer. But such complaint, containing the other necessary averments, is not bad for a failure to allege that the medicines were furnished, if it shows that the services were rendered. A complaint entitling a plaintiff to part of the relief sought is good against a demurrer.[35]

That plaintiff, a physician, by reason of ignorance and negligence, testified wrongly as an expert witness to defendant's damage is a good defense to complaint for services as such expert.[36] That plaintiff was busily engaged in the practice of his profession is material evidence in a suit on *quantum meruit*.[37]

It is presumed that one who is a city physician, and known to be in general practice, has complied with the statute as to the practice of medicine.[38]

§ 5154. **Services rendered estates.**—An attorney employed by an executor or administrator to assist in the execution of his trust is not the attorney of the estate, but simply of the executor who employs him, and allowances for his services must be made to the executor or administrator, and not to the attorney, and he has no claim that he can enforce against the estate by action or in any other manner;[39] and moneys paid to the attorney for services from the funds of the estate are paid at the peril of the administrator until the court duly allows him for such claim, after due notice to all persons interested.[40]

The attorney is employed by the executor, and where the court, on suspension of the executor, had allowed him a certain sum as an attorney fee, the attorney cannot recover such sum from the estate, nor from the succeeding administrator, but must look to his employer.[41] But, in Oregon, the failure of an administrator authorized to employ an attorney to perform his duties as administrator does not prevent an attorney employed by him, and rendering services for the estate, from having a valid claim

35 Buckley v. Irwin, 122 Ind. 51, 23 N. E. 694.

36 Coyne v. Baker, 2 Cal. App. 640, 84 Pac. 269.

37 Sill v. Cochems, 36 Colo. 524, 85 Pac. 1007.

38 Leggatt v. Gerrick, 35 Mont. 91, 88 Pac. 788, 8 L. R. A. (N. S.) 1238.

39 In re Kruger's Estate, 143 Cal. 141, 76 Pac. 891; Renwick v. Garland, 1 Cal. App. 237, 82 Pac. 89.

40 In re Sullivan's Estate, Corcoran v. Bell, 36 Wash. 217, 78 Pac. 945.

41 McKee v. Soher, 138 Cal. 367, 71 Pac. 438, 649.

against the estate for fees, though such claim is also a personal claim against the administrator.[42] But where the administrator hires an attorney to help protect an estate, it is not binding on the estate, and the attorney has no lien upon the property of the estate.[43]

§ 5155. Essential allegations—Demand.—A declaration for labor done or services performed generally, without specifying them in particular, is good.[44] But there must be an allegation of the performance of the services sued upon.[45] Where the agreement was to pay what the plaintiff's services were worth, and the value thereof was subsequently agreed to, it is proper to allege and prove the original and the subsequent agreements.[46] Where a complaint for work, labor, and services alleged an indebtedness in a sum certain therefor, but omitted to allege specially the value of the same or a promise to pay, and defendant, without demurring, put in an answer denying indebtedness, admitting services performed, and setting up payment in full, and there was a verdict for plaintiff, whatever the defects of the complaint may be, they were cured by defendant's pleading and by the verdict.[47] If the contract contains special provisions as to the mode of performance, the proper mode of declaring is still on the contract itself, and not on the general counts, setting it out at length, or in substance, with proper averments, to show that the conditions to the plaintiff's right of recovery have all been complied with.[48] No demand is necessary. Bringing the action is a sufficient demand on a contract to pay generally, and without time or terms specified. It is a debt payable when the services are performed, and no previous demand of payment is required.[49] An express agreement for extra pay must be shown where a party works for a monthly salary.[50]

42 Knight v. Hamaker, 40 Or. 424, 67 Pac. 107.

43 Waite v. Willis, 42 Or. 288, 70 Pac. 1034.

44 Edwards v. Nichols, 3 Day (Conn.) 16, Fed. Cas. No. 4296. Compare Willamette Falls Transportation Co. v. Smith, 1 Or. 171.

45 Nye v. Bill Nye Gold Min. Co., 42 Or. 560, 71 Pac. 1043.

46 Sandberg v. Victor Gold Min. Co., 24 Utah, 1, 66 Pac. 360.

47 McManus v. Ophir S. M. Co., 4 Nev. 15.

48 Adams v. Mayor etc. of New York, 4 Duer, 295; Atkinson v. Collins, 30 Barb. 430, 9 Abb. Pr. 353; Brown v. Colie, 1 E. D. Smith, 265; Wyckoff v. Meyers, 44 N. Y. 143.

49 Lake Ontario R. R. Co. v. Mason, 16 N. Y. 451; Ernst v. Bartle, 1 Johns. Cas. 319.

50 Cany v. Halleck, 9 Cal. 198.

A count in a complaint alleging that the defendant is indebted to the plaintiff in a certain sum of money, on account of work, labor, and services performed at the request of the defendant, and that the defendant has not paid the same, nor any part thereof, is not subject to the objection upon general demurrer that it is not stated by whom the work was performed.[51] But a complaint alleging a contract to perform labor in a certain year, for a gross sum of money, is bad on demurrer if it fails to allege what the plaintiffs contracted to do, or how much work was to be done, or when it was done, or its value.[52] An allegation of express promise is surplusage in a suit on *quantum meruit* which does not vitiate the complaint.[53] A complaint which alleges that "an agreement was entered into between the plaintiff and the defendants," whereby the latter agreed to pay the former the price of labor furnished the latter, cannot be said to count upon a written contract alone, and evidence of a verbal contract between the parties is admissible in support of the allegation, and the fact that a written agreement is proved does not preclude evidence of a verbal promise to pay for the labor furnished.[54] In an action against a corporation for services, an allegation that the plaintiff was employed by the defendant, through its secretary, is a sufficient allegation of employment by the corporation, though it is better pleading to omit reference to the secretary.[55] An averment that a corporation made and entered into an agreement by its president is sufficient as against a general demurrer. If the president, as such, had no authority to enter into the contract, it is matter of defense.[56]

§ 5156. **Joint services.**—Where two persons are employed by a claimant of a tract of land to procure a confirmation of the same, such service is not joint, and a separate action may be maintained by such agents for their expenses thus incurred.[57]

51 Smith v. Waite, 103 Cal. 372, 37 Pac. 232. See Busta v. Wardall, 3 S. Dak. 141, 52 N. W. 418.

52 Calhoun v. Girardine, 13 Colo. 103, 21 Pac. 1017. Compare Small v. Poffenbarger, 32 Neb. 234, 49 N. W. 337; Tracy v. Tracy, 59 Hun, 1, 12 N. Y. Supp. 665.

53 Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 Pac. 86; Donegan v. Houston, 5 Cal. App. 626, 90 Pac. 1073.

54 Chew Farng v. Keefer, 103 Cal. 46, 36 Pac. 1032.

55 Sullivan v. Grass Valley Milling etc. Co., 77 Cal. 418, 19 Pac. 757.

56 Malone v. Crescent etc. Transp. Co., 77 Cal. 38, 18 Pac. 858.

57 Conner v. Hutchinson, 12 Cal. 126. See Sullivan v. Grass Valley

§ 5157. **Jurisdiction.**—A British seaman on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States without any fault on the part of the seaman, sue for and recover his wages in a state court.[58]

In an action for the recovery of damages for a wrongful discharge from employment, the plaintiff need not allege affirmatively that he endeavored to make the damages as light as possible by procuring other employment.[59]

§ 5158. **When action lies—Allegations.**—The general rule of law is, while a special contract remains open or unperformed, the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done until the whole shall be completed. But the exceptions from that rule are cases in which something has been done under a special contract, but not in strict accordance with it; but if the other party derives any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the work is worth, and to recover it an action of *indebitatus assumpsit* is maintainable.[60] A complaint or petition averring a contract of employment, the rendering of services and expenditure of moneys in its performance, the plaintiff's wrongful discharge by the defendant, and the value of his services and expenditures, less receipts, states a cause of action on a *quantum meruit,* and not one for damages for breach of contract.[61] The services must have been rendered in pursuance of an agreement, express or implied, that they were to be paid for.[62] In an action by a sister against a brother for services rendered while living with him, it is not necessary to show an express promise, but a showing, from facts and circumstances, that there was an understanding and agreement is sufficient.[63] A person enjoying the benefit of the services of another is presumed to be bound to pay therefor what they are reasonably worth.[64] But this presumption may be rebutted

Milling etc. Co., 77 Cal. 418, 19 Pac. 757.

58 Pugh v. Gillam, 1 Cal. 485.

59 Merrill v. Blanchard, 40 N. Y. Supp. 48, 7 App. Div. 167.

60 Dermott v. Jones, 23 How. 220, 16 L. Ed. 442.

61 Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695, 25 S. W. 175.

62 Maltby v. Harwood, 12 Barb. 473; Livingston v. Ackeston, 5 Cow. 531; Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301.

63 Morrissey v. Fawcett, 28 Wash. 52, 68 Pac. 352; Hodge v. Hodge, 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873.

64 Moulin v. Columbet, 22 Cal. 509.

by proof of agreement at a fixed amount.[65] And where a hired person continues in employment after the term of the contract, the presumption is that the same wages are to be continued under the new employment, and the servant cannot recover on a *quantum meruit*.[66] When the complaint declares upon an express contract for a street improvement, and there is no allegation as to what the work done was worth, there can be no recovery upon *quantum meruit*.[67] If the complaint alleges no special contract, plaintiff can recover only what his services are worth;[68] and whether he was to receive an agreed compensation is immaterial, on *quantum meruit*.[69] In an action on a *quantum meruit*, for services rendered, excuses for not performing the contract need not be set up.[70] The complaint in an action against a guardian to recover from his wards' estate for services rendered them, must allege that the employment of the plaintiff was a reasonable and proper expense incurred by the guardian.[71]

§ 5159. **Services of wife.**—Proof that the plaintiff was wife of one of the parties defendant defeats the implication of a contract as on a *quantum meruit*.[72]

§ 5160. **Subsequent promise.**—Where a promise to pay is made subsequent to the completion of the services, it must be shown that the services were rendered at the defendant's request.[73] Where plaintiff alleges, by way of reply, a breach by defendant of a written contract and a subsequent agreement to receive extra pay for hauling ties an extra distance, the fact that the written contract is the only one pleaded in the complaint

65 Moulin v. Columbet, 22 Cal. 509.

66 Nicholson v. Patchin, 5 Cal. 475. See Wernli v. Collins, 87 Iowa, 548, 54 N. W. 365; Imhoff v. House, 36 Neb. 28, 53 N. W. 1032. As to recovery on quantum meruit, see Beers v. Kuehn, 84 Wis. 33, 54 N. W. 109; Roberts v. P. A. Deming Woodworking Co., 111 N. C. 432, 16 S. E 415; Stokes v Taylor, 104 N. C. 394, 10 S. E. 566; Littrell v. Wilcox, 9 Mont. 97, 22 Pac. 503; Whitton v. Sullivan, 96 Cal. 480, 31 Pac. 1115.

67 Raisch v. City and County of San Francisco, 80 Cal. 1, 22 Pac. 22.

68 Crole v. Thomas, 19 Mo. 70.

69 Williams v. Bishop, 17 Colo. App. 503, 68 Pac. 1063.

70 Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388.

71 Caldwell v. Young, 21 Tex. 800.

72 Angulo v. Sunol, 14 Cal. 402; Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160; Cooper v. Cooper, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.

73 Bartholomew v. Jackson, 20 Johns. 28, 11 Am. Dec. 237; Frear v. Hardenbergh, 5 Johns. 272, 4 Am. Dec. 356; Parker v. Crane, 6 Wend. 647. See, also, 1 Smith Lead. Cas. (H. & W. notes), 222. See, also, Hewett v. Bronson, 5 Daly, 1.

does not preclude evidence as to the number of ties actually hauled.[74]

§ 5161. **Services of child.**—Legal interest vests in a parent for the work, labor, and services of his child, where there is no express agreement.[75] But under an express agreement, or where circumstances warrant the conclusion that it was understood that the child might receive his earnings, payment to such child will be good.[76] So where the father gives his implied consent.[77] A father may emancipate his minor child, and confer upon such child a right to labor for itself and receive the earnings.[78] And the father in the above instance cannot sue for such services, even though he give notice not to pay said son his wages.[79] A father cannot sue in his own name for money due his minor son, in consideration of his enlistment under a contract made with the father's consent.[80] Where a minor has been paid in full for his personal services his parents cannot recover therefor.[81]

§ 5162. **Demand—Cause of action.**—In an action for services and materials furnished, where both items go to constitute a single cause of action, it must be made so to appear in the complaint. Bringing the action is sufficient demand.[82]

§ 5163. **When action lies for attorney's fees—Allegations.**—In an action by an attorney for his fees it is necessary to aver and prove on the trial a retainer or employment of the plaintiff as attorney in the suit or business in which his services were rendered.[83] It is not necessary to show a written retainer; a parol employment will suffice; or the jury may infer a retainer

74 Cook & Woldson v. Gallatin R. R. Co., 28 Mont. 509, 73 Pac. 131.

75 Shute v. Dorr, 5 Wend. 204; McMahon v. Sankey, 133 Ill. 636, 24 N. E. 1027; Lawyer v. Fritcher, 130 N. Y. 239, 27 Am. St. Rep. 521, 29 N. E. 267, 14 L. R. A. 700.

76 Id.; Benson v. Remington, 2 Mass. 115; McCoy v. Huffman, 8 Cow. 84.

77 Whiting v. Earle, 3 Pick. 201, 15 Am. Dec. 207. See Burlingame v. Burlingame, 7 Cow. 92; Keen v. Sprague, 3 Greenl. 77; Manchester v. Smith, 12 Pick. 115.

78 Stanley v. National Bank, 115 N. Y. 122, 22 N. E. 29; Beaver v. Bare, 104 Pa. St. 58, 49 Am. Rep. 567.

79 Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 73; United States v. Mertz, 2 Watts, 406; Gale v. Parrott, 1 N. H. 28; Eubanks v. Peak, 2 Bailey, 497; Chase v. Smith, 5 Vt. 556.

80 Mears v. Bickford, 55 Me. 528. See, also, Simpson v. Buck, 5 Lans. (N. Y.) 337.

81 Ping etc. v. Grant, 68 Kan. 732, 75 Pac. 1044.

82 Feeter v. Heath, 11 Wend. 479.

83 Hotchkiss v. LeRoy, 9 Johns.

from acts of the client, in the progress of the suit, amounting to a recognition of the attorney, or from his undertaking to pay for the services.[84] If the services were rendered as attorney of another person than the defendant, facts showing the defendant's liability therefor must be alleged.[85] A complaint for money expended and services performed should state, for the use and benefit of defendant, and at his instance and request. So in regard to performance of labor.[86] So a complaint which avers substantially that the defendant was at a certain time indebted to the plaintiff in a certain sum for professional services, rendered at the special instance and request of the defendant, is sufficient, without stating in terms the value of the services, or that the defendant promised to pay.[87]

§ 5164. Attorney fees as costs.—The California legislature of 1907[88] passed an act whereby the justice court shall add, as part of the costs, in any judgment recovered by the plaintiff in an action to recover wages for labor done, an attorney fee, not exceeding twenty per cent of the amount recovered. Similar statutes in other states have been declared unconstitutional, as being class legislation, and denying the equal protection of the law.[89] And the statutory allowance of attorney fees as costs in suits of foreclosure of mechanics' liens has been pretty generally declared void.[90]

§ 5165. Measure of damages—Contingent fee.—To ascertain what may be a reasonable compensation for services rendered by

142; Burghart v. Gardner, 3 Barb 64.

84 Harper v. Williamson, 1 McCord, 156; Owen v. Ord, 3 Car. & P. 349; Wiggins v. Peppin, 3 Beav. 340. See, also, Allen v. Bane, 4 Beav. 494.

85 Merritt v. Millard, 5 Bosw. 645.

86 Huguet v. Owen, 1 Nev. 464.

87 Wilkins v. Stidger, 22 Cal. 232, 83 Am. Dec. 64. See, further, as to sufficiency of complaint in action to recover for legal services, Burns v Cushing, 96 Cal. 669, 31 Pac 1124; Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60. As to immaterial variance, see Carter v. Baldwin, 95 Cal. 475, 30 Pac. 595.

88 Cal. Code Civ. Proc., § 924; Stats. 1907, p. 69.

89 Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006; Hocking Valley Coal Co. v. Rosser, 53 Ohio, 12, 53 Am. St. Rep. 622, 41 N. E. 263, 29 L. R. A. 386.

90 Builders' Supply Depot v. O'Connor, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 17 L. R. A. (N. S.) 909; Los Angeles Pressed Brick Co. v. Higgins, 8 Cal. App. 514, 97 Pac. 414; Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Davidson v. Jennings, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354, 48 L. R. A. 340; Atkinson v. Woodmansee,

an attorney, the amount involved and the character of the business transacted by him must be taken into account, and the time employed; not the time immediately devoted to the business alone, but the time which he must lose from other business in attending to it.[91] In addition to these, the jury should consider the character of the litigation in which the services were rendered; the novelty, difficulty, and importance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case as leading or assistant counsel, and the degree of responsibility resting upon him; and the fact, if it be a fact, that compensation was wholly contingent upon success. If the services were so contingent, the question when such success was obtained is a question of law.[92] And an instruction in a suit on a *quantum meruit*, to recover counsel fees, that "if plaintiffs' fee was to be contingent on success, and defendant settled the suit without plaintiffs' consent, plaintiffs could recover what their services were worth," does not incorrectly state the law.[93] And an instruction to the jury in a suit to recover counsel fees, that "if plaintiffs were employed by defendant to come from San Francisco to Virginia City, or from San Francisco to Aurora, and there was no special agreement as to the amount to be paid, they can only recover the value of the services rendered at the place where they were rendered, with the addition of reasonable traveling expenses; and if the traveling expenses were paid by defendant, then they cannot be recovered by plaintiffs," was held clearly erroneous, and properly refused.[94]

Under a complaint alleging an unconditional agreement to pay a certain sum of money for the plaintiff's services as an attorney, and that the services were reasonably worth such sum, evidence of an agreement to pay that amount on a contingency and the happening of the contingency is inadmissible, as is also evidence as to the reasonableness of the contingent agreement.[95]

§ 5166. **Partnership.**—Where partners employed plaintiff on condition that a certain portion of his wages should be retained till a certain sum had accumulated, when plaintiff should become

68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325.

91 Quint v. Ophir S. M. Co., 4 Nev. 304.

92 Leitensdorfer v. King, 7 Colo. 436, 4 Pac. 37.

93 Quint v. Ophir S. M. Co., 4 Nev. 304.

94 Id.

95 Owen v. Meade, 104 Cal. 179, 37 Pac. 923.

a partner, and during the accumulation the firm dissolved, the plaintiff may sue on the special contract or for work and labor.[96]

§ 5167. **Performance.**—If the plaintiff undertakes to aver performance by setting out the facts showing performance, he may be held to aver them with certainty.[97] Where defendant prevented plaintiff from working under the contract, the fact that plaintiff devoted a small part of the period to other work, which did not interfere with his efforts for defendant under the contract, does not make a breach by plaintiff so as to prevent his recovery of accrued salary.[98]

§ 5168. **Performance, how alleged.**—One suing on a contract assigned to him may allege performance by saying that up to the time of the assignment the assignor had performed, on his part, all the covenants of the contract, and that afterwards the plaintiff fully performed the conditions imposed by the contract on the assignor.[99] Where plaintiff has bound himself to procure certain acts to be done by third parties, adding that those on whose behalf he acted have also performed is unnecessary.[100]

§ 5169. **Defense.**—An answer denying that "defendant is indebted to the said plaintiff in a certain sum, or in any sum," is sufficient to raise an issue in an action for value of services rendered.[101] In California, it is not necessary for defendant to plead section 1980 of the Civil Code, providing that contracts for service, as against the employee, shall be limited to two years, in order to be entitled to reply thereon as a defense.[102]

§ 5170. **Defenses—Contractor's services.**—When the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot

96 Adams v. Pugh, 7 Cal. 150.

97 Hatch v. Peet, 23 Barb. 575. As to averment of performance on a modified contract, see Smith v. Brown, 17 Barb. 431.

98 Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717.

99 Cal. Steam Nav. Co. v. Wright, 6 Cal. 258, 65 Am. Dec. 511.

100 Rowland v. Phalen, 1 Bosw. 43. For cases of services rendered to relatives, see Thornton v. Grange, 66 Barb. 507; Neal v. Gilmore, 79 Pa. St. 421; Zimmerman v. Zimmerman, 129 Pa. St. 229, 15 Am. St. Rep. 720, 18 Atl. 129; Lynn v. Smith, 35 Hun, 275; Halliday v. Miller, 29 W. Va. 424, 6 Am. St. Rep. 653, 1 S. E. 821.

101 Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282, 78 Pac. 721.

102 Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017; affirmed 72 Pac. 717.

plead that it is against public policy that he should occupy two positions, of which the interests were in conflict, in defense of an action brought by him for services as superintendent.[103]

§ 5171. Defenses—Corporation work.—In an action against a municipal corporation for work and labor, an answer setting up that there was an appropriation made by law for such work, which has been exhausted, is insufficient, unless it appears clearly from the pleadings and the law referred to that the work was covered by the appropriation, and not by others contained in the same law.[104]

§ 5172. Counterclaims.—When the claim of plaintiff and counterclaim of defendant both arise out of the same contract, defendant may introduce evidence of unliquidated damages embraced in his counterclaim, unless the plaintiff come to the contract by assignment. When an action is based upon a contract to pay a stipulated sum, and the answer sets up a counterclaim for damages for matters arising out of the same contract, the defendant cannot on the trial introduce evidence of any damages except those specially set up in the answer.[105] Where, in an action for wages, defendant, the employer, has himself left wheat in an exposed manner, just as he now claims plaintiff did, the defendant cannot have a set-off on account of wheat damaged by such wheat left exposed by plaintiff.[106]

§ 5173. Denial of performance.—If the complaint is based on a written contract, by the terms of which plaintiff is to do certain things, and the complaint avers a faithful performance on his part, and the answer denies the performance, the defendant cannot, under this allegation and denial, introduce evidence of a counterclaim.[107]

§ 5174. General denial.—In an action on a *quantum meruit* not setting up a specific contract, under a general denial, defendant may show that the work was unskillfully done, or was worth less than the amount claimed.[108] On a specific contract

103 Shaw v. Andrews & Hillyer, 9 Cal. 73.

104 Donovan v. Mayor of New York, 44 Barb. 180, 19 Abb. Pr. 58.

105 Stoddard v. Treadwell, 26 Cal. 300.

106 Rawlings v. Clark, 19 Colo. App. 214, 74 Pac. 346.

107 Stoddard v. Treadwell, 26 Cal. 305.

108 Raymond v. Richardson, 4 E. D. Smith, 172; Bellinger v. Craigue, 31

it is otherwise.[109] In an action brought to recover for services rendered, the defendant, under an answer which denies the allegation in the complaint, and denies that he is indebted to the plaintiff, is at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed. He may, for example, under such denials, prove that he never incurred the debt, or that the services, either in whole or in part, were rendered as a gratuity, or that the plaintiff had himself fixed a less price for them than he claimed to recover, or that they were rendered upon the credit of some other person than the defendant, etc. So doing is not an attempt to show an extinguishment of the alleged indebtedness by payment, release, or otherwise, but to show that such indebtedness never existed.[110] In a suit on a *quantum valebat* for professional services, the rule requiring new matter to be set up does not apply.[111] Where the plaintiff, in an action to recover for labor and services, pleads the common count, a denial in the answer that defendant "owes the plaintiff the sum of [amount sued for], or any sum whatsoever, on account or otherwise," is merely a denial of a legal conclusion, and is insufficient under code practice.[112]

§ 5175. Salary of clerk.—If a merchant employs one, by written contract, at a stated salary, to act as his chief clerk and managing agent for a stated time, and an action is brought by the clerk on the contract for wages, and the answer sets up a counterclaim for damages arising out of neglect of the clerk to attend to the business, the defendant has a right on the trial to produce evidence of a loss of his profits and diminution of business caused by the clerk's neglect; and to do this he may ask a witness what amount of additional business would have been done if the clerk had attended to his business. When the plaintiff's action arises out of contract, defendant may introduce evidence of any counterclaim arising out of contract existing at the commencement of the action, even though the contracts are not the same.[113]

Barb. 534; Trimble v. Stilwell, 4 E. D. Smith, 512.

109 Kendall v. Vallejo, 1 Cal. 371; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692.

110 Schermerhorn v. Van Allen, 18 Barb. 29.

111 Bridges v. Paige, 13 Cal. 640.

As to what may be proved under a general denial in an action for services, work, and labor, see Schermerhorn v. Van Allen, 18 Barb. 29.

112 Gale v. James, 11 Colo. 540, 19 Pac. 446.

113 Stoddard v. Treadwell, 26 Cal. 300.

§ 5176. Seaman's wages.—In a libel for wages the allegations of hiring, voyage, etc., should be drawn accurately and with reasonable certainty; otherwise, it may be excepted to. The most correct course is to state the facts, etc., in distinct articles, which is the usual course in admiralty proceedings.[114] In a suit for wages, or for a share in a whaling voyage, if the defense sets up misconduct, there must be a special allegation of the facts, with due certainty of time, place, and other circumstances; otherwise, the court will reject it. Loose allegations of general misconduct are insufficient.[115] Where a new clause in the shipping articles is relied upon to repeal a claim for wages, it must be pleaded.[116] Where, in answer to a libel for wages, the claimants set up a discharge of the libelant in a foreign port by order of the consul, it is incumbent on them to set forth in their answer a state of facts justifying the discharge relied on, and to support the allegations by adequate proof.[117] An answer averring in general terms that a vessel was supplied with a medicine chest according to law is not of itself sufficient evidence to discharge a master from his liability for a physician's bill for attendance upon a sick seaman.[118] Where a libel claims extra wages, in satisfaction of a short allowance of provisions, under section 9 of the act of July 20, 1790,[119] the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions required by the statute, or an exception will lie for insufficiency.[120]

§ 5177. Violation of contract.—Where a suit was for services as agent of defendant under a contract, defendant in its answer set up a violation of the contract on the part of the plaintiff, and also certain other matters amounting to a tort on his part, as conspiracy to have the property of defendant sold and bought in by him, circulating false reports that defendant was bankrupt, its affairs a swindle, etc., it was held that the latter portion of the answer was properly stricken out on motion of plaintiff.[121]

114 Orne v. Townsend, 4 Mason, 541, Fed. Cas. No. 10583.

115 Id. Macomber v. Thompson, 1 Sumn. 384, Fed. Cas. No. 8919; Hart v. The Otis, Crabbe, 52, Fed. Cas. No. 6154.

116 Hart v. Rogers, 1 Sprague, 556, 7 Law Rep. 442, Fed. Cas. No. 6298.

117 The Atlantic, Abb. Adm. 451, Fed. Cas. No. 620.

118 Freeman v. Baker, Blatchf. & H. 372, Fed. Cas. No. 5084.

119 See U. S. Stats. at Large, § 4568.

120 The Elizabeth Frith, Blatchf. & H. 195, Fed. Cas. No. 4361.

121 Bates v. Sierra Nevada Lake Water etc. Co., 18 Cal. 171.

FORMS—ACTIONS FOR LABOR PERFORMED.

§ 5178. Complaint in action for services at a fixed price.

Form No. 1457.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., plaintiff rendered services to the defendant, at his special instance and request, in the capacity of [clerk, or otherwise].

II. That for said services the defendant promised to pay plaintiff a salary at the rate of [fifteen dollars per week].

III. That the defendant has not paid the said salary [or, that no part of said salary has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 5179. Complaint in action for services at a reasonable price.

Form No. 1458.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., at . . ., he [made sundry repairs on several articles of furniture] for the defendant, at his request.

II. That the said services were reasonably worth . . . dollars.

III. That defendant has not paid the same [or, that no part thereof has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 5180. Complaint in action by carriers, for freight.

Form No. 1459.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., he transported [in his wagon], thirty tons of coal, from . . . to . . ., for the defendant, and at his request.

II. That defendant promised to pay plaintiff the sum of . . . dollars per ton, as freight thereon [or, that such transportation was reasonably worth . . . dollars].

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5181. Complaint in action for passage money.

Form No. 1460.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19 .., he conveyed defendant in his steamer, called the . . ., from . . . to . . ., at his request.

II. That defendant promised to pay plaintiff . . . dollars therefor [or, that said passage was reasonably worth . . . dollars].

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5182. Complaint in action by parent for services of minor son.

Form No. 1461.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. rendered services [as clerk] to the defendant, at his request, in his store at . . ., from the . . . day of . . ., 19.., to the . . . day of . . ., 19..

II. That such services were reasonably worth . . . dollars [or, allege price agreed, as in preceding forms].

III. That the said A. B. was then, and is now, under twenty-one years of age, and the minor child of this plaintiff.

IV. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5183. Complaint in action for services and materials at a fixed price.

Form No. 1462.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., he furnished the paint, and painted defendant's house, at his request.

II. That defendant promised to pay him . . . dollars therefor.

III. That he has not paid the same [or, that no part of the same has been paid, except, etc.]

[DEMAND OF JUDGMENT.]

§ 5184. Complaint in action by an attorney for services.

Form No. 1463.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., the plaintiff performed services for the defendant, at his request, in prosecuting and defending certain suits, and in drawing and engrossing various instruments in writing, and in counseling and advising the defendant, and in attending in and about the business of the defendant.

II. That said services were reasonably worth the sum of . . . dollars.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5185. Complaint in action for services and materials at a reasonable price.

Form No. 1464.

[TITLE.]

The plaintiff complains, and alleges:

That on the . . . day of . . ., 19.., at . . ., he built a house known as No. . . ., . . . street, in said city, and furnished the materials therefor, for the defendant, at his request.

II. That the said work and materials were reasonably worth . . . dollars.

III. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 5186. Complaint in action by advertising agent for services and disbursements.

Form No. 1465.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., at . . ., the plaintiff rendered services to the defendant, at his request, in causing the defendant's advertisements of his business to be inserted in the following-named newspapers and periodicals: [Names of newspapers.]

II. That the plaintiff paid out, for such insertions for the use of the defendant, and at his request, . . . dollars.

III. That the defendant promised to pay said amount, together with a reasonable sum for said services.

IV. That said services were reasonably worth . . . dollars.

V. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5187. Complaint by publisher and proprietor for advertising.

Form No. 1466.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff, at the times hereinafter mentioned, was publisher and proprietor of the daily newspaper known as the "Mountain Avalanche," published at . . ., in the county of . . ., in this state.

II. That between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., the plaintiff published . . . insertions in the said newspaper of the advertisements of the defendant at his request.

III. That such services and publication were reasonably worth . . . dollars.

IV. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5188. Complaint in action for stabling horses.

Form No. 1467.

[TITLE.]

The plaintiff complains, and alleges:

I. That, at the request of the defendant, he provided for, kept, and fed a horse of the defendant, from the . . . day of . . ., 19.., to the . . . day of . . ., 19..

II. That such keeping and finding of said horse was reasonably worth . . . dollars.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5189. Complaint in action on special contract, completely filled.

Form No. 1468.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made his agreement in writing under his hand and seal, of which the following is a copy: [Copy of agreement.]

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That on the . . . day of . . ., 19.., at . . ., the plaintiff demanded of the defendant payment of the sum of . . . dollars, in said contract mentioned.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5190. The same—Where the contract was fulfilled by an assignee.

Form No. 1469.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., defendants, in consideration of . . ., executed and delivered in writing, under their hands and seals, a contract with one A. B., of which the annexed is a copy, and marked "Exhibit A."

II. That thereafter, and before the . . . day of . . ., said A. B. duly assigned the same, and all his rights under it, to the plaintiff.

III. That up to the time of the assignment, the assignor had duly performed all the conditions of the contract on his part, and that since said assignment, the plaintiff duly performed all the conditions thereof on his part.

IV. That on the . . . day of . . ., 19.., at . . ., the plaintiff demanded of the defendants payment of the sum of . . . dollars, in said contract mentioned.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of contract.]

§ 5191. Complaint in action by servant for partial performance of entire contract.

Form No. 1470.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., defendant employed plaintiff as a farm laborer [or otherwise, describe the nature of the employment] for the full term of ten months, commencing March 1, 19.., and agreed to pay plaintiff for his services during said entire period the sum of . . . dollars per month, payable at the end of each month.

II. That thereupon plaintiff entered upon his said employment, and continued therein until the . . . day of . . ., 19.., when by mutual consent the plaintiff left the service of said defendant.

III. That no part of the said wages so agreed to be paid by defendant has been paid [except, etc.], although plaintiff has demanded the same before the commencement of the action; and that the sum of . . . dollars, with interest from . . ., 19.., is now due plaintiff on said contract.

[DEMAND OF JUDGMENT.]

§ 5192. Complaint in action upon building contract for services and materials.

Form No. 1471.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . ., 19.., plaintiff and defendant entered into a contract, in writing, by which the plaintiff agreed to erect and furnish materials for the erection of a certain building for defendant, to be used as a dwelling-house, for the sum of . . . dollars, a copy of which contract is attached to this complaint and made a part hereof, and marked "Exhibit A."

II. That thereafter plaintiff proceeded to construct the said building, and furnished materials therefor, and prior to the . . . day of . . ., 19.., duly performed all the conditions of said contract on his part to be performed, and completed said building, and the same was duly accepted by defendant.

III. That defendant has paid, on account of the said contract, at various times, the sum of . . . dollars, leaving a balance of . . . dollars now due and owing to plaintiff; and that no part thereof has been paid, although the same has been demanded by plaintiff prior to the commencement of this action.

[DEMAND OF JUDGMENT.]

[Annex copy of contract.]

§ 5193. Answer—Accounting and payment.

Form No. 1472.

[TITLE.]

The defendant answers to the complaint:

1. For a first defense:

I. He denies each and every allegation in said complaint, except what is hereinafter admitted.

II. The defendant admits that said plaintiff did, at the request of defendant, enter into the service of the defendant as stated in the complaint, but alleges that he did account with said plaintiff on the . . . day of . . ., 19.., at . . ., and that on the said accounting there was found due said plaintiff only the sum of . . . dollars.

2. For a second defense, defendant alleges that after said accounting in the first defense alleged, to-wit, on the . . . day of . . ., 19.., he paid to the plaintiff the said sum of . . . dollars so found due upon said accounting, and the plaintiff received and accepted the same in full satisfaction of his said claim.

§ 5194. Answer—Plaintiff's work not finished, and architect's certificate not obtained.

Form No. 1473.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said labor and services set forth in the complaint were performed by the said plaintiff in and about the execution and construction of a certain dwelling-house, the property of this defendant, and were performed under the terms of a certain written contract between plaintiff and defendant, by the terms of which it was provided [here set forth provisions of contract relied on].

II. That the said work was not completed in a good and workmanlike manner on or before the day limited therefor in the said contract; but, on the contrary, the said work on that day, and from thence to the commencement of this action, was, and still is, incomplete and unfinished, in this: [Here state particulars.]

III. That no certificate from the said architect, that the said work had been completed to his satisfaction, was obtained by the plaintiff before this action.

CHAPTER CXXVII.

ACTIONS ON CONTRACTS OF EMPLOYMENT.

§ 5195. Discharge of employee.—Where no definite period of employment is agreed upon between master and servant, the master has a right to discharge the servant at any time, and to eject him by force if he refuses to leave after receiving notice to that effect, but no more force than is necessary.[1] But where a contract for services is made for a fixed period, if the employer discharge the servant without good cause, the servant may recover the stipulated wages.[2] The right to rescind the contract may be waived by lapse of time.[3] Under section 1999 of the California Civil Code, providing that an employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by law, an agreement to give a party "permanent" employment may be terminated at any time.[4] Where a singer's contract, providing that either party desiring to terminate the engagement should give six months' notice to the other, was broken, and she was discharged without notice, the remedy was an action for breach of contract, and not for tort.[5] In some jurisdictions, the proper remedy of an employee wrongfully discharged is an action for damages caused by the wrongful discharge.[6] Under the new procedure in Mississippi, a declaration alleging that the defendant employed the plaintiff for a term of one year, at specified weekly wages, and, during the year, without his fault, he was discharged, and that the defendant owes him a certain sum as wages for the rest of the term, sufficiently states a cause of action.[7]

1 De Briar v. Minturn, 1 Cal. 450. See, also, Greenburg v. Early, 23 N. Y. Supp. 1009, 4 Misc. 99.

2 Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218; La Coursier v. Russell, 82 Wis. 265, 52 N. W. 176; Liddell v. Chidester, 84 Ala. 508, 5 Am. St. Rep. 387, 4 South. 426; Cox v. Bearden, 84 Ga. 304, 20 Am. St. Rep. 359, 10 S. E. 627; Markham v. Markham, 110 N. C. 356, 14 S. E. 963; Mt. Hope Cem. Assoc. v. Weidenmann, 139 Ill. 67, 28 N. E. 834.

3 Reynolds v. Hart, 42 Colo. 150, 94 Pac. 14.

4 Davidson v. Laughlin (Cal.), 68 Pac. 101.

5 Westwater v. Rector etc. of Grace Church, 140 Cal. 339, 73 Pac. 1055.

6 James v. Allen County, 44 Ohio St. 226, 58 Am. Rep. 821, 6 N. E. 246; Weed v. Burt, 7 Daly, 267, 78 N. Y. 191; Bennett v. Roofing Co., 23 Mo. App. 587.

7 Gibson-Moore Mfg. Co. v. Meek, 71 Miss. 614, 15 South. 789.

§ 5196. Grounds for discharge.—A superintendent of mining property, employed under contract for a definite period of time, may be justly discharged for keeping dissolute women on the premises and conducting himself improperly, and a counterclaim for wages paid to himself as such superintendent, during times when he was not engaged in the service of the company, would be valid in case of suit on the contract for wages.[8] Negligently allowing a team to stand untied near a railroad track is sufficient ground for discharge.[9] Failure of a subagent to account for commissions received is just ground for his discharge.[10]

§ 5197. Entire contract.—A distinction exists between contracts for specific work and contracts for the hire of clerks, agents, laborers, domestic servants, etc., for a specified period. In the latter, if the person employed is improperly dismissed before the term of service has expired, he is entitled to recover for the whole term, unless the defendant can show, by way of defense, that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected.[11] A contract to grade a section of a railroad is an entire contract, and a condition in it for payments from time to time, as the work progresses, does not make it severable. If the contractor, in such case, is prevented by his employer from completing his whole contract, he is justified in abandoning it, and may recover a fair compensation for the work performed.[12]

§ 5198. Measure of damages.—The increase of damages is not the entire contract price, but a just recompense for the actual injury which the party has sustained.[13] Where plaintiff, in consideration of defendant's agreement to permanently employ him as agent to manage his building after its completion, for one hundred and fifty dollars a month, agreed until the completion of the building to work for sixty dollars a month, and defendant broke the agreement to permanently employ him, plaintiff was entitled to recover the reasonable value of his services rendered

8 Moynahan v. Interstate Min. etc. Co., 31 Wash. 417, 72 Pac. 81.

9 Wright v. Lake, 48 Wash. 469, 93 Pac. 1072.

10 Sumner v. Nevin, 4 Cal. App. 347, 87 Pac. 1105.

11 Costigan v. Mohawk etc. R. R. Co., 2 Denio, 609, 43 Am. Dec. 758, 2 Greenleaf on Evidence, p. 273.

12 Cox v. Western Pacific R. R. Co., 47 Cal. 87.

13 Clark v. Marsiglia, 1 Denio, 317, 43 Am. Dec. 670.

before the building was completed.[14] Under sections 3300 and 3301 of the California Civil Code, providing that for breach of an obligation arising from contract the measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, and that no damages can be recovered which are not clearly ascertainable in both their nature and origin, a singer discharged from her employment without notice, in violation of her contract, could not recover damages to her health, nor to injury to her feelings and reputation by reason of such discharge.[15]

§ 5199. Offer to perform.—The rejection of the offer to perform services excuses the performance as a condition precedent, but does not release the plaintiff from the obligation to perform so long as he insists upon the agreement.[16] When the plaintiff has been wrongfully discharged, this averment, coupled with an allegation of readiness to serve, is all that is necessary. He need not aver an offer to serve.[17] For if any one is bound to do a thing, he must either do it or offer to do it, and, if no objections are made, he must show that he made a tender in a regular manner; but this is not necessary if the other party by his conduct dispenses with a tender, as by a previous refusal to accept.[18] In order to bring a case within section 1998 of the California Civil Code, providing for the continuance of the employment for a reasonable time in certain cases, the complaint must state facts, and not mere conclusions. It is not sufficient to allege in terms that the continuance of the employment was necessary, and that the time was reasonable.[19] A complaint alleging that the defendant is indebted to the plaintiff in the sum of two hundred dollars for work and labor performed by him for the defendant during the year 1888, at defendant's request, for which work and labor said defendant agreed to pay the plaintiff the sum of two hundred dollars, but has not paid said sum, or any part thereof, is held to state a sufficient cause of action, although subject to a motion to make more definite and certain.[20] A complaint or petition aver-

14 Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. (N. S.) 579.

15 Westwater v. Rector etc. of Grace Church, 140 Cal. 339, 73 Pac. 1055.

16 Cooper v. Pena, 21 Cal. 403.

17 Wallis v. Warren, 4 Exch. 364, 7 Dowl. & L. 60.

18 Blight v. Ashley, Pet. C. C. 15, Fed. Cas. No. 1541.

19 Weithoff v. Murray, 76 Cal. 508, 18 Pac. 435.

20 Busta v. Wardall, 3 S. Dak. 141,

ring a contract of employment, the rendering of services and expenditure of moneys in its performance, the plaintiff's wrongful discharge by the defendant, and the value of his services and expenditures, less receipts, is held to state a cause of action on a *quantum meruit*, and not one for damages for breach of contract.[21] But a complaint alleging that the plaintiff performed certain work for the defendant under a contract by which the defendant agreed to pay the plaintiff a specified sum therefor, and that the work so performed was reasonably worth such sum, states a cause of action, not on a *quantum meruit*, but on a contract to pay an agreed sum for the work. The averment of value in the complaint is immaterial, and need not be denied by the defendant.[22] Where one employed to render services is ready and willing to perform his duties, but is prevented by the employer, the presumption, in the absence of any claim that he could have claimed or did obtain other employment, is that he was damaged in the sum he would have received under the contract, had he performed the services.[23]

§ 5200. **Rescission of contract.**—If the servant willfully desert the employer's service, the employer is not bound to receive him again, and he cannot recover for past services.[24] Plaintiff agreed to work seven months for defendant, at ten dollars per month, unless one or the other should become dissatisfied. He worked six months and a half, and left, alleging that he had business to attend to. It was held that he could not recover.[25] Where, during the term of a contract of employment, defendant prevented plaintiff from working under the contract, the fact that plaintiff devoted a small portion of the period to other work, which did not interfere with his efforts on defendant's behalf under the contract, did not constitute a breach of contract by plaintiff, so as to preclude his recovery of salary accrued.[26]

22 N. W. 418. To same effect, see Small v. Poffenbarger, 32 Neb. 234, 49 N. W. 337; Farron v. Sherwood, 17 N. Y. 227; Curran v. Curran, 40 Ind. 473; Tessier v. Reed, 17 Neb. 105, 22 N. W. 225.

21 Glover v. Henderson, 120 Mo. 367, 41 Am. St. Rep. 695, 25 S. W. 175. Compare Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566; Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611.

22 Meissner v Brennan, 15 N. Y. Supp. 671. But compare American Encaustic Tiling Co. v. Reich, 11 N. Y. Supp. 776; Goetz v. Van Au, 12 Civ. Proc. Rep. 104.

23 Hancock v. Board of Education, 140 Cal. 554, 74 Pac. 44.

24 Faxon v. Mansfield, 2 Mass. 147; Lantry v. Parks, 8 Cow. 63.

25 Monell v. Burns, 4 Denio, 121.

26 Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717.

§ 5201. **Age of apprentice.**—The master of an apprentice is concluded by the recital in the indentures of the age of the boy.[27] And a stranger to the indentures cannot take advantage of the omission to insert the age of the apprentice in the indentures.[28]

§ 5202. **Assignment of indentures.**—A master cannot assign the indentures of an apprentice.[29] And, therefore, a note given for such an assignment, being based upon a void contract, cannot be recovered.[30]

§ 5203. **Apprentice's wages.**—The master is entitled to his apprentice's wages when hired by another, whether the person hiring knew or not that he was an apprentice.[31] The right of the master to the earnings of the apprentice, in the way of his business, or of any other business which is substituted for it, does not extend to his extraordinary earnings, which do not interfere with the profit which the master may legitimately derive from his services.[32] The employer who has an express contract with his employee for all inventions made by him during a certain term of employment becomes the owner of any invention worked out during the term of such employment.[33]

§ 5204. **Breach, how alleged.**—The allegation that the defendant had not used any endeavors to have the apprentice serve, and refused to do anything, sufficiently showed a breach.[34]

§ 5205. **Covenants.**—The usual covenants in an apprentice's indenture are independent, and the plaintiff need not aver performance on his part.[35]

§ 5206. **Liability of parent.**—The father of an apprentice may be held liable upon the indenture, by reason of his signature and seal, although there are no express words of covenant binding

27 McCutchin v. Jamieson, 1 Cranch C. C. 348, Fed. Cas. No. 8743.

28 Heinecke v. Rawlings, 4 Cranch C. C. 699, Fed. Cas. No. 6326.

29 Handy v. Brown, 1 Cranch C. C. 610, Fed. Cas. No. 6019.

30 Walker v. Johnson, 2 Cranch C. C. 203, Fed. Cas. No. 17073.

31 James v. Leroy, 6 Johns. 274; Munsey v. Goodwin, 3 N. H. 272; Conant v. Raymond, 2 Aik. 243.

32 Mason v. The Blaireau, 2 Cranch, 240, 2 L. Ed. 266.

33 Portland Iron Works v. Willett, 49 Or. 245, 89 Pac. 421, 90 Pac. 1000.

34 Van Dorn v. Young, 13 Barb. 286.

35 Phillips v. Clift, 4 Hurl. & N. 167.

him.[36] If a son remains with and performs services for his father after attaining his majority, the law will not, ordinarily, imply a promise on the part of the father to pay for his labor; but if the circumstances show that the expectation of both parties was that he should be compensated, the promise will be implied, and he may recover a *quantum meruit*.[37]

§ 5207. **Right of action.**—An apprentice may sue a master for not teaching him his trade, although no indentures were executed, the master having taken him under an order of the court.[38]

§ 5208. **Complaint.**—In an action by a singer to recover damages for a discharge without notice, in violation of her contract, a complaint alleging such discharge, and that the same was malicious, and for the purpose of injuring her feelings and reputation, and that she had been greatly humiliated thereby, etc., but failing to allege the wages she was receiving, or that anything was due her when she was dismissed, or that she could not get employment in her profession at better wages, was demurrable.[39] Where plaintiff alleged breach of an oral contract to hire him "for a period of one year, for the season commencing December 1, 1897," the words "for the season" qualified the preceding words "for a period of one year," and hence testimony was admissible to show what constituted the "season."[40] Where, in an action to recover for an alleged breach of contract for employment, the complaint alleges that the parties agreed that plaintiff should serve the defendant in a certain capacity at certain wages, and that defendant refused to permit plaintiff to enter on his duties, the contract set out is not so uncertain as to render the complaint subject to an objection to the introduction of evidence.[41]

§ 5209. **Measure of damages.**—The measure of damages in case of wrongful discharge is the contract price less any sum the employee has earned, or might with reasonable diligence earn, during the period; but this rule does not apply where the em-

36 Woodrow v. Coleman, 1 Cranch C. C. 171, Fed. Cas. No. 17982.

37 Friermuth v. Friermuth, 46 Cal. 42.

38 Adams v. Miller, 1 Cranch C. C. 5, Fed. Cas. No. 63.

39 Westwater v. Rector etc. of Grace Church, 140 Cal. 339, 73 Pac. 1055.

40 Johnston-Woodbury Hat Co. v. Lightbody, 18 Colo. App. 239, 70 Pac. 957.

41 Prescott v. Puget Sound Bridge etc. Co., 31 Wash. 177, 71 Pac. 772.

ployment covers only part of the day, in the other portion of which the same amount or more money is earned.[42] Suit on *quantum meruit* may be had for the reasonable value of the service, whether the contract be valid or not.[43]

§ 5210. Defenses—Master and servant.—To an action for breach of an indenture of apprenticeship, the defendant, the apprentice's father, pleaded that the apprentice "was and is prevented by an act of God, to-wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all said term." It was held, on demurrer, a good plea in excuse of performance, without any averment that the plaintiff had notice of the illness before the commencement of the action.[44] The relation of master and servant is personal, and is severed by the death of either.[45]

§ 5211. Defense—Performance prevented by plaintiff.—In an action for the breach of a contract to clear certain land of standing timber, so as to fit it for seeding, an answer which admits the contract, but denies a breach thereof, and shows affirmatively that defendants were proceeding with due performance thereof according to its terms until requested by plaintiffs to desist from so doing, cannot be said to be either sham, frivolous, or immaterial.[46]

§ 5212. Defense—Unavoidable accident.—A defense based on an unavoidable accident is unavailing where it already appears that the gross carelessness and negligence of the defendant contributed to the injury complained of.[47]

§ 5213. Answer.—A denial that the employment was for a year's time admits proof of some different fixed time without pleading such time in the answer.[48]

42 Nuckolls v. College of Physicians, 7 Cal. App. 233, 94 Pac. 81.

43 Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 Pac. 86.

44 Boast v. Firth, L. R., 4 C. P. 1. That act of God rendering performance impossible, if relied on as a defense, must be pleaded, see Pengra v. Wheeler, 24 Or. 532, 34 Pac. 354, 21 L. R. A. 726; New Haven etc. Co. v. Quintard, 37 How. Pr. 29, 6 Abb. Pr. (N. S.) 128. As to performance prevented by act of God, see Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858.

45 Casto v. Murray, 47 Or. 57, 81 Pac. 388, 883.

46 Brown v. Porter, 7 Wash. 327, 34 Pac. 1105.

47 Greeley Irrigating Co. v. House, 14 Colo. 549, 24 Pac. 329.

48 Armstrong v. Wm. Musser Lumber Co., 43 Wash. 584, 86 Pac. 944.

FORMS—ACTIONS ON CONTRACTS OF EMPLOYMENT.

§ 5214. Complaint in action for breach of contract to employ.

Form No. 1474.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant [as accountant], and that the defendant should employ the plaintiff as such for the term of [one year, or as the case may be], and pay him for his services . . . dollars monthly [or as the case may be].

II. That on the . . . day of . . ., 19. . , the plaintiff entered upon the service of the defendant under said agreement, and has ever since been, and still is, ready and willing to continue in such service.

III. That on the . . . day of . . ., 19. . , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, though the plaintiff then and there offered to continue in said service, and perform said agreement on his part, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5215. The same—Where the employment never took effect.

Form No. 1475.

[TITLE.]

The plaintiff complains, and alleges:

I. [As in last form.]

II. That on the . . . day of . . ., 19. . , at . . ., the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

III. That the defendant refused to permit the plaintiff to enter upon such service, or to pay him for his services, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5216. Complaint for breach of contract to serve.

Form No. 1476.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the plaintiff

and defendant mutually agreed that the plaintiff should employ the defendant at [a monthly] compensation of . . . dollars, and that the defendant should serve the plaintiff [as bookkeeper] for the term of [one year].

II. That the plaintiff has always been ready and willing to perform his part of the said agreement [and on the . . . day of . . ., 19.., offered so to do].

III. That the defendant refused to serve the plaintiff as aforesaid, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5217. Complaint by master against father of apprentice.

Form No. 1477.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., one A. B., with the consent of the defendant, made an indenture under his hand and seal, a copy of which is hereto annexed.

II. That at the same time and place, the defendant entered into an agreement, under his hand and seal, a copy of which is also hereto annexed [or state the tenor of these covenants].

III. That on the . . . day of . . ., 19.., the said A. B. willfully absented himself from the service of the plaintiff, and continues so to do, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

[Annex copies of indentures.]

§ 5218. Complaint by the apprentice against the master.

Form No. 1478.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant entered into an agreement with the plaintiff, and his father, Benjamin Rider, under his and their hands and seals, a copy of which is hereto annexed.

II. That the defendant has not [instructed the plaintiff in the business of . . ., or state any other breach], to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

[Annex copy of agreement.]

§ 5219. Complaint for breach of contract to manufacture goods.

Form No. 1479.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant promised and agreed with the plaintiff to manufacture and deliver to the plaintiff four hundred dozen woolen hose, at the price of . . . dollars for each dozen, for which the plaintiff agreed to pay the defendant . . . dollars.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. The defendant did manufacture said hose under said agreement, but manufactured them in an unskilled and unworkmanlike manner, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5220. Complaint for refusing to accept manufactured goods.

Form No. 1480.

[TITLE.]

I. That on the . . . day of . . ., 19.., at . . ., the defendant contracted with the plaintiff to make for him [describe what], and agreed to pay for the same, upon delivery thereof, . . . dollars.

II. That the plaintiff made the said goods, and on the . . . day of . . ., 19.., offered to deliver the same to the defendant, and has ever since been ready and willing to deliver them, and has otherwise duly performed all the conditions of said contract on his part.

III. That the defendant has not accepted or paid for the same.

[DEMAND OF JUDGMENT.]

[Annex copy of contract.]

§ 5221. Complaint on promise to manufacture raw material into merchantable goods.

Form No. 1481.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff delivered to the defendant . . . [sides of leather], of the value of . . . dollars, to be manufactured into [harness], for a reasonable compensation, to be paid to the defendant by the plaintiff.

II. That the defendant, in consideration thereof, undertook to manufacture the said [harness], or cause it to be manufactured from the [leather], and to deliver the same to the plaintiff when so manufactured.

III. That the said [leather] was so manufactured into [harness] by the defendant before the . . . day of . . ., 19.., on which the plaintiff demanded the same of the defendant. and then and there offered to pay him a reasonable compensation for manufacturing the same.

[Or, III. That the defendant did not manufacture said [leather] into [harness], although a reasonable time therefor elapsed before this action.]

IV. That the defendant, then and ever since, refused and neglected to deliver the same, and has converted them to his own use.

[Or, IV. That the defendant manufactured said [leather] in such a negligent and unskillful manner, that the said [harness] was of no value.]

[DEMAND OF JUDGMENT.]

§ 5222. Complaint against a builder for not completing building.

Form No. 1482.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., plaintiff and defendant entered into an agreement, under their hands and seals [or, under the hand and seal of the defendant], of which a copy is annexed and made part of this complaint, and marked "Exhibit A," [or state its legal effect, e. g. thus:] whereby defendant agreed to erect, in a substantial manner, a two-story frame house in the town of . . ., county of . . ., and to have the said house completed and ready for occupancy on or before the . . . day of . . ., 19.., for which this plaintiff agreed to pay him . . . dollars, payable as follows: When the foundation should be laid the sum of . . . dollars; when the first story should be up and the second tier of beams laid, . . . dollars; when the second story should be up and the third tier of beams laid, . . . dollars; and when the house should be entirely completed, the balance of . . . dollars.

II. That plaintiff duly performed all the conditions thereof on his part.

III. That the defendant entered upon the performance of the work under said contract, and laid the foundations of the said house, and commenced the erection of the first story thereof, but has neglected to finish the said building pursuant to said contract, and has left the same with the foundations laid and the walls of the first story partly up, and that, although the time for the completion of said building expired before this action, he refuses to complete the same.

IV. That the plaintiff, on the . . . day of . . ., 19.., at . . ., made an agreement with one E. F., whereby he agreed to let, and said E. F. agreed to hire, the said building for one year from the . . . day of . . ., 19.., at the yearly rent of . . . dollars, of which the defendant had due notice.

V. That by reason of the defendant's failure to complete the contract aforesaid upon his part, the plaintiff has been unable to complete said house so as to give said E. F. occupancy thereof, and has been deprived of the profits of said lease, and has been otherwise greatly injured, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

[Annex copy of agreement.]

§ 5223. Complaint against builder for not well finishing building.

Form No. 1483.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., this plaintiff and the defendant entered into an agreement, in writing, under their hands and seals, of which a copy is hereto annexed and made part of this complaint, and marked "Exhibit A."

II. That the plaintiff duly fulfilled all the conditions thereof on his part.

III. That the defendant did not fulfill said contract on his part; but, on the contrary, erected said building in so unskillful and negligent a manner [and of so unsuitable materials] that shortly after its completion the foundation settled, the walls cracked, the roof and walls became leaky, a considerable portion of the plastering fell, and the house otherwise was and is entirely untenantable and nearly useless, through the negligent and

unskillful manner of its erection, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

[Annex copy of agreement.]

§ 5224. Complaint against attorney for negligent prosecution of action.

Form No. 1484.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, being an attorney of the . . . court of this state, the plaintiff, in or about the month of . . ., 19.., retained and employed him as such, for a compensation to be paid him therefor, to prosecute and conduct an action in the . . . court on behalf of this plaintiff against one E. F., for the recovery of a large sum of money due from him to this plaintiff; and the defendant undertook to prosecute said action in a proper, skillful, and diligent manner as the attorney of the plaintiff.

II. That the defendant might, in case he had prosecuted said action with due diligence and skill, have obtained final judgment therein for this plaintiff before the . . . day of . . ., 19.., yet he did not do so, but so negligently and unskillfully conducted said action that, by his negligence, delay, and want of skill, he did not obtain judgment until the . . . day of . . ., 19.., and that meanwhile said E. F. had become insolvent, whereby the plaintiff was hindered and deprived of the means of recovering said sum of money, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5225. Complaint against attorney, for negligence in examining title.

Form No. 1485.

[TITLE.]

The plaintiff complains, and alleges:

I. That at a time hereinafter mentioned the plaintiff made a contract with one E. F. for the purchase from him of certain real property [briefly designate the premises] for the sum of . . . dollars, which property said E. F. assumed to have power to convey in fee, and clear of all incumbrances.

II. That the defendant being an attorney, the plaintiff at . . ., in the month of . . ., 19.., employed him as such to examine the title of E. F. to said property, and to ascertain if the title were good, and if any incumbrances existed thereon, and to cause and procure an estate therein in fee simple and clear of all incumbrances, to be conveyed to the plaintiff, which the defendant, for compensation to be paid him, undertook to do.

III. That the defendant did not do so, but negligently and unskillfully conducted himself in respect to such examination, and did not use endeavors to cause or procure a good and sufficient title in fee, clear of incumbrances, to be conveyed to the plaintiff, but wrongfully advised and induced the plaintiff to pay said E. F. the sum of . . . dollars, being said purchase price of the premises, when in fact said E. F. had no title thereto [or, when the property was subject to incumbrances to the sum of . . . dollars as follows [specifying them], and the plaintiff in order to release the premises from said incumbrances was compelled to pay the holders thereof the sum of . . . dollars], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5226. Complaint against physician for malpractice.

Form No. 1486.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant being a physician, the plaintiff, at . . ., in the month of . . ., 19.., employed him as such to attend the plaintiff to cure him of a malady from which he then suffered, for compensation to be paid therefor, and for that purpose he undertook as a physician to attend and care for the plaintiff.

II. That defendant then entered upon such employment, but did not use due and proper care or skill in endeavoring to cure the plaintiff of the said malady, in this, that the defendant did not bleed the plaintiff at an early stage of the sickness, when, if the defendant had used due or proper care or skill in that behalf, he would have bled him; and also in this, that the defendant at a subsequent stage of the plaintiff's malady bled the plaintiff in a profuse and immoderate extent, taking from him . . . ounces of blood, the same being an excessive and injurious quantity, and which the defendant, if he had used proper

care and skill, ought not to have taken; and also in this, that the defendant, on [etc.], and on the fourteen days next following, unskillfully and negligently administered to the plaintiff . . . grains of mercury every six hours during that time, the same being excessive and injurious doses, and which the defendant, if he had used due and proper care and skill, ought not to have administered to the plaintiff.

III. By reason of the several premises, the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to and did expend the sum of . . . dollars in endeavoring to be cured of the said sickness, which was prolonged and increased by the said unskillful and improper conduct of the defendant, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5227. Complaint against surgeon for malpractice.

Form No. 1487.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff was kicked on the right leg by a vicious horse, and the same was thereby broken and greatly injured; that at that time, the defendant being a surgeon, the plaintiff called and informed him of the manner of receiving such injury, and employed him as such surgeon to examine such broken leg and ascertain the extent of the injury thereby caused, and to set the same, if broken, and to treat and heal the same for whatever the injury was to it; and for that purpose the said defendant undertook to treat and heal the same for whatever the injury was or may have been to it.

II. That pursuant to said undertaking said defendant examined the said injured leg of the plaintiff in a negligent and unskillful manner, and failed to ascertain that the same was broken or the extent of the injury to the same, and that he treated and tried to heal the same as though it was not broken, greatly to the plaintiff's injury.

III. That by reason of the defendant's negligence and unskillful examination and treatment of plaintiff's said broken leg the plaintiff was made sick and kept from attending to his business ever since the date aforesaid, suffered much pain and annoy-

ance, and was put to great expense, and has been, and still is, disabled from attending to his labor and business, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

ANSWERS.

§ 5228. Denial of contract.

Form No. 1488.

[TITLE.]

The defendant answers to the complaint, and denies:

That he agreed with the plaintiff as alleged, or at all.

§ 5229. The same—Denial of plaintiff's performance.

Form No. 1489.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff has not performed the conditions of said agreement on his part; but, on the contrary, has wholly omitted [here state breach].

§ 5230. The same—Performance by defendant.

Form No. 1490.

[TITLE.]

The defendant answers to the complaint:

That he made the said [articles] furniture, and on the . . . day of . . ., 19.., delivered the same to the plaintiff, in every respect as agreed.

§ 5231. The same—Excuse for non-performance.

Form No. 1491.

[TITLE.]

The defendant answers to the complaint:

I. That at the time of making said agreement, the plaintiffs agreed with this defendant that, in consideration that he would deliver to them at their store in . . . [state what], they, the said

plaintiffs, would pay this defendant [state amount, and when and where to be paid].

II. That the said plaintiffs failed and refused to pay the same on the delivery of said articles at said store.

§ 5232. Answer—Plaintiffs' failure preventing defendant's performance.

Form No. 1492.

[TITLE.]

The defendant answers to the complaint:

I. That at the time of making said agreement, the plaintiffs agreed, in writing, with this defendant, that in consideration that he would deliver to them, at their warehouse in . . ., the said quantity of shelled corn, they, the said plaintiffs, would pay this defendant twenty cents a bushel therefor, and would furnish to this defendant a thresher to thresh said corn for one cent a bushel.

II. That the said plaintiffs failed and refused to furnish said thresher, though this defendant, on the . . . day of . . ., 19.., requested them so to do; whereby this defendant was disabled from performing his said contract.

§ 5233. Answer—Alleging plaintiff's discharge for misconduct.

Form No. 1493.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That by the terms of said contract of employment it was provided that the plaintiff should [here set forth terms of the agreement which the plaintiff breached; also, set forth provision authorizing discharge if there be any].

II. Notwithstanding the said agreement on the part of the said plaintiff, and in violation thereof, the said plaintiff, on and between the . . . day of . . ., 19.., and the . . . day of . . ., 19.., did not [here negative performance of the agreement in question, and state affirmatively the misconduct charged, as in a complaint].

III. That by reason of the said violation of his said agreement by the said plaintiff, this defendant, on the . . . day of . . ., 19.., discharged the said plaintiff from his employment, as he of right might do, and that such discharge constitutes the supposed breach of the contract of employment aforesaid, which is alleged in the complaint.

§ 5234. Answer—Discharge on account of plaintiff's incompetency.

Form No. 1494.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That by the said contract of employment the plaintiff agreed to perform for the defendant the services of a competent engineer in charge of defendant's stationary engine [or otherwise, state the character of the services], which services the plaintiff at the time of the contract represented himself able and competent to perform.

II. That the defendant, relying on the truth of such representation, thereupon entered into said contract of employment, but that the plaintiff was not a competent engineer, and was not in fact a competent stationary engineer, and unable to perform, and did not in fact perform, the services of such an engineer, in this, [here set forth the nature of the incompetency as fully as possible].

III. That by reason of the plaintiff's aforesaid incompetence, on the . . . day of . . . , 19.. , the defendant discharged the said plaintiff, as he lawfully might do.

CHAPTER CXXVIII.

NEGOTIABLE PAPER.

§ 5235. **Defined.**—A negotiable instrument is a written promise or request for the payment of a certain sum of money to order, or bearer, in conformity to the provisions of sections 3086 to 3095, inclusive, of the Civil Code of California.[1] There must be no uncertain condition attached to the promise.[2] It may be with or without date or time and place of payment.[3] There are six classes of negotiable instruments, as follows: Bills of exchange, promissory notes, bank notes, checks, bonds, certificates of deposit.[4]

A bill of lading, not being payable in money, is non-negotiable; but all the title to the freight, which the first holder had passes to every subsequent indorsee of the bill in good faith and for value, in the ordinary course of business, with like effect and manner as in case of a bill of exchange.[5] Certificates of corporate stock are not negotiable, but they are transferable by indorsement and delivery as to the parties thereto, and by entry upon the stock-book, as to third parties;[6] and the owner may be estopped to assert title as against *bona fide* purchasers for value without notice.[7] The order must not be upon a particular fund, and it must be unconditional; but it may indicate the fund to which the drawee is to look for reimbursement.[8] Payment upon confirmation of a land grant is not morally certain. The certainty must exist at the date of the instrument.[9] A provision for an "increased rate" of interest, if not paid at maturity, makes the amount uncertain and the instrument non-negotiable.[10] A note providing for an extension of time for payment without notice is uncertain as to the time of payment and non-negotiable.[11] In

1 Cal. Civ. Code, § 3087.
2 Cal. Civ. Code, § 3088.
3 Cal. Civ. Code, § 3091.
4 Cal. Civ. Code, § 3095.
5 Cal. Civ. Code, § 2127; Central Sav. Bank v. Smith, 43 Colo. 90, 95 Pac. 307.
6 Cal. Civ. Code, § 324.
7 Beckwith v. Galice Mines Co., 50 Or. 542, 93 Pac. 453, 16 L. R. A. (N. S.) 723.
8 First Nat. Bank v. Lightner, 74 Kan. 736, 118 Am. St. Rep. 353, 88 Pac. 59, 8 L. R. A. (N. S.) 231.
9 Joseph v. Catron, 13 N. Mex. 202, 81 Pac. 439, 1 L. R. A. (N. S.) 1120.
10 Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.
11 Union Stock Yds. Nat. Bank v. Bolan, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508.

Montana, a note secured by a mortgage, which contains the usual provisions as to waste, insurance, taxes, and attorney fees, is not negotiable for want of certainty,[12] as is also a title-retaining sale note, giving the payee the right to take possession on default, or when he deems himself insecure.[13]

§ 5236. **Altered instrument—Onus probandi.**—A party who claims under an instrument which appears upon its face to have been altered is bound to explain the alteration. But not so when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument.[14] The alteration of the number of a state bond, payable to bearer, and not required by law to be numbered, is immaterial, and, though made with fraudulent intent, does not avoid it in the hands of a subsequent *bona fide* holder for value without notice.[15] In California, the code provides that the party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.[16]

§ 5237. **Consideration, when and how alleged.**—Where a copy of the instrument declared on is set out in the complaint, and it purports to be for value received, that is a sufficient allegation of a consideration.[17] A complaint in an action on a contractor's bond, setting out the written bond under seal, thereby importing a consideration, is not demurrable for failure to allege sufficient consideration.[18] In California, a written instrument is presump-

12 Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

13 Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 125 Am. St. Rep. 185, 94 Pac. 1039.

14 United States v. Linn, 1 How. 104, 11 L. Ed. 64; Odell v. Gallup, 62 Iowa, 253, 17 N. W. 502; Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832, 8 South. 498, 12 L. R. A. 140; Neil v. Case, 25 Kan. 510, 37 Am. Rep. 259.

15 Commonwealth v. Emigrant Industrial Sav. Bank, 98 Mass. 12, 93 Am. Dec. 126.

16 Cal. Code Civ. Proc., § 1982. See Miller v. Luco, 80 Cal. 257, 22 Pac. 195; First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748.

17 Jerome v. Whitney, 7 Johns. 321; Walrad v. Petrie, 4 Wend. 575; Prindle v. Caruthers, 15 N. Y. 425.

18 Considine v. Gallagher, 31 Wash. 669, 72 Pac. 469.

tive evidence of a consideration.[19] In declaring upon such instrument, it may be unnecessary to aver a consideration, if the instrument set out expresses one; but if none is expressed on the face of the instrument, it is; and it is the better practice in all cases, unless upon negotiable instruments. Where the instrument neither expresses a consideration nor, as in the case of a sealed instrument or negotiable paper, imports one, a consideration should be averred.[20] A valuable consideration for the assumption of a contract to furnish water is sufficiently shown by an allegation in the complaint that the defendant, for a considerable time, collected the price and notes therein mentioned.[21] Where the instrument requires a consideration to support it, the consideration must be averred in the complaint.[22] In an action on a written instrument, it is not necessary to set out the consideration.[23] In Iowa and Indiana, an agreement in writing imports a consideration.[24] In a sealed instrument, the seal imports consideration.[25] So in an undertaking to answer for the debt of another.[26] The contention of defendant that because the written contract did not require the contractor to furnish a bond, the bond requested and given was without consideration, is of no avail.[27] A bond given by a contractor pursuant to an unconstitutional statute cannot be upheld as a common-law bond.[28]

§ 5238. Construction.—In construing written instruments, the circumstances under which they were written and the subsequent conduct of the parties may be consulted.[29] Under the New York code, the recitals of an instrument averred in a complaint to have been executed by the defendant have the same effect as specific averments of the truth of the facts recited.[30] When the plaintiff sets out in his complaint the contract sued on in the terms in which it is written, and then puts a false construction

19 Civ. Code, § 1614.

20 Spear v. Downing, 12 Abb. Pr. 37.

21 Horsky v. Helena Cons. Water Co., 13 Mont. 229, 33 Pac. 689.

22 Prindle v. Caruthers, 10 How. Pr. 33; Joseph v. Holt, 37 Cal. 250.

23 Sloan v. Gibson, 4 Mo. 32; Caples v. Branham, 20 Mo. 244, 64 Am. Dec. 183.

24 Tousley v. Olds, 6 Iowa, 526.

25 McCarty v. Beach, 10 Cal. 461; Wills v. Kempt, 17 Cal. 98; Clark v. Thorpe, 2 Bosw. 680; County of Montgomery v. Auchley, 92 Mo. 126, 4 S. W. 410.

26 Bush v. Stevens, 24 Wend. 256.

27 Sweeney v. Ætna Indemnity Co., 34 Wash. 126, 74 Pac. 1057.

28 Cal. Code Civ. Proc., § 1203; Montague & Co. v. Furness, 145 Cal. 205, 78 Pac. 640; Shaughnessy v. American Surety Co., 138 Cal. 545, 69 Pac. 250, 71 Pac. 701.

29 McNeil v. Shirley, 33 Cal. 202.

30 Slack v. Heath, 1 Abb. Pr. 331.

on its terms, the allegation repugnant to its terms should be regarded as surplusage;[31] and where a declaration contains an averment of a fact *dehors* the written contract, which is in itself immaterial, the party making such averment is not bound to prove it.[32] In Massachusetts, where a written agreement has been executed by one person only, by which he agreed to deliver to another, upon the formation of a coal company, and when the certificate should have been issued, a certain amount of the stock of the company, and the agreement recites that the person who was to receive the stock agreed, in consideration thereof, to sell a certain amount of the stock of the company at a specified valuation, and collect payment therefor, a declaration in an action against the signer of the agreement is demurrable which does not allege that there was a consideration for the defendant's promise, or that the company has been formed, the certificates issued, or the specified amount of stock sold, and payment therefor collected by the plaintiff.[33]

All the terms of the promise, including the kind of money in which the payment is to be made, are to be ascertained by an inspection and construction of the instrument.[34]

§ 5239. **Date of an instrument.**—In pleading a written instrument,—e. g. a release,—if the only materiality of the date is that it was after another event, it is sufficient to say that it was so.[35]

§ 5240. **Delivery.**—A delivery of a deed need not be stated in a pleading, and it may be stated to have been made on a day other than its date. Time need not be averred, unless it be the essence of the contract.[36] That an instrument was executed imports a delivery.[37] The delivery of a promissory note is sufficiently averred by implication, and indorsement is unnecessary to transfer the title.[38]

31 Love v. Sierra Nevada L. W. & M. Co., 32 Cal. 639, 91 Am. Dec. 602; Stoddard v. Treadwell, 26 Cal. 300.

32 Wilson v. Codman's Executors, 3 Cranch. 193, 2 L. Ed. 408.

33 Murdock v. Caldwell, 8 Allen, 309; Wheaton v. Rampacker, 3 Wyo. 442, 26 Pac. 912.

34 Burnett v. Stearns, 33 Cal. 468.

35 Kellogg v. Baker, 15 Abb. Pr. 286.

36 Cro. Eliz. 178; Ashmore v. Rypley, Cro. Jac. 420; Moore v. Jones, 2 Ld. Raym. 1538; Tompkins v. Corwin, 9 Cow. 255; Brinkerhoff v. Lawrence, 2 Sandf. Ch. 400.

37 Brinkerhoff v. Lawrence, 2 Sandf. Ch. 400.

38 Purdy v. Vermilyea, 8 N. Y. 346.

§ 5241. "Executed" implies "subscribed."—An averment that an agreement was "executed" amounts to an averment that it was "subscribed" by the party to be charged.[39] If in pleading a deed executed by a married woman the pleader states that it was executed by attorney, he must also state the facts which make the case one in which such mode of execution is valid, or his pleading is demurrable.[40]

§ 5242. Foreign language.—If the instrument is in a foreign language, it is sufficient on demurrer to set it forth in that language.[41] But it is better to plead it according to its legal effect.

§ 5243. Lex loci of execution governs.—Where a bond, secured by a mortgage, is a Minnesota contract, its enforcement is governed by the laws of Minnesota, and interest is allowed in accordance with the laws of Minnesota.[42] The parties to a bond may stipulate that it shall be governed by the laws of a certain state, and the fact that the bond is secured by a mortgage on real estate in another state does not void the stipulation; and in a suit to foreclose the mortgage and enforce the bond the court should interpret the bond by the laws of the state so agreed upon by the parties thereto.[43]

§ 5244. Genuineness deemed admitted.—When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.[44] This section extends only to those parties who are alleged to have "signed" the instrument. Therefore, if the action is against an administrator, the genuineness of the signature must be proved.[45] So proceedings which are void by reason of the infirmity of the statute under which they are had are not cured by an averment in a complaint that they were duly and legally had; and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal.[46]

39 Cheney v. Cook, 7 Wis. 413.

40 Johnston v. Taylor, 15 Abb. Pr. 339.

41 Nourny v. Dubosty, 12 Abb. Pr. 128.

42 Monier v. Clark, 12 N. Mex. 118, 75 Pac. 35.

43 Midland Sav. etc. Co. v. Solomon, 71 Kan. 185, 79 Pac. 1077.

44 Cal. Code Civ. Proc., § 447.

45 Heath v. Lent, 1 Cal. 411.

46 People v. Hastings, 29 Cal. 449.

§ 5245. **Identity.**—Where the note was made payable to G. W., and the plaintiff named himself as Gilbert W., it was held that he should be presumed to be the same person.[47] Where the note was signed in the name of one of the partnership "& Co.," and in the action the defendants were named individually, it was held sufficient.[48] The insertion of the name of "Wilson" for that of "Nelson," by a clerical error, does not constitute such a variance between the bond set out in the complaint and the bond offered in evidence as could in any manner injure the defendants.[49]

§ 5246. **Indebtedness of defendant.**—If a complaint should allege only that defendant was indebted to plaintiff in a named sum, which defendant refused to pay, it would be insufficient. It must allege the facts which constitute the indebtedness.[50]

§ 5247. **Indorsement of sealed instrument.**—*Assumpsit* may be brought on the unsealed indorsement of a sealed writing.[51]

§ 5248. **Interest of parties.**—Where the covenant purported to be made between two persons, by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone, because the covenant inured to the benefit of those who were parties to it.[52] The assignee or pledgee of a negotiable bond is the real party in interest, and may sue in his own name, irrespective of the nature of his title or the consideration paid by him.[53]

§ 5249. **Issue of warrant.**—Averring the issue of a warrant imports a seal, if the case is one in which a seal is necessary.[54]

47 Marshall v. Rockwood, 12 How. Pr. 452.

48 Butchers & Drovers' Bank v. Jacobson, 15 Abb. Pr. 218, 24 How. Pr. 204.

49 Thalheimer v. Crow, 13 Colo. 397, 22 Pac. 779. See Hinchman v. Point Defiance Ry. Co., 14 Wash. 349, 44 Pac. 867.

50 Piercy v. Sabin, 10 Cal. 28, 70 Am. Dec. 692.

51 Campbell v. Jordan, Hempst. 534, Fed. Cas. No. 2362.

52 Philadelphia etc. R. R. Co. v. Howard, 13 How. 308, 14 L. Ed. 157.

53 Board of Commissioners v. Schradsky, 31 Colo. 178, 71 Pac. 1104.

54 Beekman v. Traver, 20 Wend. 67.

§ 5250. Lost instrument.—A party need not plead loss of an instrument, unless it be a negotiable instrument properly indorsed.[55] A motion to make a pleading more definite and certain, by setting forth the contents of a written instrument relied on by the pleader, should not prevail where it appears that the instrument is lost, and the pleading apprises the adverse party of the nature and effect of the instrument.[56]

If a claim is made on an estate, on a note or contract which is lost or destroyed, the claimant must describe such writing, and also give the sworn statement of the manner in which it was lost or destroyed.[57]

§ 5251. Statute of limitations—New promise.—It is well settled, with reference to actions for moneys due on contracts, that the statute does not discharge the debt, or in any way extinguish the right or destroy the obligation, but only takes away a remedy. The debt remains unsatisfied and unextinguished. It is a sufficient consideration to support a new promise.[58] In some of the states where there is a new promise to pay a continuing debt, although the creditor may sue on the old debt and give the new promise in evidence, he may, on the other hand, sue on the new promise.[59] Where a debtor promises to pay when able, and the creditor does not wait, but proceeds immediately on the original obligation before defendant is able to pay, he cannot afterwards resort to an action of *assumpsit* on the new promise. In Iowa, the new promise must be alleged.[60] And in Missouri, under the statute of 1845, and in the revision of 1855, the promise or acknowledgment must be in writing or it is of no effect.[61] In Ohio, the rule seems to be that where a new promise or acknowledgment has been made, the plaintiff may state the de-

55 McClusky v. Gerhauser, 2 Nev. 47, 90 Am. Dec. 512. See Adams v. Baker, 16 R. I. 1, 27 Am. St. Rep. 721, 11 Atl. 168.

56 Kellogg v. Baker, 15 Abb. Pr. 286.

57 Cal. Code Civ. Proc., § 1497; Ariz. Civ. Code, par. 1746; Idaho Rev. Codes, § 5467; Mont. Rev. Codes, § 7529; Utah Rev. Stats., § 3854; Wyo. Rev. Stats., § 4752.

58 Townsend v. Jemison, 9 How. 413, 13 L. Ed. 194; Bulger v. Roche, 11 Pick. 37, 22 Am. Dec. 359; Lincoln v. Battelle, 6 Wend. 475; Angell on Limitations, p. 268, § 213; Chabot v. Tucker, 39 Cal. 434; Grant v. Burr, 54 Cal. 298; Shaw v. Silloway, 145 Mass. 503, 14 N. E. 783; Jordan v. Jordan, 85 Tenn. 561, 3 S. W. 896; Ferguson v. Harris, 39 S. C. 323, 39 Am. St. Rep. 731, 17 S. E. 782; Marshall v. Holmes, 68 Wis. 555, 32 N. W. 685.

59 Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494.

60 Id.

61 Blackburn v. Jackson, 26 Mo. 308.

mand barred as a consideration of the new promise, and allege the new promise in writing as the cause of action.[62] By the practice in New York the complaint may be made on the original demand; and if the statute of limitations be pleaded, the new promise may be given in evidence without an allegation.[63] And the same rule applies after a discharge in bankruptcy or insolvency.[64]

§ 5252. **New promise, when to be alleged.**—In California, in actions upon written instruments for the payment of money, such as promissory notes, the date being shown, shows the period when the right of action accrues. In such cases, any new promise which has been made, renewing or continuing the contract, should be alleged.[65] In Ohio, this provision under the statute extends to accounts and other instruments "for the unconditional payment of money only." But a judgment cannot be so pleaded.[66]

§ 5253. **Promissory notes.**—When a copy of the promissory note is annexed, and the answer is not verified, the due execution and genuineness of the note are admitted.[67] So of a bond. And if the complaint contains a copy of the written instrument sued on, and is not verified, and the answer denies its execution, but is not sworn to, the note is admissible in evidence without proof of the genuineness of the signature.[68]

§ 5254. **Written instruments, how proved.**—An instrument in writing, executed and attested by a subscribing witness in a foreign country, or beyond the jurisdiction of the court, can be proved by evidence of the handwriting of the party who executed it.[69] The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit

62 Sturges v. Burton, 8 Ohio St. 215, 72 Am. Dec. 582.

63 Esselstyn v. Weeks, 12 N. Y. 635; Clark v. Atkinson, 2 E. D. Smith, 112. See, also, Polk v. Butterfield, 9 Colo. 325, 12 Pac. 216; Fox v. Tay, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

64 Shippey v. Henderson, 14 Johns. 178, 7 Am. Dec. 458; Depuy v. Swart, 3 Wend. 135, 20 Am. Dec. 673.

65 Smith v. Richmond, 19 Cal. 481.

66 Memphis Med. College v. Newton, 2 Handy, 163.

67 Burnett v. Stearns, 33 Cal. 468; Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Kinney v. Osborne, 14 Cal. 112.

68 Corcoran v. Doll, 32 Cal. 83; Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Sacramento County v. Bird, 31 Cal. 67; Burnett v. Stearns, 33 Cal. 468.

69 McMinn v. Whelan, 27 Cal. 300.

the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument,[70] as no proof is required of facts admitted or not denied.[71] Where a written instrument is made part of the complaint with both the first and second counts, and in the second count is referred to as already on file with the former, the latter will be sufficient.[72] The legal effect of written documents offered in evidence is a question for the court, and not for the jury.[73]

§ 5255. Sealed contract—Allegations in actions on.—Where the sealing of an instrument is sufficient according to the laws of a state in which it was made, the remedy upon it in a state in which such mode of sealing is not sufficient must be according to the law of the latter state instead of the former. Thus, in New York, an action on a deed sealed with a scroll must be an action appropriate to unsealed instruments.[74] An impression of the seal of a corporation stamped upon the paper on which a mortgage of the corporation is written is a good seal, although no adhesive substance is used.[75] In declaring on a specialty, it must be averred that it was sealed by the defendant. Setting it forth, with its conclusion that it was signed and sealed with the name of the defendant, and with an "L. S.," is not sufficient,[76] although "indenture," "deed," "writing obligatory," were held to import a seal.[77] The delivery of a specialty, though essential to its validity, need not be stated in a pleading. It is enough to allege that it was made by the defendant, as that implies delivery.[78] Where the law requires an instrument to be under seal to authorize a particular remedy thereon, it is necessary to state that it is under seal. But where it is wholly immaterial

70 Lee v. Evans, 8 Cal. 424.

71 Patterson v. Ely, 19 Cal. 28; Landers v. Bolton, 26 Cal. 416.

72 Peck v. Hensley, 21 Ind. 344.

73 Carpenter v. Thirston, 24 Cal. 268.

74 Warren v. Lynch, 5 Johns. 239; Van Santwood v. Sandford, 12 Johns. 198; Coit v. Milliken, 1 Denio, 376; Andrews v. Herriot, 4 Cow. 508, 4 Kent. 451; United States Bank v. Donnally, 8 Pet. 362, 8 L. Ed. 974; Story's Conflict of Laws, 47; Trasher v. Everhart, 3 Gill & J. 234; Douglas v. Oldham, 6 N. H. 150.

75 Hendee v. Pinkerton, 14 Allen, 381.

76 Cabell v. Vaughan, 1 Saund. 291; 1 Chit. Pl. 109; Van Santwood v. Sandford, 12 Johns. 197; Macomb v. Thompson, 14 Johns. 207. To much the same effect, see Stanton v. Camp, 4 Barb. 274.

77 Cabell v. Vaughan, 1 Saund. 291; Phillips v. Clift, 4 Hurlst. & N. 168.

78 1 Chit. Pl. 348; Cabell v. Vaughan, 1 Saund. 291; Marshall v. Rockwood, 12 How. Pr. 452; La Fayette Ins. Co. v. Rogers, 30 Barb. 491.

whether the instrument was or was not under seal, an averment that it was in writing is supported by the production of a written instrument, either with or without a seal attached.[79] In California, all distinctions between sealed and unsealed instruments are abolished.[80]

§ 5256. **Subscription by agent.**—The word "agent," appended to the signature of the agent, is not mere *descriptio personæ*. It is the designation of the capacity in which he acted.[81] Where a contract purported upon its face to have been made by an agent, and it is set forth in full in the complaint, it must be alleged that the agency was duly constituted.[82] In an action upon an instrument executed by an attorney in fact, which is made a part of the complaint, it is sufficient to allege the execution by the principal without setting out that the agent had been constituted attorney in fact for the purpose of its execution.[83]

§ 5257. **Writing implied.**—An award set forth, "as in the form following," and with a date, may be presumed to have been in writing. When the terms and conditions of an agreement are set out in a complaint, and the violation of that agreement is charged against the defendant, if it is such an instrument as the law requires to be in writing, and the complaint is silent as to whether it was oral or in writing, courts will presume it was a lawful written instrument until the contrary appears.[84]

§ 5258. **Breach, how alleged.**—It is not alone sufficient to show a technical breach of the literal terms of a covenant in a bond,[85] and no damages being shown, no recovery can be had.[86] But upon a reasonable interpretation of the intent and meaning of the covenant, to be ascertained from all its terms, it must likewise appear that some substantial right guaranteed thereby has

79 Jenkins v. Pell, 20 Wend. 450.

80 Civ. Code, § 1629.

81 Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280. See Tolmie v. Dean, Wash. T. 46. That "executed" implies "subscribed," see Cheney v. Cook, 7 Wis. 413.

82 Regents v. Detroit Society, 12 Mich. 138.

83 Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014.

84 Van Doren v. Tjader, 1 Nev. 380, 90 Am. Dec. 498.

85 As to what averments on a bond are sufficient to charge a guarantor, see Tappan v. Cleveland R. R. Co., 4 West. Law Month. 67.

86 McDaniels v. Cowey, 30 Wash. 412, 71 Pac. 12.

been infringed, or some of its purposes defeated.[87] It is suggested that specific breaches should be assigned, even on a mere money bond.[88] In California, where the contract or bond is for payment in gold coin, it must be averred, and judgment demanded accordingly.

§ 5259. **Mutilated bond.**—If the obligee tear off the seal or cancel a bond, in consequence of fraud and imposition practiced by the obligor, he may declare on such mutilated bond as the deed of the party, making a proper averment of the special facts.[89]

§ 5260. **What written obligation imports.**—The term "written obligation" imports a sealed instrument.[90] Under the statutes of California, bonds are on the same footing as undertakings.[91]

§ 5261. **Averment of death of joint obligee.**—One of two joint obligees cannot sue, unless he avers that the other is dead. Wherever, by reason of a several interest, one may sue, he must set forth the bond truly, and then by proper averments show a cause of action in himself alone.[92] All the obligees in a joint bond must join in an action thereon, or some sufficient excuse for not joining must be stated.[93] The liability of a surety for a bankrupt is not altered by the discharge of the bankrupt.[94]

§ 5262. **Joint and several bonds.**—No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. It is otherwise as to a joint and several bond, where each signer is considered bound without the signature of the others named as obligors.[95] Where a complaint is against two of three obligors, it must aver that

87 Levitsky v. Johnson, 35 Cal. 41.

88 Western Bank v. Sherwood, 29 Barb. 383. Compare Supervisors etc. v. Semler, 41 Wis. 374; Reynolds v. Hurst, 18 W. Va. 648; Gibson v. Robinson, 90 Ga. 756, 35 Am. St. Rep. 250, 16 S. E. 969.

89 3 T. R. 153; United States v. Spalding, 2 Mason C. C. 478, Fed. Cas. No. 16365.

90 Clark v. Phillips, Hempst. 294, Fed. Cas. No. 2831a; Paddock v. Hume, 6 Or. 82.

91 Canfield v. Bates, 13 Cal. 606. As to pleading an instrument according to its legal effect, see Brown v. Champlin, 66 N. Y. 214.

92 Ehle v. Purdy, 6 Wend. 629.

93 Strange v. Floyd, 9 Gratt. 474.

94 Boyd v. Agricultural Ins. Co., 20 Colo. App. 28, 76 Pac. 986.

95 Sacramento v. Dunlap, 14 Cal. 421.

all three have failed to pay the debt.[96] Under the statute of Indiana, the representatives of a deceased joint obligor may be sued on a joint and several obligation.[97] A declaration in an action of debt against the obligor, setting forth a joint and several bond, cannot be annulled by adding a new count, setting forth a bond by the defendant and another person.[98]

FORMS—NEGOTIABLE PAPER.

§ 5263. Complaint against maker of written instrument.

Form No. 1495.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, in consideration of . . ., made, executed, and delivered to the plaintiff, a certain instrument in writing, of which a copy is hereto annexed, marked "Exhibit A," and made a part hereof [or, an instrument in writing in the words and figures following, to-wit].

II. That by the terms of said written instrument, the defendant became indebted to the plaintiff in the sum of . . . dollars.

III. That the plaintiff has duly performed all the conditions thereof on his part.

IV. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5264. Complaint in action on bond for payment of money only.

Form No. 1496.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of . . . dollars.

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

96 Robins v. Pope, Hempst. 219.

97 Curtis v. Bowrie, 2 McLean, 374.

98 Postmaster-General v. Ridgeway, Gilp. 135.

§ 5265. Complaint in action on bond—Pleading it according to its legal effect.

Form No. 1497.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [state the actual debt], in gold coin, on the . . . day of . . ., 19.., with interest from, [etc. or, otherwise, according to the condition]:

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5266. Complaint by surviving obligee, on joint bond.

Form No. 1498.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and sealed his certain bond, of which the following is a copy: [copy the bond]; and thereby covenanted with the plaintiff and one R. N. to pay them the sum of . . . dollars [on, etc., stating when it became payable].

II. That on the . . . day of . . ., 19.., at . . ., said R. N. died.

III. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

CHAPTER CXXIX.

BILLS OF EXCHANGE.

§ 5267. Definition.—A bill of exchange drawn in one state upon a person in another state is a foreign bill.[1] And such bills are, by the custom of merchants, protested if dishonored.[2] A bill of exchange drawn upon a bank or banker, and payable on demand, without interest, is a check;[3] and an instrument having these characteristics does not cease to be a check because drawn by a bank.[4]

§ 5268. Alteration.—If a person who has no authority to do so, and who is not the agent of the payee for that purpose, writes across the face of a draft, payable generally in money, the words, "payable in United States gold coin," it is not such an alteration of the draft as vitiates it.[5] An alteration is material and vitiating which, in any event, may alter the promisor's liability, if made without his consent at the time, unless subsequently approved by him.[6] Erasing the words "to order of," and inserting "or bearer" instead, is material, and avoids the note.[7] In such case it matters not whether the alteration was with fraudulent intent or not, except as such intention affects the right to resort to the original indebtedness;[8] and the original maker is by such fraudulent alteration relieved from liability, even to an innocent holder.[9]

§ 5269. Interest.—The obligation of the first indorser of a check is the same as the drawer;[10] and he warrants to every sub-

1 Dickins v. Beal, 10 Pet. 572, 9 L. Ed. 538; Buckner v. Finley, 2 Pet. 586, 7 L. Ed. 528; Bank of United States v. Daniel, 12 Pet. 32, 9 L. Ed. 989.

2 Townsley v. Sumrall, 2 Pet. 170, 7 L. Ed. 386.

3 Cal. Civ. Code, § 3254.

4 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

5 Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418. See, also, Flint v. Craig, 59 Barb. 319.

6 Id.; Hollis v. Harris, 96 Ala. 288, 11 South. 377; Cline v. Goodale, 23 Or. 406, 31 Pac. 956; Reeves v. Pierson, 23 Hun. 185.

7 Booth v. Powers, 56 N. Y. 22.

8 Id. See, also, Meyer v. Huneke, 55 N. Y. 412; reversing 65 Barb. 304; Seibel v. Vaughan, 69 Ill. 257; Beal v. Roberts, 113 Mass. 525; Evans v. Foreman, 60 Mo. 449; Goodspeed v. Cutler, 75 Ill. 534.

9 Bank v. Wargerin, 65 Kan. 423, 70 Pac. 330, 59 L. R. A. 717.

10 Cal. Civ. Code, § 3177.

sequent holder to pay the check, if dishonored, with interest.[11] Interest on a dishonored check should be computed from the date of the check.[12] Interest after judgment cannot exceed the statutory interest—in California, seven per cent.[13]

§ 5270. **Form of bill.**—The following written order possesses all the requisites of an inland bill of exchange: "Mr. . . . , Please pay the bearer of these lines . . . dollars, and charge the same to my account."[14] The following document is a negotiable bill of exchange: "July 15, 1865. On first of August next, please pay to A., or order, 600 pounds, on account of moneys advanced to me by the S. Company. To Mr. W., Official Liquidator of the Company."[15] The words "or order," "or bearer," in notes, bills, or checks, are words of negotiability, and the use of either of them makes the paper negotiable, although impersonal words are used in naming a payee.[16] By statute, in Colorado, all promissory notes and instruments in writing for the payment of money are negotiable, whether so expressed or not.[17] The insertion of the word "please" does not alter the character of the instrument.[18] "Value received" is not necessary to show a consideration.[19]

§ 5271. **Satisfaction of demand.**—A bill of exchange operates only as a conditional payment; but if the creditor fails to present it for payment to the drawee, it becomes, *pro tanto*, a satisfaction of the demand.[20] The drawer of a dishonored check, who has been notified of its dishonor, is not relieved of any part of his liability by the insolvency of the drawee occurring after notice of dishonor.[21]

§ 5272. **Who may recover.**—A bill indorsed to the treasurer of the United States may be sued and declared on in the name of

11 Cal. Civ. Code, § 3116.

12 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

13 Thrasher v. Moran, 146 Cal. 683, 81 Pac. 32.

14 Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

15 Griffin v. Weatherby, L. R., 3 Q. B. 753.

16 Mechanics' Bank v. Straiton, 5 Abb. Pr. (N. S.) 11. See Shaw v. Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348; Peltier v. Babillion, 45 Mich. 384, 8 N. W. 99; Howard v. Palmer, 64 Me. 86.

17 Cowan v. Hallack, 9 Colo. 572, 13 Pac. 705.

18 Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

19 Benjamin v. Tillman, 2 McLean, 213, Fed. Cas. No. 1304.

20 Brown v. Cronise, 21 Cal. 386.

21 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

the United States, and the averment that it was indorsed to them immediately is good.[22] Where the complaint stated the bill drawn on "B. & Co.," and to have been accepted by B. by the name and style of "B. & Co.," by writing the name of "B. & Co.," the plaintiff may recover.[23]

§ 5273. **Equities between parties.**—Where a creditor takes a bill before maturity as collateral security for an antecedent debt, if there be any change in the legal rights of the parties, the creditor becomes the holder for value, and the bill is not subject to the equities between the parties.[24]

§ 5274. **Corporation, a party.**—Where defendant is a corporation, and the bill is accepted by the president thereof as such, an averment that he was president, and as such authorized to accept, is not necessary.[25] Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and non-payment is necessary to hold the corporation.[26] The burden of proof is on the corporation to show that the drawee was provided with funds and ready to pay at maturity, in order to exempt them from damages and costs.[27]

§ 5275. **Payable to third persons.**—When the drawer sues on a bill payable to a third person, it is necessary to state that it was dishonored, taken up, and paid by the plaintiff.[28]

§ 5276. **Averment against drawee.**—A complaint against the drawees of a bill, alleging that they had refused to accept, and that they had a settlement of accounts with the drawers, and that on such settlement the drawers had in their hands sufficient money to pay the bill, which they had agreed to pay, is suffi-

22 United States v. Barker, 1 Paine, 156, Fed. Cas. No. 14517.

23 City Bank of Columbus v. Beach, 1 Blatchf. 438, Fed. Cas. No. 2737. Compare Lapeyre v. Gales, 2 Cranch C. C. 291, Fed. Cas. No. 8081.

24 Naglee v. Lyman, 14 Cal. 450; Robinson v. Smith, 14 Cal. 95.

25 Partridge v. Badger, 25 Barb. 146; Andrews v. Astor Bank, 2 Duer, 629; Price v. McClave, 6 Duer, 544. As to acceptance by corporation, see Credit Co. v. Howe Machine Co., 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 68.

26 Dennis v. Table Mountain Water Co., 10 Cal. 369.

27 Wolcott v. Santvoord, 17 Johns 248, 8 Am. Dec. 396; Fairchild v Ogdensburgh etc. R. R. Co., 15 N. Y 337, 69 Am. Dec. 606.

28 Chit. Pl. 148.

cient.[29] The drawee is not ordinarily liable to the holder until he, in writing, accepts, or certifies, or promises to pay it.[30] And when he has once accepted, he becomes liable for the full amount thereof, even though the drawer ceases to have any funds in the drawee's hands.[31]

§ 5277. Part payment.—When the drawee pays a part of the draft, and receipts on the back of the order the amount paid, and it is signed by the payee, it is not an acceptance. It is evidence that the drawee owed that amount and paid it.[32] The acceptance of a note of a third party by the creditor is accompanied with the condition that the note shall be paid at maturity.[33]

§ 5278. Party in interest.—In an action on a draft, brought by the Camden Bank against the drawer, after showing that the draft was made payable "to the order of W. B. Storm, cashier," an averment that the defendant "delivered the said draft to W. B. Storm, cashier of said Camden Bank, for the said bank," and that "the said draft is now held and owned by the said plaintiffs, and still remains due to them from the defendants," sufficiently shows that the bank, and not the cashier, is the real party in interest.[34] An agent to whom a bill of exchange has been indorsed in blank for collection may fill up the assignment to himself, and bring suit in his own name.[35] Plaintiff may in one action sue the different parties to a bill of exchange;[36] but when the promise is separate and distinct, the promisors cannot be joined.[37] An indorser, waiving notice and protest, is a party to the promissory note.[38]

§ 5279. Acceptance by wrong name.—In an action against B., as sole acceptor of a bill of exchange, the plaintiffs were entitled to recover under a count in the declaration, stating the bill to have been drawn on "B. & Co.," and to have been accepted by

29 Mittenbeyer v. Atwood, 18 How. Pr. 330.

30 Van Buskirk v. State Bank, 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; Seattle Shoe Co. v. Packard, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

31 Cramer v. Munkres, 14 Wyo. 234, 83 Pac. 374.

32 Bassett v. Haines, 9 Cal. 260.

33 Griffith v. Grogan, 12 Cal. 317.

34 Camden Bank v. Rodgers, 4 How. Pr. 63.

35 Orr v. Lacy, 4 McLean, 243, Fed. Cas. No. 10589.

36 Cal. Code Civ. Proc., § 383.

37 Thomas v. Anderson, 58 Cal. 99.

38 Loustalot v. Calkins, 120 Cal. 688, 53 Pac. 258.

B., by the name and style of "B. & Co.," by writing the name of "B. & Co." thereon.[39] Where the declaration in *assumpsit* upon a bill of exchange alleged an acceptance by B. & Co., and the acceptance was "B. & Co., per F.," it was held not a variance.[40]

§ 5280. **Letter of credit.**—A letter of credit, promising unconditionally to accept bills drawn upon its faith, is an actual acceptance in favor of a person who, upon its faith, receives a bill so drawn for a valuable consideration.[41]

§ 5281. **Promise to indorse.**—A promise to indorse under a letter of credit representing a person to be good, and saying that the writer will indorse for him on a purchase to a certain amount, the writer is not liable directly for the amount of a sale without any request to indorse; and unless an indorsement is required, no action can be maintained.[42]

§ 5282. **Promise to accept.**—In an action brought upon a promise made by the defendant to accept a draft which another might draw on him, it is not necessary to aver that the promise was in writing.[43] An action upon a promise to accept can be maintained only by the party to whom the promise is made.[44] Such an acceptor becomes liable, though there is a condition thereto which is not performed by the drawer.[45]

§ 5283. **Accommodation acceptor.**—The accommodation acceptor who pays without funds can recover from the drawer, not upon the bill, but for money paid.[46]

§ 5284. **Consideration on acceptance.**—A written agreement to accept amounts to an acceptance, and no consideration need be shown.[47]

39 City Bank of Columbus v. Beach, 1 Blatchf. 438, Fed. Cas. No. 2737. Compare Lapeyre v. Gales, 2 Cranch C. C. 291, Fed. Cas. No. 8081.

40 Meyer & Sons Co. v. Black, 4 N. Mex. 190 (352), 16 Pac. 620.

41 Naglee v. Lyman, 14 Cal. 450.

42 Stafford v. Low, 16 Johns. 67; Stockbridge v. Schoonmaker, 45 Barb. 100.

43 Wakefield v. Greenhood, 29 Cal. 597; Bank of Lowville v. Edwards, 11 How. Pr. 216; Whilden v. Merchants' etc. Bank, 64 Ala. 1, 38 Am. Rep. 1.

44 Henrietta Nat. Bank v. State Nat. Bank, 80 Tex. 648, 26 Am. St. Rep. 773, 16 S. W. 321.

45 McPhee v. Fowler, 36 Colo. 202, 85 Pac. 421.

46 Griffith v. Reed, 21 Wend. 502, 34 Am. Dec. 267; Suydam v. Westfall, 4 Hill, 211.

47 Ontario Bank v. Worthington, 12 Wend. 593.

§ 5284a. **Non-acceptance, effect of.**—The want of acceptance affects the right of the payee only as to his mode of enforcing payment.[48]

§ 5285. **Acceptance.**—A promise that a drawer will pay a draft which may be drawn on him is an acceptance, and he may be sued as acceptor.[49] An unconditional promise, in writing, to accept a bill of exchange is a sufficient acceptance thereof, in favor of every person who upon the faith thereof has taken the bill for value.[50] If the bill is payable at a certain time after sight, the date of acceptance should be stated; otherwise, it is not necessary. A bill drawn payable so many days after sight, means after presentment for acceptance.[51] A bill of exchange does not operate as an assignment of the funds in the hands of the drawee, and he is not liable unless he accepts the bill;[52] and such acceptance must be in writing;[53] and where a railroad contractor gave plaintiff an order on defendant company to retain out of moneys due or to become due to the contractor, etc., the complaint must not only allege that defendant company accepted the order and agreed to retain the money, but must also allege its written acceptance thereof.[54]

§ 5286. **Acceptor.**—A person not personally a party to a bill of exchange who for a consideration accepts the same, is an acceptor equally as if he were the drawee. The loss of the acceptance by the drawee is a sufficient consideration for the acceptance by the third person.[55]

§ 5287. **Pleading acceptance.**—It is not necessary to copy the acceptance, nor even to aver that it was in writing. It is enough

48 Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

49 Wakefield v. Greenhood, 29 Cal. 597; Whilden v. Merchants' etc. Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

50 Cal. Civ. Code, § 3197. As to how acceptance is made, who entitled to, what sufficient acceptance by separate instrument, what acceptance admits, and cancellation of acceptance, see Cal. Civ. Code, § 3193 et seq. See, also, Cortelyou v. Maben, 22 Neb. 697, 3 Am. St. Rep. 284, 36 N. W. 159; Norton v. Knapp, 64 Iowa, 112, 19 N. W. 867. That acceptance by telegram is sufficient, see Brinkman v. Hunter, 72 Mo. 172, 39 Am. Rep. 492; Nevada Bank v. Luce, 139 Mass. 488, 1 N. E. 926.

51 Mitchell v. Degrand, 1 Mason, 176, Fed. Cas. No. 9661.

52 Wash. Stats. 1899, p. 363, ch. 149, § 127.

53 Wash. Stats. 1899, § 132.

54 Wadhams v. Portland etc. Ry. Co., 37 Wash. 86, 79 Pac. 597.

55 Kelly v. Lynch, 22 Cal. 661.

to aver its acceptance.[56] Where a draft is accepted conditionally to be paid upon the happening of a contingency, the question whether it has happened is a question of fact.[57] An acceptance generally, without words of restriction, to a fund or contingency will in some cases bind the acceptor absolutely.[58]

§ 5288. **Presentment.**—In an action against the maker of a note or the acceptor of a bill of exchange in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay.[59] As against the drawer, presentment at any time before suit brought is sufficient, unless it appear that he has been prejudiced by unreasonable delay.[60] By the law merchant, it is sufficient if a check drawn upon one day be presented for payment in the usual banking-hours on the next succeeding day.[61] The payee, to hold the drawer, is bound to use reasonable diligence.[62]

§ 5289. **Presentment at maturity.**—In a complaint against the acceptor for honor, the plaintiff must show that the bill was presented at maturity to the drawee, and that the drawer had notice of non-payment.[63] It is not necessary to aver that the demand

56 Horner v. Wood, 15 Barb. 371; Bank of Lowville v. Edwards, 11 How. Pr. 216; Fowler v. New York Indem. Ins. Co., 23 Barb. 150; Gibbs v. Nash, 4 Barb. 449; Washburn v. Franklin, 28 Barb. 27, 7 Abb. Pr. 8. But see dicta, contra, Thurman v. Stevens, 2 Duer, 609; Le Roy v. Shaw, 2 Duer, 628; Merwin v. Hamilton, 6 Duer, 248. That acceptance of a bill of exchange must be in writing, see Cal. Civ. Code, §§ 3193, 3194; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522. See, also, Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545.

57 Nagle v. Homer, 8 Cal. 353.

58 Atkinson v. Manks, 1 Cow. 691; Maber v. Massias, 2 W. Bl. 1072; Lent v. Hodgman, 15 Barb. 274. As to conditional acceptance, see Brown v. Jones, 113 Ind. 46, 3 Am. St. Rep. 623, 13 N. E. 857; Taylor v. Newman, 77 Mo. 257; Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702. That acceptance can be enforced only on averment and proof that the condition has been performed, see Shackelford v. Hooker, 54 Miss. 716.

59 Montgomery v. Tutt, 11 Cal. 307; Wolcott v. Van Santvoord, 17 Johns. 248, 8 Am. Dec. 396; Caldwell v. Cassidy, 8 Cow. 271; Haxton v. Bishop, 3 Wend. 13. For case in which the evidence shows sufficient diligence in presenting draft for payment, see Brown v. Olmsted, 50 Cal. 162. See, also, Collins v. Naylor, 10 Phila. 437; Cox v. National Bank, 100 U. S. 704, 25 L. Ed. 739; Brown v. Jones, 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452.

60 Little v. Phœnix Bank, 2 Hill, 425; Harbeck v. Craft, 4 Duer, 122.

61 Ritchie v. Bradshaw, 5 Cal. 228; Holmes v. Roe, 62 Mich. 199, 4 Am. St. Rep. 844, 28 N. W. 864; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43; Simpson v. Pacific etc. Ins. Co., 44 Cal 139.

62 Ritchie v. Bradshaw, 5 Cal. 228.

63 Williams v. Germaine, 7 Barn.

was made of the maker at the place specified in the note, in a complaint under the code. Such a demand was, by authority, settled to be a condition precedent under the late practice, and the averment essential to a recovery. But section 533 of the New York Code of Civil Procedure has dispensed with the necessity of pleading the facts which constitute the performance of a condition precedent.[64]

§ 5290. **Omission of demand and notice.**—The omission of demand and notice, when it cannot possibly operate to the injury of the indorser of a note or drawer of a bill, does not discharge him; but the mere insolvency of the maker does not excuse neglect in presenting it.[65]

§ 5291. **Waiver of demand.**—A promise by an indorser after notice of non-payment of a note, and with full knowledge of all the circumstances attending presentment and demand, to pay the note or give a new one, will constitute a waiver of any irregularities in presenting or demanding the same, and even of presentment and demand itself.[66]

§ 5292. **Demand.**—If a draft does not specify the kind of money in which it is made payable, a demand of payment in gold coin, whether by a notary or the holder, is not sufficient to charge the drawer. The demand must be in accordance with the tenor of the draft.[67] In the absence of evidence to the contrary, the presumption is that the notary demands payment in the kind of money in which it appears on its face to be made payable.[68]

§ 5293. **Dishonor.**—In California, a bill of exchange, payable a certain time after sight, which is not accepted within ten days

& Cress. 468; Schofield v. Bayard, 3 Wend. 488.

64 Gay v. Paine, 5 How. Pr. 107; Woodbury v. Sackrider, 2 Abb. Pr. 402. To the contrary, see Graham v. Machado, 6 Duer, 515. The later case of Ferner v. Williams, 37 Barb. 9, follows and approves Gay v. Paine. See, also, Case v. Phœnix Bridge Co., 23 Jones & Sp. 25; Bogardus v. New York Life Ins. Co., 101 N. Y. 328, 4 N. E. 522.

65 Smith v. Miller, 52 N. Y. 545.

66 Meyer v. Hibsher, 47 N. Y. 265; Richard v. Boller, 51 How. Pr. 371. As to waiver of demand and notice, see Annville Nat. Bank v. Kettering, 106 Pa. St. 531, 51 Am. Rep. 536; Stanley v. McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866; Wright v. Liesenfeld, 93 Cal. 90, 28 Pac. 849.

67 Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418.

68 Id.

after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.[69] A negotiable instrument is dishonored when it is either not paid or not accepted according to its tenor, on presentment for that purpose, or without presentment, where that is excused.[70] Although a check may be actually dishonored by a refusal to pay upon proper demand before presumptive dishonor, yet to charge the check with the infirmity of dishonor in the hands of a third party, to whom it has been transferred for a valuable consideration, before the expiration of the reasonable time which must elapse before presumptive dishonor, notice of the previous actual dishonor must be brought home to him, or he holds it free from the taint of dishonor.[71]

§ 5294. **Difference of exchange.**—On a bill of exchange, payable at a particular place, it seems that the difference of exchange may be recovered, if the declaration contains the proper averment; but this is not the rule where the action is on a note, and there is no count or allegation in the declaration to cover the rate of exchange.[72]

§ 5295. **Non-payment.**—In a declaration on a foreign bill of exchange for non-payment, no averment of a presentment for acceptance, or of a refusal and protest for non-acceptance, of the bill is necessary.[73] No liability exists on a draft which is revoked before acceptance, or before any credit is given thereon.[74]

§ 5296. **Payment stopped.**—Where the complaint alleged demand, refusal, and notice to defendants of non-payment, and also that before the demand the defendant had stopped its payment by notice to the officers of the bank not to pay it, and the answer denied that the defendants had notice of the non-payment, and alleged that they stopped its payment because it was obtained from them by fraud, of which, as well as of its payment having been stopped, the plaintiffs had notice before they took the check, it was held that the allegation in the complaint of

69 Cal. Civ. Code, § 3133.

70 Cal. Civ. Code, § 3141.

71 Himmelman v. Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

72 Weed v. Miller, 1 McLean, 423, Fed. Cas. No. 17346.

73 Brown v. Barry, 3 Dall. 365, 1 L. Ed. 638.

74 Harlan v. Gladding, 7 Cal. App. 49, 93 Pac. 400; Brinton v. Lewiston Nat. Bank, 11 Idaho, 92, 81 Pac. 112.

notice to the defendants of non-payment might be disregarded as surplusage; and the plaintiffs should be allowed to prove, under the pleadings, the fact that payment had been stopped. That excused the want of notice.[75]

§ 5297. **To bearer.**—A check payable to the order of a fictitious person,—e. g. of a firm long since dissolved[76]—or "to the order of bills payable,"[77] is to be deemed payable to bearer, if negotiated by the maker.

§ 5298. **When due.**—When no time of payment is mentioned, the check or note is payable immediately, and complaint should not state a time of payment.[78]

§ 5299. **Notice of dishonor.**—In general, presentment and notice of non-payment are necessary to charge the drawer of a check.[79] Notice may be given to the indorser or others entitled to notice immediately after presentment to the maker or acceptor and the refusal of the same to pay.[80] Any notice is sufficient, if it informs the party of the fact.[81] Notice of dishonor may be given by a holder, or by any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.[82]

§ 5300. **Protest, when necessary.**—Protest of a domestic note is unnecessary.[83] In the absence of statute, the protest of inland bills and promissory notes is not regarded as an official act.[84] A bill of exchange drawn in one state upon a citizen in another

75 Purchase v. Mattison, 6 Duer, 537.

76 Stevens v. Strang, 2 Sandf. 138.

77 Willets v. Phœnix Bank, 2 Duer, 121.

78 Herrick v. Bennett, 8 Johns. 374; Pearsoll v. Frazer, 14 Barb. 564; Thompson v. Ketcham, 8 Johns. 189.

79 Harker v. Anderson, 21 Wend. 372; Shultz v. Dupuy, 8 Abb. Pr. 252. But compare Cruger v. Armstrong, 3 Johns. Cas. 5, 2 Am. Dec. 126; Conroy v. Warren, 3 Johns. Cas. 259, 2 Am. Dec. 156; Culver v. Marks, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. 1086, 7 L. R. A. 489; Parker v. Reddick, 65 Miss. 242, 7 Am. St. Rep. 647, 3 South. 575.

80 McFarland v. Pico, 8 Cal. 626.

81 Id. See Minturn v. Fisher, 7 Cal. 573; Cal Code Civ. Proc., § 1865.

82 Cal. Civ. Code, § 3142; Himmelmann v. Hotaling, 40 Cal. 111, 6 Am. Rep. 600; Los Angeles Bank v. Wallace, 101 Cal. 478, 36 Pac. 197.

83 Brennan v. Lowry, 4 Daly, 253.

84 Corbin v. Planters' Nat. Bank, 87 Va. 661, 24 Am. St. Rep. 673, 13 S. E. 98.

state is a foreign bill, and protest is necessary to charge the indorser.[85]

§ 5301. **Costs of protest.**—A claim for statutory damages and costs of protest need not be set forth in the petition as a separate and distinct cause of action, disconnected from the claim on the bill.[86]

§ 5302. **Damages on foreign bills, protested.**—In California, damages are allowed, as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated in that state, and protested for non-acceptance or non-payment, as follows: 1. If drawn upon a person in the state, two dollars upon each one hundred dollars of the principal sum specified in the bill; 2. If drawn upon a person out of the state, five dollars upon each one hundred dollars; 3. If drawn upon a person in any place in a foreign country, fifteen dollars upon each one hundred dollars.[87]

§ 5303. **Payment after dishonor.**—The holder must sue on that one of the set which was dishonored.[88] Where a second of exchange was dishonored, and the first was subsequently paid previous to suit brought, the drawer was released from damages for the dishonor.[89]

§ 5304. **Drafts on an appropriation, when due.**—A draft payable in terms out of an "appropriation," for work done by the acceptor, becomes due on payment for the work by the government.[90]

§ 5305. **Averment of protest.**—"The said bill was duly protested at maturity," is sufficient to admit evidence of demand, neglect to pay, and notice of non-payment.[91] When a complaint

85 Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269.

86 Summit County Bank v. Smith, 1 Handy, 575.

87 Cal. Civ. Code, §§ 3234, 3235. See, also, Pratalongo v. Larco, 47 Cal. 378, as to who is the holder in the sense of the statute.

88 Downes v. Church, 13 Pet. 205, 10 L. Ed. 127; Wells v. Whitehead, 15 Wend. 527.

89 Page, Bacon & Co. v. Warner, 4 Cal. 395.

90 Nagle v. Homer, 8 Cal. 353.

91 Woodbury v. Sackrider, 2 Abb. Pr. 405.

alleges that a bill was protested for non-payment, it will be assumed that all steps necessary to fix the drawer's liability were taken.[92] The holder of a bill, upon protest for non-acceptance, has an immediate cause of action against the drawer, and averments of demand of payment and protest might be rejected if the declaration counted properly for non-acceptance.[93] In a complaint against the drawer of a bank check, or of a bill of exchange properly so called, it is necessary to aver either demand, and notice to the drawer of non-payment, or such facts as excuse demand and notice,—e. g. want of funds at bank.[94] It is held that failure to allege protest, in an action on a bill, is only an objection of form, and cannot be reached by general demurrer.[95]

§ 5306. **Dishonored checks—Consideration.**—Checks are on the same footing as bills of exchange, excepting the difference which may arise from the custom of merchants.[96] The legal presumption is that a check is drawn for money due from the drawer.[97] A party taking a check after presentment and dishonor takes it subject to all the equities to which it was subject in the hands of the original holder.[98] When the holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check. The surrender of the note is *prima facie* evidence of its payment.[99] The presumption is that the check was given on a valid consideration; but this presumption being rebutted, plaintiff must prove that he received it in good faith, and without notice of the illegality of the consideration. A check given for a gaming debt is void in the hands of all persons, except a *bona fide* holder without notice.[100] Where the answer claims a bank check was obtained by fraud, of which plaintiff had notice, the burden is on the defendant to show fraud, and then on plaintiff to show himself a *bona fide* holder.[101]

§ 5307. **Grace.**—In California, days of grace are not allowed.[102]

92 Wards v. Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703.

93 Mason v. Franklin, 3 Johns. 202.

94 Shultz v. Dupuy, 3 Abb. Pr. 252. See Offutt v. Rucker, 2 Ind. App. 350, 27 N. E. 589.

95 Hart v. Otis, 41 Ill. App. 431.

96 Minturn v. Fisher, 4 Cal. 35.

97 Headley v. Reed, 2 Cal. 322.

98 Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746. But see Chambers v. Satterlee, 40 Cal. 511.

99 Smith v. Harper, 5 Cal. 330.

100 Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

101 Harrington v. Butte etc., 27 Mont. 1, 69 Pac. 102.

102 Cal. Civ. Code, § 3181.

§ 5308. **Lost paper.**—Where a check has been lost and paid by the banker upon a forged indorsement, in a suit for the same, where the banker refused to deliver the check to the owner, in the absence of rebutting testimony, the measure of damages is the full amount for which it was drawn.[103]

§ 5309. **Non-negotiable draft.**—A non-negotiable draft, rendered so by the absence of any fixed amount, may be rendered negotiable by an indorsement, "Balance due, . . . dollars," and signed by the indorser, who is estopped thereby from setting up against it any antecedent matter, and is liable for the full amount.[104] No right of action can accrue upon a draft till payment.[105]

§ 5310. **Raised check certified.**—A bank, by certifying a check in the usual form, simply affirms the genuineness of the signature of the drawer, and that it has funds sufficient to meet it, and engages that they will not be withdrawn to the prejudice of the holder of the check, but does not warrant the genuineness of the body of the check.[106] Where a raised check has been certified and afterwards paid, the bank certifying and paying could recover back as for money paid by mistake.[107]

§ 5311. **Certified check.**—The certifying of a check as "good" transfers the sum drawn for to the holder, and imports a promise to pay to him on demand. But the drawee cannot set off a claim on the holder against the amount so transferred, and the maker of the check is not discharged.[108] Where a check dated January 10, 1866, was certified by the assistant cashier of defendant's bank, and was indorsed to W., December 1, 1865, and on March 7, 1866, the check was deposited with the plaintiffs, who credited W. with the amount on their books; and the drawer of the check had no funds with defendant to meet it, either when it was certi-

103 Survey v. Wells, Fargo & Co., 5 Cal. 124.

104 Garwood v. Simpson, 8 Cal. 101.

105 Wakeman v. Vanderbilt, 3 Cal. 380.

106 Marine National Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Clews v. Bank of New York, 89 N. Y. 418, 42 Am. Rep. 303.

107 Marine National Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Security Bank v. National Bank, 67 N. Y. 458, 23 Am. Rep. 129.

108 Brown v. Leckie, 43 Ill. 497; Bickford v. First National Bank of Chicago, 42 Ill. 238, 89 Am. Dec. 436; Rounds v. Smith, 42 Ill. 245.

fied or when it was presented, it was held that W., as he took a post-dated check, had notice that the cashier was exceeding his authority in certifying it, and that plaintiffs took subject to the equities against W.[109]

§ 5312. **Allegation of excuse—Want of funds.**—Want of funds in the drawee's hands excuses the omission to give notice of non-payment.[110] But where it is intended to rely upon want of funds as excusing demand or notice, that fact must be averred.[111] In an action by the holder of a check against the drawer, when payment has been refused on demand, the complaint need not allege that the drawer has no funds in bank, nor is the complaint defective because it fails to allege notice of the dishonor of the check, where it does not appear that the drawer was injured by the failure to give notice.[112] As against the drawer, the drawee's insolvency is sufficient to dispense with presentment and notice.[113]

§ 5313. **Evidence.**—In an action to recover the amount paid by a drawee on a forged check, the introduction of the check without the indorsement of the payee, in absence of evidence to the contrary, is sufficient to prove non-payment.[114] On an issue whether plaintiff bank, in paying a draft drawn by a third party on defendant, had done so at defendant's request, or had merely received it for collection, defendant may show that he had notified plaintiff's agent that he would not pay any more of the same drafts unless the drawer had sufficient credits to cover the amount of the draft, and whether such agent of plaintiff was a general or a special agent.[115]

109 Clarke Nat. Bank v. Bank of Albion, 52 Barb. 592. As to authority of bank officers to accept and certify, see Willets v. Phœnix Bank, 2 Duer, 121; Farmers' Bank v. Butchers' etc. Bank, 4 Duer, 219; Claflin v. Farmers' etc. Bank, 25 N. Y. 293, 24 How. Pr. 1; Cooke v. State Nat. Bank, 52 N. Y. 97, 11 Am. Rep. 667; Lee v. Smith, 84 Mo. 304, 54 Am. Rep. 101; Hill v. National Trust Co., 108 Pa. St. 1, 56 Am. Rep. 189.

110 As to whether it excuses non-presentment, see Cruger v. Armstrong, 3 Johns. Cas. 5, 2 Am. Dec. 126; Conroy v. Warren, 3 Johns. Cas. 259, 2 Am. Dec. 156; Fitch v. Redding, 4 Sandf. 130; Franklin v. Vanderpool, 1 Hall, 88; Brush v. Barrett, 82 N. Y. 401, 37 Am. Rep. 569; Fletcher v. Pierson, 69 Ind. 281, 35 Am. Rep. 214.

111 Shultz v. Dupuy, 3 Abb. Pr. 252; Garvey v. Fowler, 4 Sandf. 665; Franklin v. Vanderpool, 1 Hall. 78.

112 Offutt v. Rucker, 2 Ind. App. 350, 27 N. E. 589.

113 Lovett v. Cornwell, 6 Wend. 369; Warrensburgh etc. Bldg. Assoc. v. Zoll, 83 Mo. 94; Madderom v. Heath etc. Mfg. Co., 35 Ill. App. 588.

114 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

115 First Nat. Bank v. Jacoby, 137 Cal. 17, 69 Pac. 690.

§ 5314. Presumptions. — The following are disputable presumptions: That a promissory note or bill of exchange was given or indorsed for a sufficient consideration; that an indorsement was made at the time and place of making the note or bill; that it is truly dated.[116]

FORMS—ACTIONS ON BILLS OF EXCHANGE.

§ 5315. Foreign bill—Complaint by payee against drawer for non-acceptance.

Form No. 1499.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant made and delivered to the plaintiff his certain bill of exchange of that date, of which the following is a copy: [Copy of the bill.]

II. That on the . . . day of . . ., 19. . , the same was duly presented to the said . . . for acceptance, but was not accepted, and was thereupon duly protested for non-acceptance.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same.

V. That the value of a similar bill of exchange at the time of said protest in . . ., that being the place where said bill was negotiated, and where such bills were currently sold, was . . . dollars.

Wherefore, the plaintiff demands judgment against the defendant for the sum of . . . dollars [the amount named in the bill], and . . . dollars damages, and interest on said sums from the . . . day of . . ., 19. . , [date of protest], and costs of suit.

§ 5316. Complaint by payee against acceptor.

Form No. 1500.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant made and delivered to the plaintiff his certain bill of exchange of that date, of which the following is a copy: [Copy of the bill.]

116 Cal. Code Civ. Proc., § 1963, subds. 21-23.

II. That on the . . . day of . . ., 19. . , at . . ., the defendant accepted the said bill.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5317. Inland bill—Complaint by drawer against acceptor for non-payment.

Form No. 1501.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the defendant made and delivered to the plaintiff his certain bill of exchange of that date, of which the following is a copy: [Copy of the bill.]

II. That the defendant thereafter accepted the said bill.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5318. Complaint in action on bill payable to drawer's own order, and not negotiated.

Form No. 1502.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the plaintiffs [under their firm name of A. B. C. & Co.], by their bill of exchange, required the defendant to pay to the order of the plaintiffs . . . dollars, . . . days after date thereof [or otherwise]; a copy of which said bill of exchange is hereto attached and made part of this complaint.

II. That on the . . . day of . . ., 19. . , the defendant accepted the bill.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Attach copy of bill.]

§ 5319. Complaint in action on bill returned and taken up.

Form No. 1503.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the plaintiff, by his bill of exchange, required the defendant to pay to one A. B. . . . dollars, . . . days after the date thereof; a copy of

which bill of exchange and the acceptance thereon indorsed, is hereto attached and made part of this complaint.

II. That on the . . . day of . . ., 19.., at . . ., the defendants, upon sight thereof, accepted the same for value received.

III. That at maturity the same was presented for payment, but was not paid.

IV. That on the . . . day of . . ., 19.., the same was returned to the plaintiff for non-payment, and the plaintiff, as drawer thereof, was then and there compelled to take up the same and to pay to the holder thereof the sum of . . . dollars, being the amount of said bill, with damages and interest.

V. That no part of the same has been repaid.

[DEMAND OF JUDGMENT.]

[Attach copy of bill.]

§ 5320. Complaint by acceptor without funds against drawer.

Form No. 1504.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant became indebted to him for money advanced by him, and paid by him, upon a certain draft drawn by the defendant, bearing date on the . . . day of . . ., 19.., whereby the defendant requested the plaintiff . . . days after date, to pay to one A. B. the sum of . . . dollars.

II. That on the . . . day of . . ., 19.., at . . ., the plaintiff accepted said draft, and paid it.

[Or, II. That the plaintiff accepted said draft, and paid the same at maturity.]

III. That at the time of the acceptance and payment of said draft, the plaintiff was without funds of the defendant in his hands to meet the same.

IV. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5321. The same—By a copartnership firm against another firm, on a draft accepted and paid by plaintiffs.

Form No. 1505.

[TITLE.]

The plaintiffs complain, and allege:

I. That on the . . . day of . . ., 19.., the defendants, then

composing the firm of C. D. & Co., drew their certain bill of exchange, in said copartnership name, at . . ., and directed the same to the plaintiffs at . . ., who then were and now are copartners, doing business under the firm name of A. B. & Co., by which bill of exchange the said defendants requested the plaintiffs to pay to the order of said defendants, four months after date, the sum of . . . dollars, for value received.

II. That said bill of exchange the plaintiffs afterwards accepted and paid in full.

III. That no funds were provided by said defendants, either before or after the same was drawn as aforesaid for the payment thereof, and the plaintiffs have had no funds of said defendants at any time in their hands to pay the same.

[DEMAND OF JUDGMENT.]

§ 5322. Complaint by payee against drawer for non-acceptance.

Form No. 1506.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by his bill of exchange, required one C. D. to pay to the plaintiff . . . dollars [. . . days after sight].

II. That on the . . . day of . . ., 19.., the same was duly presented to the said C. D. for acceptance, but was not accepted.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5323. Allegation setting out copy of bill.

Form No. 1507.

That on the . . . day of . . ., 19.., at . . ., the defendants made and delivered to the plaintiff their bill of exchange, of which the following is a copy: [Copy of bill.]

§ 5324. Allegation of demand and notice excused by waiver.

Form No. 1508.

That the defendant at the time said bill was transferred by him, waived the presentation of the same to said . . . for payment, and also waived notice of the non-payment thereof.

§ 5325. Allegation of excuse for non-presentment—Bill countermanded.

Form No. 1509.

That on or about the . . . day of . . ., 19.., said bill not then having been presented for acceptance [or for payment], the defendant countermanded the same, by instructions to the said [drawee] not to accept or pay [or, if payable at sight, not to pay] the same; wherefore it was not presented.

§ 5326. Allegation of excuse for non-presentment—Drawee not found.

Form No. 1510.

That on the [etc.] due search and inquiry was made for said . . . at [state the place of address], that the same might be presented for acceptance, but he could not be found, and the same was not accepted.

§ 5327. Complaint—Where bill is payable at a specific date.

Form No. 1511.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and delivered to the plaintiff his bill of exchange, directed to E. F., and required said E. F. to pay to the plaintiff . . . dollars on the . . . day of . . ., 19.. [or at sight, or . . . days after date thereof, or after sight thereof], for value received.

II. That the same was presented to E. F. for payment, but was not paid.

III. [If a foreign bill:] That the same was duly protested for non-payment.

IV. That notice thereof was given to the defendant.

V. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5328. Complaint by partners payees against partners acceptors.

Form No. 1512.

[TITLE.]

A. B. and C. D., the plaintiffs in the above-entitled action, complain of E. F. and G. H., the defendants, and allege:

I. That at the times hereinafter mentioned, the said plaintiffs were partners, doing business at . . ., under the firm name of "A. B. & Co.," and the said defendants were partners, doing business at . . ., under the firm name of "E. F. & Co."

II. That on the . . . day of . . ., 19.., at . . ., L. M. and N. O., partners, doing business under the firm name of "L. M. & Co.," under their said firm name made their certain bill of exchange in writing, payable in gold coin of the United States, directed to the defendants, under their said firm name of "E. F. & Co.," bearing date on that day, in the words and figures following, to-wit: [Copy of bill.]

III. That on the . . . day of . . ., 19.., at . . ., the said defendants, under their said firm name of "E. F. & Co.," upon sight thereof, accepted said bill of exchange.

IV. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5329. Complaint by payee against acceptor—Short form.

Form No. 1513.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant accepted a bill of exchange made [or, purporting to have been made] by one C. D., on the . . . day of . . ., 19.., at . . ., requiring the defendant to pay to the plaintiff . . . dollars, . . . after sight thereof. A copy of said bill of exchange is hereto attached, and marked "Exhibit A," and made part of this complaint.

II. That he has not paid the same.

[DEMAND OF JUDGMENT.]

[Attach copy of bill.]

§ 5330. Allegation setting out copy of bill.

Form No. 1514.

That on the . . . day of . . ., 19.., at . . ., the defendant A. B. accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy: [Copy bill and acceptance.]

§ 5331. Payee against acceptor—Pleading the legal effect.

Form No. 1515.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , one A. B., by his bill of exchange in writing, dated on that day, required the defendants to pay to the order of the plaintiff . . . dollars, . . . days after said date [or otherwise], for value received.

II. That on the . . . day of . . . , 19.. , at . . . , the defendant, upon sight thereof, accepted said bill, of which, and the acceptance thereof, the following is a copy: [Copy of the bill.]

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5332. The same—Acceptance varying as to time from the bill.

Form No. 1516.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege making of bill as in preceding form.]

II. That on the . . . day of . . . , 19.. , at . . . , the defendant [or, the defendants under their firm name], upon sight thereof, accepted the same, payable at . . . days [or otherwise] after the date of said bill [or, after said day of acceptance]. A copy of which said bill, and the acceptance thereof, is hereto attached and made part of this complaint.

III. That he has [they have] not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Attach copy of bill.]

§ 5333. Complaint—Where drawer is also acceptor, on bill drawn on himself.

Form No. 1517.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the defendant made and accepted, and delivered to the plaintiff, his bill of exchange in writing, of which the following is a copy: [Copy of the bill and acceptance.]

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5334. Complaint by assignee of a bill payable out of a particular fund.

Form No. 1518.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., one A. B. made his bill of exchange or order in writing, dated on that day, and directed it to the defendant, and thereby required the defendant to pay to one C. D., out of the proceeds of [state fund as in the bill] . . . dollars . . . days after the date thereof, and delivered it to said C. D.

II. That on the . . . day of . . ., 19.., at . . ., upon sight thereof, the defendant accepted the same, payable, when in funds, from the proceeds of [etc., as in acceptance].

III. That on the . . . day of . . ., 19.., at . . ., said C. D. assigned said bill to this plaintiff. The following is a copy of said bill of exchange, and of the said acceptance and assignment thereof: [Copy of same.]

IV. That on the . . . day of . . ., 19.., the defendant had funds of the said A. B., proceeds of [etc.].

V. That on the . . . day of . . ., 19.., at . . ., the plaintiff demanded payment thereof from the defendant.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5335. Complaint by payee against drawer and acceptor—On bill accepted by drawee.

Form No. 1519.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B., by his bill of exchange, required one C. D. to pay to the plaintiff . . . dollars, . . . days after the date thereof [or, otherwise].

II. That on the . . . day of . . ., 19.., the defendant C. D., upon sight thereof, accepted said bill. The following is a copy of said bill and of said acceptance: [Insert copy.]

III. That at maturity the same was presented to the defendant C. D. for payment, but was not paid.

IV. That notice thereof was given to the defendant A. B.

V. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 5336. Complaint by payee—On bill accepted for honor.

Form No. 1520.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant A. B., by his bill of exchange, required one C. D. to pay to the plaintiff . . . dollars . . . days after the date thereof [or otherwise]. The following is a copy of the said bill of exchange, and of all acceptances thereon: [Insert copy of same.]

II. That on the . . . day of . . ., 19.., the same was presented to the said C. D. for acceptance, but was not accepted.

III. That notice thereof was given to the defendant A. B.

IV. That on the . . . day of . . ., 19.., at . . ., the defendant E. F. [acceptor for honor], upon sight thereof, accepted said bill for the honor of said A. B.

V. That at maturity the same was presented for payment to said C. D., but was not paid.

VI. That notice thereof was given to the defendant A. B.

VII. That thereupon the same was duly presented to the defendant E. F. [acceptor for honor], for payment, but was not paid.

VIII. That notice thereof was given to the defendant A. B.

IX. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 5337. Complaint by indorsee — First indorsee against acceptor.

Form No. 1521.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., the defendant accepted a bill of exchange, made by one A. B., on the . . . day of . . ., 19.., at . . ., requiring the defendant to pay to the order of one C. D., . . . dollars . . . days after sight thereof, of which the following is a copy: [Insert copy.]

II. That the said C. D. indorsed the same to the plaintiff.

III. That defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 5338. Complaint by first indorsee against first indorser.

Form No. 1522.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to the plaintiff a bill of exchange, made by one A. B., on the . . . day of . . ., 19.., at . . ., requiring one C. D to pay to the order of the defendant . . . dollars, . . . [days] after sight [or, after date; or, at sight] thereof, and accepted by the said C. D. on the . . . day of . . ., 19.., at . . . The following is a copy of said bill of exchange, and of said indorsement and acceptance: [Insert copy.]

II. That on the . . . day of . . ., 19.., at . . ., the same was presented to the said . . ., for payment, but it was not paid.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5339. Complaint by first indorsee against drawer and indorser—For non-acceptance.

Form No. 1523.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by his bill of exchange, required one C. D. to pay to the order of one E. F. . . . dollars . . . days after the date thereof [or otherwise].

II. That the said A. B. then and there delivered the same to the defendant E. F., who then and there indorsed it to the defendant G. H.

III. That on the . . . day of . . ., 19.., at . . ., the defendant G. H. indorsed the same to the plaintiff for value. The following is a copy of said bill of exchange and of the said indorsements thereon: [Copy of bill and indorsements.]

IV. That the same was presented to C. D. for acceptance, but was not accepted [if a foreign bill, add: and was thereupon duly protested for non-acceptance]; of all which due notice was given to the defendants.

V. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 5340. Complaint by first indorsee against all prior parties—For non-payment.

Form No. 1524.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B., by his bill of exchange, requested C. D, to pay to the order of the defendant E. F., . . . dollars, . . . days after the date thereof.

II. That the said A. B. then and there delivered the same to the said E. F., who thereupon indorsed it to the defendant G. H.

III. That on the . . . day of . . ., 19.., at . . ., the said G. H. indorsed the same to the plaintiff for value.

IV. That on the . . . day of . . ., 19.., at . . ., the defendant C. D., upon sight thereof, accepted said bill.

V. That at maturity the same was presented to the defendant C. D. for payment, but was not paid [if a foreign bill, add: and was thereupon duly protested for non-payment]; of all which due notice was given to the defendants A. B., E. F., and G. H.

VI. That no part of the same has been paid.

[DEMAND OF JUDGMENT.]

§ 5341. Complaint by subsequent indorsee against acceptor.

Form No. 1525.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege acceptance of bill, as in form No. 1524.]

II. That by the indorsement of said . . ., the same was transferred to the plaintiff for value.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5342. Complaint by subsequent indorsee against first indorser—Indorsement special.

Form No. 1526.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to one C. D. a bill of exchange, made by one A. B., on the . . . day of . . ., 19.., at . . ., requiring E. F. to pay to the order of the defendant . . .

dollars, . . . days after sight thereof [or otherwise], and accepted by the said E. F. on the . . . day of . . ., 19.., at . . .

II. That the same was by the indorsement of the said C. D., transferred to the plaintiff.

III. That on the . . . day of . . ., 19.., at . . ., the same was presented to the said E. F. for payment, but it was not paid.

IV. That notice thereof was given to the defendant.

V. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5343. Complaint by subsequent indorsee against intermediate indorser.

Form No. 1527.

[TITLE.]

The plaintiff complains, and alleges:

I. That a bill of exchange made by one A. B. on the . . . day of . . ., 19.., at . . ., requiring one C. D. to pay to the order of one E. F. . . . dollars, . . . days after sight thereof [or otherwise], [accepted by said C. D.], and indorsed by the said E. F. to the defendant, was by the indorsement of the defendant [and others], transferred to the plaintiff.

[Allege presentment, notice, and non-payment as in form No. 1526.]

[DEMAND OF JUDGMENT.]

§ 5344. Complaint by subsequent indorsee against last indorser.

Form No. 1528.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to him a bill of exchange, made [or, purporting to have been made] by one A. B., on the . . . day of . . ., 19.., at . . ., requiring one C. D. to pay to the order of E. F. . . . dollars, . . . days after sight thereof [or otherwise], [accepted by the said C. D.], and indorsed by the said E. F. to the defendant.

II. That on the . . . day of . . ., 19.., at . . ., the same was presented to the said C. D. for payment, but it was not paid.

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5345. Complaint by subsequent indorsee against all prior parties—Short form.

Form No. 1529.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B., by his bill of exchange, required the defendant C. D. to pay to the order of the defendant E. F., . . . dollars, . . . days after sight thereof.

II. That on the . . . day of . . ., 19.., the said C. D. accepted the same.

III. That the said E. F. indorsed the same to the plaintiff.

IV. That on the . . . day of . . ., 19.., the same was presented to the said C. D. for payment, but was not paid.

V. That due notice thereof was given to the other defendants, and each of them.

VI. That they have not, nor has either or any of them, paid the same.

[DEMAND OF JUDGMENT.]

§ 5346. The same—By a bank in its corporate name.

Form No. 1530.

[STATE AND COUNTY.] [COURT.]

The Bank of . . . }
v. }
A. B., C. D., and E. F. }

The plaintiff, a corporation duly organized and incorporated under the laws of the state of . . ., complains, and alleges:

[Allegation same as in last form.]

[DEMAND OF JUDGMENT.]

§ 5347. Check—Complaint by payee against drawer.

Form No. 1531.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned the said defendants were partners, doing business as merchants at . . ., under the firm name of C. D. & Co.

II. That on the . . . day of . . ., 19.., at . . ., the defendants, under their said firm name of C. D. & Co., made their check

in writing, dated on that day, payable to the order of the plaintiff, which said check is in the words and figures following, to-wit: [Copy of check.]

III. That the said check was presented on the . . . day of . . ., 19.., to the said . . ., for payment, but was not paid.

IV. That due notice thereof was given to the defendants.

V. That they have not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 5348. Complaint by indorsee or bearer of check against drawer.

Form No. 1532.

[Title.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made his check in writing, dated on that day, and directed the same to the bank of A. B., requiring said bank to pay to one C. D., or order [or bearer], . . . dollars for value received.

II. That the defendant then and there indorsed the same to this plaintiff.

III. That on the . . . day of . . ., 19.., at . . ., the same was presented to said bank of A. B. for payment, but was not paid.

IV. That due notice thereof was given to the defendant.

V. That he has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 5349. Allegation of excuse for failure to give notice.

Form No. 1533.

That on the . . . day of . . ., 19.., the same was presented to said [drawee] for payment, but the defendant had no funds with said drawee.

§ 5350. Allegation of excuse from insolvency of drawee.

Form No. 1534.

That on the . . . day of . . ., 19.., at . . ., said [drawee] was insolvent [or had stopped payment].

§ 5351. Complaint by indorsee or bearer of check against drawer and indorser.

Form No. 1535.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B. made his check, and directed the same to the bank of C. D., and thereby required said C. D. to pay to the defendant E. F., or order [or bearer], . . . dollars, for value received, and delivered it to the defendant E. F.

II. That thereupon said defendant E. F. indorsed the same to this plaintiff for value.

III. That said check was duly presented for payment, but was not paid.

IV. That due notice thereof was given to the defendants.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5352. Complaint in action against bank, drawee having certified.

Form No. 1536.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant is a corporation, created by and under the laws of this state, organized pursuant to an act of the legislature entitled "An act to authorize the business of banking," passed . . ., and the acts amending the same.

II. That on the . . . day of . . ., 19.., at . . ., one A. B. made his check, and directed it to the defendants, and thereby required them to pay this plaintiff, or order [or bearer], . . . dollars, for value received; and delivered the same to this plaintiff [or, if payable to third party, state accordingly].

III. That on the . . . day of . . ., 19.., at . . ., the defendant, by its agent duly authorized thereto, in writing, accepted and certified the same to be good.

IV. That thereafter the same was duly presented for payment, but no part thereof was paid.

[DEMAND OF JUDGMENT.]

§ 5353. Complaint by payee against acceptor, on bill payable from particular fund.

Form No. 1537.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., one C. D. made his [or, certain persons, under their firm name, etc., made their] bill of exchange or order, in writing, dated on that day, and directed it to the defendant [or, to the defendants, under their firm name, etc.]; and thereby required the defendant to pay to one E. F. out of the proceeds of [state fund as in the bill] . . . dollars, . . . days after the date [or, at sight] thereof [or otherwise], for value received, and delivered it to said [payee].

II. That on the . . . day of . . ., 19.., at . . . [or, then and there], upon sight thereof, the defendant accepted the same, payable, when in funds, from the proceeds of, etc. [State terms of acceptance as made.]

III. [If plaintiff is assignee of the bill, state assignment as follows:] That on the . . . day of . . ., 19.., at . . ., said [payee] duly assigned said bill for value to this plaintiff.

IV. That on the . . . day of . . ., 19.., the defendant had in his hands funds of the said [drawer] to the amount of . . . dollars, being the proceeds of [state fund as in bill].

V. That payment of said bill was, on the . . . day of . . ., 19.., at . . ., duly demanded by this plaintiff from the defendant, but was refused.

VI. That no part thereof has been paid [except the sum of, etc.], and that plaintiff is now the owner and holder thereof.

[DEMAND OF JUDGMENT.]

§ 5354. Complaint in action upon certificate of deposit by indorsee.

Form No. 1538.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege defendant's corporate capacity, if the action be against a corporation.]

II. That on or about the . . . day of . . ., 19.., the defendant, in consideration of the sum of . . . dollars, then paid to it, issued a certain certificate of deposit to the order of one E. F., for the sum of . . . dollars, whereby defendant agreed

to pay the said amount on the return of said certificate of deposit properly indorsed; the following being a true copy of said certificate: [Insert exact copy of certificate.]

III. That the said certificate was thereafter properly indorsed by said E. F. and was transferred and for value delivered to the plaintiff, and on or about the . . . day of . . ., 19.., was duly indorsed by the plaintiff and presented for payment to the defendant, and payment thereof was refused.

IV. That plaintiff is the lawful owner and holder of said certificate, and that no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 5355. Answer—That the acceptance was for accommodation.

Form No. 1539.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That he accepted the bill mentioned in the complaint for the accommodation of the plaintiff [or, of said M. N.]; and that there was never any value or consideration for the acceptance or payment of said bill by the defendant.

[Where plaintiff is an indorsee, add:] II. That the same was indorsed to the plaintiff, and he always held the same, without any value or consideration.

§ 5356. Answer—That the note or acceptance was given for goods sold, but never delivered.

Form No. 1540.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the bill [or, note] mentioned in the complaint was accepted [or, given by the defendant] for the price of goods to be sold and delivered by the plaintiff to the defendant before the said bill [or, note] should become due.

II. That defendant has always been ready and willing to buy and accept said goods from the plaintiff, and has duly performed all the conditions on his part.

III. That the plaintiff has not sold and delivered the same to the defendant [though the defendant, on the . . . day of . . ., 19.., at . . ., duly requested him so to do].

IV. That except as aforesaid there never was any consideration for the acceptance or payment of said bill [or, giving or payment of said note] by the defendant.

CHAPTER CXXX.

ON PROMISSORY NOTES AND CERTIFICATES OF DEPOSIT.

§ 5357. **Accommodation maker as plaintiff.**—An accommodation maker or indorser is a surety, and may sue as such to recover payments made by him.[1] If the accommodation maker was sued, the allegation may state that "the plaintiff was thereupon compelled, by suit brought against him by A. B., the holder, in the . . . court."[2] When in an action against the makers of a note, the answer of certain defendants set up that the other defendant had received all the money for which the note was given, and that such defendants were merely sureties, and that the note was accepted on the understanding that they were sureties, the allegations showed such defendants to be sureties.[3]

§ 5358. **Coupons.**—Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds, and a purchaser in good faith, before maturity, from one who has stolen them, acquires a valid title.[4] Under section 3254 of the California Civil Code, defining a check as a "bill of exchange drawn upon a bank or banker, and payable on demand, without interest," an instrument having these characteristics does not cease to be a check because drawn by a bank.[5]

§ 5359. **Contingent order.**—A contingent order is not negotiable.[6] An instrument providing that, in consideration of L.'s assigning to defendant her equity in certain realty, the defendant agreed with plaintiff that the latter should hold an equity in the land to the amount of the balance of its account against

1 Baker v. Martin, 3 Barb. 634; Neass v. Mercer, 15 Barb. 318.

2 Packard v. Hill, 7 Cow. 442. As to recovery of costs of suits, see Baker v. Martin, 3 Barb. 634. But see Holmes v. Weed, 24 Barb. 546, which limits it to costs of default.

3 Daneri v. Gazzole, 139 Cal. 416, 73 Pac. 179.

4 Evertson v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9.

5 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

6 Kenny v. Hinds, 44 How. Pr. 7.

T., and that T. or defendant would pay the amount claimed by plaintiff against T. either out of the equity in the land, or out of the crop raised thereon, does not amount to a note.[7] Plaintiff furnished materials for a building, and took an order from the contractor to secure the purchase price. Defendant corporation, at the time of the acceptance had money and securities in its hands belonging to the owner more than sufficient to pay the order. It was held that the acceptance was conditional on the building being completed, and there was no liability where, before completion, the building was destroyed by fire.[8]

§ 5360. **Consideration.**—A complaint upon a promissory note need not aver that it was given for a consideration.[9] Section 3104 of the Civil Code of California is as follows: "The signature of every drawer, acceptor, and indorser of a negotiable instrument is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business." One who adds his signature to a promissory note as a maker, after its execution and delivery to the payee, without any agreement for extension of credit or forbearance, or other new consideration, is not liable thereon.[10] But where a loan is made upon the consideration that the borrower will execute a note and procure the signature of another person to it as a joint maker, with the understanding that the note shall not be considered as delivered until signed by such other person, and his signature is procured several days afterwards, whereupon the note is delivered as a complete instrument to the payee, the party so adding his signature is bound by the note without the necessity of a new consideration, notwithstanding he had no prior knowledge or agreement respecting the loan previously made.[11] Setting out in the complaint the note sued on is a sufficient allegation of consideration, where the note recites that it was given for "valuable consideration."[12]

7 Thompson v. Wheatland Mercantile Co., 10 Wyo. 86, 66 Pac. 595.

8 Hogan v. Globe Mut. Bldg. etc. Assoc., 140 Cal. 610, 74 Pac. 153; McNamara v. Jose, 28 Wash. 461, 68 Pac. 903; McDonald v. Randall, 139 Cal. 246, 72 Pac. 997.

9 Pinney v. King, 21 Minn. 514; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962.

10 Leverone v. Hildreth, 80 Cal. 139, 22 Pac. 72.

11 Winders v. Sperry, 96 Cal. 194, 31 Pac. 6. See Harrington v. Brown, 77 N. Y. 72; McNaught v. McClaughry, 42 N. Y. 22, 1 Am. Rep. 487.

12 Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180; Mt. Morris Bank v. Lawson, 7 Misc. 228, 27 N. Y. Supp. 272. See, also, Petree v. Fielder, 3

§ 5361. **Illegal consideration.**—In Colorado, a note payable to the order of a foreign corporation, which had not complied with the statute[12a] requiring foreign corporations to pay certain fees before engaging in business in the state, is nevertheless valid in the hands of a purchaser before maturity, for value, and without notice.[13] Under the Colorado statute,[13a] declaring notes and all contracts the consideration of which is a loss at gambling void, and that no assignment of a note or other evidence of indebtedness the consideration of which assignment is a loss at gambling shall offset the defense of the person executing it, or the remedies of any person interested in it, such an assignment is void in the hands of an innocent purchaser.[14] In an action on certain checks given for a gambling debt by an alleged *bona fide* holder, an instruction that all bills and other securities the consideration of which was money won by gambling were null and void between the parties and others, except holders in good faith without notice, and that the checks sued on were invalid in the hands of the payee, and if plaintiff, at the time he purchased, knew the circumstances under which and the consideration for which they were given, he could not recover, but that if he did not know the circumstances or the consideration, and was an innocent purchaser in good faith, he was entitled to recover, was proper.[15]

§ 5362. **Consideration.**—In a complaint on a promissory note it is not necessary that a consideration should be specially alleged. If there is no consideration, the defendant should set up the want of it as a defense.[16] Every note imports consideration.[17] An oral promise to convey land, in accordance with which the land is subsequently conveyed, is a sufficient consideration for a promissory note.[18] A covenant to convey is a good consideration for a note for purchase money, although the payee of the

Ind. App. 127, 29 N. E. 271; Elmquist v. Markoe, 39 Minn. 494, 40 N. W. 825.

12a Sess. Laws 1897, p. 157, ch. 51.

13 McMann v. Walker, 31 Colo. 261, 72 Pac. 1055.

13a Mills' Annot. Stats., § 1344.

14 Western Nat. Bank v. State Bank, 18 Colo. App. 128, 70 Pac. 439.

15 Ash v. Clark, 32 Wash. 390, 73 Pac. 351.

16 Winters v. Rush, 34 Cal. 136; Flint v. Phipps, 16 Or. 437, 19 Pac. 543; Carnwright v. Gray, 127 N. Y. 92, 24 Am. St. Rep. 424, 27 N. E. 835, 12 L. R. A. 845; Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Andrews v. Hayden, 88 Ky. 455, 11 S. W. 428.

17 Bank of Troy v Topping, 13 Wend. 557; Goshen Turnpike Co. v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273; Prindle v. Caruthers, 15 N. Y. 425.

18 Kratz v. Stocke, 42 Mo. 351.

note who had given the bond of conveyance had not the legal title, and could not convey it when the note became payable.[19] Delivering a policy on the life of the maker of a note is sufficient consideration for the indorsement thereof by the payee.[20] But paying part of a note when all is due is no consideration for an agreement to extend the time of payment.[21] Though the holder of a promissory note which proves to be void may in a proper case recover on the consideration for which the note was intended to be given, he cannot do so unless the pleading set out such consideration.[22] Where an agreement of sale of personal property was signed by the purchaser only, who gave his note for the price, it might be inferred from the evidence of performance on the seller's part so as to constitute a consideration for the note.[23] The agreement of sale and a compliance with its terms need not be pleaded.[24] As the statute makes a promissory note *prima facie* evidence of indebtedness, though no consideration be expressed,[25] it is not necessary to add an averment that the defendant is indebted.[26] Consideration in such complaints may be specially set out,[27] and, if so stated, must be proved as laid.[28] It must be averred, when the instrument itself does not import a consideration.[29] In case the consideration be subject to transfer on demand of payment, the plaintiff must allege a transfer or tender of transfer.[30]

§ 5363. Copy of note.—A complaint against a maker is sufficient where it sets forth a copy of the note, and alleges that a specified sum is due thereon from defendant to plaintiff, although the note is by its terms payable to a third person, and there is no allegation of an indorsement by him.[31] But a complaint simply

19 Holy v. Rhodes, 2 Cranch C. C. 245, Fed. Cas. No. 6651; Lane's Admr. v. Dyer, 2 Cranch C. C. 439, Fed. Cas. No. 8050.

20 Muller v. Swanton, 140 Cal. 249, 73 Pac. 994.

21 Liening v. Gould, 13 Cal. 598.

22 Wayman v. Torreyson, 4 Nev. 124.

23 Weightman v. Caldwell, 4 Wheat. 85, 4 L. Ed. 520.

24 McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000.

25 Stewart v. Street, 10 Cal. 372.

26 Connecticut Bank v. Smith, 9 Abb. Pr. 168.

27 Ward v. Sackrider, 3 Caines, 363.

28 Jerome v. Whitney, 7 Johns. 321.

29 Spear v. Downing, 34 Barb. 522.

30 Considerant v. Brisbane, 14 How. Pr. 487.

31 Prindle v. Caruthers, 15 N. Y. 425; Continental Bank v. Bramhall, 10 Bosw. 595; Raynor v. Hoagland, 39 N. Y. Super. Ct. Rep. 11; Smith v. Waite, 103 Cal. 372, 37 Pac. 232; Scott v. Esterbrooks, 6 S. Dak. 253, 60 N. W. 850; Watson v. Barr, 37 S. C. 463, 16 S. E. 188. See Jaqua v. Woodbury, 3 Ind. App. 289, 29 N. E. 573; Gish v. Gish, 7 Ind. App. 104, 34 N.

alleging that the action is on an instrument for the payment of money only, of which a copy is given, but not alleging the making of the instrument by the defendant, is held bad on demurrer.[32]

§ 5364. **Date.**—A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.[32a] Any date may be inserted by the maker of a negotiable instrument, whether past, present, or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date.[33] A bill or note takes effect, not from the day on which it is dated or signed, but from the day on which it is delivered.[34]

§ 5365. **Filling blanks.**—One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable on the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.[35]

§ 5366. **Accommodation indorsers, co-sureties.**—In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent for defendant to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, co-sureties.[36]

§ 5367. **Title of plaintiff.**—A note indorsed in blank before maturity, and thereafter transferred by delivery for purpose of collection, gives the transferee right to sue in his own name.[37] Where an indorser has paid the whole of a note, and become the legal owner of it, he may sue directly on the note.[38] But where he paid only a part, he must sue for the amount actually

E. 305; Behrens v. Dignowitty, 4 Tex. Civ. App. 201, 23 S. W. 288; Alexander v. McDow, 108 Cal. 25, 41 Pac. 24.

32 Vogle v. Kirby, 15 Civ. Proc. Rep. 332, 4 N. Y. Supp. 99. See Broome v. Taylor, 13 Hun, 341.

32a Cal. Civ. Code, § 3091.

33 Cal. Civ. Code, § 3094.

34 Conrad v. Kinzie, 105 Ind. 281, 4 N. E. 863; King v. Fleming, 72 Ill. 21, 22 Am. Rep. 131.

35 Cal. Civ. Code, § 3125.

36 Easterly v. Barber, 66 N. Y. 433.

37 Meyer v. Foster, 147 Cal. 166, 81 Pac. 402; Eagle Min. etc. Co. v. Lund (N. Mex.), 94 Pac. 949.

38 Baker v. Martin, 3 Barb. 634; Wright v. Butler, 6 Wend. 290, 21 Am. Dec. 323.

paid, as for money paid to the use of the drawer or first indorser.[39] But separate prior indorsers cannot be joined as defendants in such an action.[40]

§ 5368. **Certificate of deposit.**—A certificate of deposit is on the same footing as a promissory note.[41] It changes the character of the maker from a custodian of the funds to that of a debtor;[42] and the brokers become liable to pay to the holder of the certificate on its presentation.[43] The authority of a bank to issue certificates of deposit, payable at a certain time, with interest, is not curtailed by section 576 of the California Civil Code, expressly vesting such power in savings-banks.[44] In an action by an indorsee on a certificate of deposit, presentation and demand must be alleged in the complaint.[45]

§ 5369. **Date—Variance.**—It is of no consequence whether the date of a promissory note be at the beginning or end of it.[46] But as a variance would be immaterial,[47] the plaintiff may transfer the allegation of time and place into one of date, thus: That the defendant, by his promissory note, dated on . . ., at . . ., promised, etc. A variance of one month in the time of a note described was disregarded as immaterial, the defendant not having been misled.[48] When in an action on a note an indorsement was alleged to have been made, and the note delivered on November 20th, it was competent to prove that the note was actually delivered, indorsed in blank, in the previous August, and that on November 20th an indorsement of a waiver of demand and notice of protest was made on the note.[49] Where

39 Wright v. Butler, 6 Wend. 284, 21 Am. Dec. 323; Pownal v. Ferrand, 6 Barn. & Cress. 439; Dygert v. Gros, 9 Barb. 506.

40 Barker v. Cassidy, 16 Barb. 177.

41 Welton v. Adams, 4 Cal. 37, 60 Am. Dec. 579; Brummagim v. Tallant, 29 Cal. 503, 89 Am. Dec. 61. See, also, Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 4 Am. St. Rep. 526, 11 N. E. 799; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910.

42 Naglee v. Palmer, 7 Cal. 543.

43 McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655. See Cal. Civ. Code, § 3095.

44 Abbott v. Jack, 136 Cal. 510, 69 Pac. 257.

45 Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377.

46 Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518.

47 Bentzing v. Scott, 4 Car. & P. 24.

48 Trowbridge v. Didier, 4 Duer, 448. As to setting out mistake in date of note, see Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

49 Delsman v. Friedlander, 40 Or. 33, 66 Pac. 297.

no time of payment is named, the note is due immediately,[50] and interest runs from date and without demand. On such a note a count stating no time of payment is good.[51] An antedated note may be alleged to have been made on the day of its date.[52]

§ 5370. **Delivery.**—It is not necessary to add an averment of delivery where the plaintiff is the payee. "Made" imports delivery.[53] Indorsement likewise imports delivery. Where a check was sent by mail, and never received by the addressee, it remained the property of the sender.[54] In an action on a note, the delivery of the same is *prima facie* established by plaintiff's production and proffer of the note.[55]

§ 5371. **Demand.**—No previous demand is necessary to maintain an action on a note payable on demand.[56] The action itself is a sufficient demand; and if there were no days of grace allowed, the note would be payable immediately after delivery.[57] But an indorser after maturity is entitled to demand and notice of non-payment before he is liable to pay.[58] As against a maker or acceptor of a note drawn payable at a particular bank or place, it is not necessary to aver that a demand was made at place specified.[59] But with the indorser the rule is different.[60] An averment in a complaint that a note, at the instance of the holder, "was duly presented for payment, and payment thereof demanded, and refused," is held sufficient to charge an indorser, although it does not allege that the presentment was to the maker,

50 Thompson v. Ketchum, 8 Johns. 189, 5 Am. Dec. 332; Gaylord v. Van Loan, 15 Wend. 308; Peets v. Bratt, 6 Barb. 662; Bell v. Sackett, 38 Cal. 407.

51 Herrick v. Bennett, 8 Johns. 374.

52 Denick v. Hubbard, 36 Hun. 188. As to amendment changing date of note sued on, see Drake v. Found Treasure Min. Co., 53 Fed. 474.

53 Churchill v. Gardner, 7 T. R. 596; Russell v. Whipple, 2 Cow. 536; Prindle v. Caruthers, 15 N. Y. 425; Keteltas v. Myers, 19 N. Y. 231; Smith v. Waite, 103 Cal. 372, 37 Pac. 232. As to allegations sufficiently showing execution and delivery of note, see Lord v. Russell, 64 Conn. 86, 29 Atl. 242; Elbring v. Mullen (Idaho), 38 Pac. 404.

54 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

55 Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681; Schallehn v. Hibbard, 64 Kan. 601, 68 Pac. 61.

56 Ziel v. Dukes, 12 Cal. 482; Story on Promissory Notes, § 29; Wheeler v. Warner, 47 N. Y. 519, 7 Am. Rep. 478.

57 Bell v. Sackett, 38 Cal. 407.

58 Beebe v. Brooks, 12 Cal. 308.

59 Silver v. Henderson, 3 McLean, 165, Fed. Cas. No. 12854; Payson v. Whitcomb, 15 Pick. 212.

60 United States Bank v. Smith, 11 Wheat. 171, 6 L. Ed. 443. As to necessity of demand to charge indorser, see Conkling v. Gandall, 1 Abb. Ct. App. 423; Parker v. Stroud, 98 N. Y. 379, 50 Am. Rep. 685;

nor that it was at the place where the note was payable.[61] Where a note is payable in installments due at different times, and demand on the maker is not made till the last installment falls due, and then demand is made for the whole amount, the demand is good for the purpose of charging the indorser for the last installment.[62]

§ 5372. **Indorsement.**—If a person who is not a party to a promissory note indorses his name upon it in blank, with intent to give it credit, the holder may write over it an engagement to pay it in case of insolvency of the maker; and if such insolvency be shown, no allegation of demand or notice is necessary.[63] A parol agreement between two indorsers, at the time of indorsement, to divide the loss between them in the event of non-payment, is a collateral agreement, founded on sufficient consideration, and will support an action.[64] Payment of a note by an indorser after protest is a good consideration for an *assumpsit* on the part of the maker, for the note, with cost of protest.[65]

§ 5373. **Execution.**—The general rule of law requiring proof of the title of the holders of a note may be modified by a rule of court dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him;[66] but where a petition declares on five promissory notes, purporting to be signed by a mark, and not attested by a witness, and defendant denies the execution of the notes by a duly verified answer, and the plaintiff testifies that the maker's name was signed to the notes by him at the maker's request, and that no other person was present, the evidence is insufficient to sustain a cause of action.[67] In an action on a note, where its execution is denied by defendant, the burden of proving that it is defendant's note is on plaintiff;[68] there is no presumption that such note was regularly executed.[69]

Shutts v. Fingar, 100 N. Y. 539, 53 Am. Rep. 231, 3 N. E. 588.

61 Chemical Nat. Bank v. Carpentier, 9 Abb. N. C. 301.

62 Eastman v. Turman, 24 Cal. 379.

63 Offut v. Hall, 1 Cranch C. C. 504, Fed. Cas. No. 10449, 1 Cranch C. C. 572, Fed. Cas. No. 10450.

64 Phillips v. Preston, 5 How. 278, 12 L. Ed. 152.

65 Morgan v. Reintzell, 7 Cranch, 273, 3 L. Ed. 340.

66 Mills v. Bank of United States, 11 Wheat. 431, 6 L. Ed. 512. See Cal. Code Civ. Proc., § 447.

67 Sivils v. Taylor, 12 Okla. 47, 69 Pac. 867.

68 Sears v. Daly, 43 Or. 346, 73 Pac. 5.

69 Id.

§ 5374. **Foreign-coin note.**—Where a note is payable in foreign coin, the value of such coin must be averred.[70]

§ 5375. **Forms of notes.**—A written promise to pay to "A. B.," without adding "or order," or "or bearer," is a promissory note within the statute;[71] but is not negotiable under the Civil Code of California. An instrument in the following form: "Troy, August 4, 1846. I hereby agree to pay Miss A. Y. twenty dollars per month during her natural life, for her attention to my son J. S. M. [Signed] B. M."—is not a promissory note.[72] Such an instrument expresses no consideration, since it affords no presumption that the services referred to were rendered in pursuance of a previous request of the promisor, or that they were beneficial to him.[73] On a promise to pay "as soon as able," a judgment and execution are the best test of defendant's ability to pay.[74]

§ 5376. **Interest.**—If the holder of a promissory note fill in the rate of interest left blank by the maker, he can collect only legal interest; but an innocent holder from him can collect only interest as filled in.[75] Interest need not be averred. It can be recovered as damages.[76] The filling of a blank with the rate of interest does not thereby vitiate the note.[77] If the original note offered in evidence contains an abbreviation for the word "administratrix," and specifies the rate of interest in figures only, and the copy in the complaint gives the word in full, and states the rate of interest in words as well as figures, the variance is immaterial.[78]

§ 5377. **Complaint.**—In an action on a note, allegations that it was secured by a mortgage on land in another state, and that

70 United States v. Hardyman, 13 Pet. 176, 10 L. Ed. 113. See Civ. Code, § 3238.

71 Burchell v. Slocock, 2 Ld. Raym. 1545; Smith v. Kendall, 6 T. R. 123; Downing v. Blackenstoes, 3 Caines, 137; Goshen etc. Turnpike Co. v. Hurtin, 9 Johns. 217, 6 Am. Dec. 273.

72 Spear v. Downing, 12 Abb. Pr. 437.

73 Id.

74 Cecil v. Welsh, 2 Bush, 168, 92 Am. Dec. 481.

75 Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534.

76 Chinn v. Hamilton, Hempst. 438, Fed. Cas. No. 2685.

77 Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534; Visher v. Webster, 8 Cal. 109. See Humphreys v. Crane, 5 Cal. 173. See "Negotiable Paper," ante, chap. cxxviii.

78 Corcoran v. Doll, 32 Cal. 82.

the mortgage had been foreclosed, were surplusage.[80] A complaint in an action on an order given by a railroad contractor on defendant railroad company, alleging that defendant received and accepted the order, and promised and agreed to retain out of moneys due or to become due to the contractor the amount of the order, etc., but failing to allege defendant's written acceptance thereof, did not state a cause of action against defendant.[81] Erroneous reference to defendant as a guarantor in the complaint on a note is harmless, where the complaint is sufficient to properly charge him as a joint maker.[82] Where a complaint alleges that a note was made, executed, and delivered, and the court in defining the issues made by the pleadings declares that the execution of the note is in issue, it means execution in its legal sense, as including delivery, and hence non-delivery may be shown.[83]

§ 5378. **Mortgage pleaded.**—If the mortgage given to secure the note has been extinguished by agreement between the parties, plaintiff in suit on the note need not allege the execution or extinction of the mortgage.[84]

§ 5379. **Pleading—Legal effect.**—A note may be set out according to its legal effect.[85] The difference between a note payable on a certain day and one payable on or before such a day is material when described according to its legal effect.[86] A complaint pleading a note according to its legal effect must state a payee; otherwise, it seems, it is demurrable.[87] And a complaint which states the material substance and legal effect of the note, showing its date, consideration, parties, principal sum, and rate of interest, and the amount due and unpaid, and avers that defendant refuses to pay the same or any part thereof, and that plaintiff is still the owner and holder of the note, is not

80 Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866.

81 Wadhams v. Portland etc. Ry. Co., 37 Wash. 86, 79 Pac. 597.

82 Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180.

83 Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681.

84 Bank of Paso Robles v. Blackburn, 2 Cal. App. 146, 83 Pac. 262.

85 Drake v. Fisher, 2 McLean, 69, Fed. Cas. No. 4061; Spaulding v. Evans, 2 McLean, 139, Fed. Cas. No. 13216. Compare Turner's Exrs. v. White, 4 Cranch C. C. 465, Fed. Cas. No. 14264.

86 Kikindal v. Mitchell, 2 McLean, 402, Fed. Cas. No. 7763.

87 White v. Joy, 13 N. Y. 83.

subject to a general demurrer on the ground that a copy of the note is not embodied in the complaint.[88]

§ 5380. **Liability of maker.**—The maker is bound by the contract which he signs, whatever his motive or purpose in signing it may be, and he cannot vary the legal effect of his obligation by parol.[89] A promissory note is neither an account, unliquidated demand, nor a thing in action not arising out of contract.[90]

§ 5381. **Lost paper.**—In case of the loss or destruction of negotiable paper, as a note or certificate of deposit, the plaintiff cannot maintain an action without first indemnifying the maker against all future claims upon it.[91] And no distinction exists between a note destroyed and one lost; but in either case a bond of indemnity need not be tendered or filed with the complaint, but may be tendered upon the trial.[92]

§ 5382. **Maturity.**—It is not necessary to show that the note was due before the commencement of the action,[93] nor that the time for payment has elapsed,[94] but where a note payable on a certain date, with interest "payable monthly in advance," was not paid when due, but the interest was paid in advance, an action for the principal brought after accepting an advance payment of interest was not premature.[95] The consent by defendant in an action on a note, commenced before its maturity, to the filing of a substituted complaint after the maturity of the note and the filing of an answer, does not estop him from relying on the premature bringing of the action as a defense.[96] An allegation that a note was given to provide for payment does not mean a present payment, but a provision for a future payment.[97]

88 Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227.

89 Aud v. Magruder, 10 Cal. 282.

90 Priest v. Bounds, 25 Cal. 188.

91 Welton v. Adams, 4 Cal. 37, 60 Am. Dec. 579; Price v. Dunlap, 5 Cal. 483.

92 Randolph v. Harris, 28 Cal. 561, 87 Am. Dec. 139. But see Wright v. Wright, 54 N. Y. 437. As to action on lost instrument, see Mowery v. Mast, 14 Neb. 510, 16 N. W. 839; Adams v. Baker, 16 R. I. 1, 27 Am. St. Rep. 721, 11 Atl. 168; O'Neil v. O'Neil, 123 Ill. 361, 14 N. E. 844.

93 Smith v. Holmes, 19 N. Y. 271; Maynard v. Talcott, 11 Barb. 569.

94 Peets v. Bratt, 6 Barb. 662; Maynard v. Talcott, 11 Barb. 569; Smith v. Holmes, 19 N. Y. 271; Keteltas v. Myers, 19 N. Y. 231.

95 Hellier v. Russell, 136 Cal. 143, 68 Pac. 581.

96 Radue v. Pauwelyn, 27 Mont. 68, 69 Pac. 557.

97 Bates v. Rosenkrans, 23 How.

§ 5383. **New promise.**—Where a creditor sues after the statute of limitations has run upon the original contract, or after a discharge in insolvency, his cause of action is not the original contract, but the new promise; and in such case the new promise must be pleaded.[98]

§ 5384. **Non-payment.**—In a complaint upon a promissory note, an allegation of its non-payment is material, and, if omitted, the complaint is demurrable.[99] The averment that there is a certain amount due upon the note is insufficient, being a statement of a mere conclusion of law.[100] And an allegation that defendant has refused, and still does refuse, to pay the principal or interest of the note, or any part thereof, and that there is now due plaintiff a certain sum, is insufficient.[101] The rule is stated to be that upon an ordinary contract for the payment of money non-payment is a fact which constitutes the breach of the contract, and is the essence of the cause of action, and must be alleged in the complaint.[102] An allegation in the complaint that "no part of said note, principal or interest, has been paid," is a sufficient averment of a breach.[103]

§ 5385. **Note held adversely.**—A party who claims to be the owner of a promissory note which is at the time in the possession of another claiming title thereto cannot maintain an action thereon, the maker being entitled to have it delivered up and canceled upon paying it. The title to the note could not be settled in such suit.[104]

§ 5386. **Negotiability.**—In Indiana, a promissory note made payable at a bank in that state having an actual existence is negotiable; if not so payable, it is assignable, but is not commercial paper;[105] and in an action brought thereon by a *bona fide*

Pr. 98. As to amendment of complaint alleging the time when the note sued upon is payable, see Tribune Pub. Co. v. Hamill, 2 Colo. App. 237, 30 Pac. 137.

98 McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170; Chabot v. Tucker, 39 Cal. 434; overruling Smith v. Richmond, 19 Cal. 476.

99 Notman v. Green, 90 Cal. 172, 27 Pac. 157; Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678.

100 Frisch v. Caler, 21 Cal. 71.

101 Scroufe v. Clay, 71 Cal. 123, 11 Pac. 882.

102 Lent v. New York etc. Ry. Co., 130 N. Y. 504, 510, 29 N. E. 988. Compare Andrews v. Moller, 37 Hun. 480; Turner v. Kouwenhoven, 100 N. Y. 115, 2 N. E. 637.

103 Jones v. Frost, 28 Cal. 245.

104 Crandall v. Schroeppel, 1 Hun, 557.

105 King v. Vance, 46 Ind. 246.

holder the maker is not estopped from showing that there was no such bank in existence.[106] A promissory note providing that it may be paid at any time before maturity, and that interest at eighteen per cent per annum shall be deducted till due, is not negotiable.[107] A note may be negotiable if payable certainly at a fixed time, although subject to a contingency under which it may become due earlier.[108] The current rate of exchange must be proved by extrinsic evidence; therefore, a promise to pay a sum certain, with the current rate of exchange added, is not a negotiable note.[109] The mere possession of a check will not justify a bank in making payment to the holder without some identification or evidence of the genuineness of the indorsement in question.[110]

§ 5387. Allegation of plaintiff's title.—The purchaser of a note at execution sale may sue on it in his own name, though it is defectively assigned to him by the sheriff, or not assigned at all, but his title should be alleged.[111] It is not necessary to allege that plaintiff was the owner or holder of the note at the commencement of the suit.[112] In an allegation on a note payable to a third person the right of plaintiff should be alleged.[113] And if the answer does not deny the allegation, defendant cannot prove that payee had no capacity to transfer.[114] Thus, in an action against one A. B. as the maker, and others as indorsers, of a promissory note, the complaint set forth a copy of the note signed A. B. & Co., upon which it alleged the defendants were indebted, etc. The word "signed" was prefixed to the name of the makers, and the word "indorsed" was prefixed

106 First Nat. Bank v. Grindstaff, 45 Ind. 158. See, also, Melton v. Gibson, 97 Ind. 158; De Pauw v. Bank of Salem, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46.

107 Way v. Smith, 111 Mass. 523.

108 Ernst v. Steckman, 74 Pa. St. 13, 15 Am. Rep. 542. Compare Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 12 Am. St. Rep. 860, 17 Atl. 603, 4 L. R. A. 190; Iron City Nat. Bank v. McCord, 139 Pa. St. 52, 23 Am. St. Rep. 166, 21 Atl. 143, 11 L. R. A. 559; Costelo v. Crowell, 127 Mass. 293, 34 Am. Rep. 367.

109 Lowe v. Bliss, 24 Ill. 168, 76 Am. Dec. 742; Hill v. Todd, 29 Ill. 101; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313; Windsor Sav. Bank v. McMahon, 38 Fed. 283, 3 L. R. A. 192.

110 Western Union Tel. Co. v. Bimetallic Bank, 17 Colo. App. 229, 68 Pac. 115; Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

111 Fishburn v. Londershausen, 50 Or. 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1234.

112 Graham v. Light, 4 Cal. App. 400, 88 Pac. 373.

113 Montague v. Reineger, 11 Iowa, 503; Bennett v. Crowell, 7 Minn. 385.

114 Robbins v. Richardson, 2 Bosw. 248.

to the name of the indorsers in the copy; but there was no other allegation that the defendants made or indorsed the note, except that it was alleged that the note was "written," and that it was passed to the plaintiff. It was held on demurrer that the making and indorsement should be deemed sufficiently alleged.[115] An allegation that a corporation indorsed and transferred and delivered to the plaintiffs the note sued on sufficiently implies that the transfer was made pursuant to a resolution of the board of directors, if such resolution is necessary. So an allegation that after the transfer the company became insolvent and was dissolved is an indirect statement that it was solvent when the transfer was made.[116] Yet all necessary allegations should be directly made.

§ 5388. **Allegation of ownership.**—The averment in the complaint that plaintiff is the owner of the note and mortgage in suit is a sufficient answer to a demurrer on the ground that it does not appear by the complaint that the plaintiff is the holder of the note.[117] That the defendant made his promissory note in writing, and thereby "promised to pay plaintiff," is sufficient to show that plaintiff is owner of the note.[118] If plaintiff is the payee of notes sued on, the complaint is not defective for failure to allege that he was the owner of the notes.[119] Where the only allegation of non-payment of a note sued on was a statement "that the whole of said note is owing from said defendants to said plaintiff," the complaint was demurrable for want of facts.[120] The averment that the plaintiff was owner of the note is not the averment of an issuable fact; it is the allegation of a legal conclusion, and is immaterial, and should be omitted.[121] For the plaintiff may recover without being the holder, as where

115 Phelps v. Ferguson, 9 Abb. Pr. 206; Lee v. Ainslie, 4 Abb. Pr. 463; Bank of Geneva v. Gulick, 8 How. Pr. 51.

116 Nelson v. Eaton, 15 How. Pr. 305; Taylor v. Corbiere, 8 How. Pr. 385. But see Montague v. King, 37 Miss. 441.

117 Rollins v. Forbes, 10 Cal. 300.

118 Moss v. Cully, 1 Or. 147, 62 Am. Dec. 301.

119 Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180.

120 Knox v. Buckman Contractor Co., 139 Cal. 598, 73 Pac. 428.

121 Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; approving Wedderspoon v. Rogers, 32 Cal. 569; Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337. See, also, Flammer v. Kline, 9 How. Pr. 216; Bank of Lowville v. Edwards, 11 How. Pr. 217; Mitchell v. Hyde, 12 How. Pr. 460; Keteltas v. Myers, 19 N. Y. 231; Farmers' etc. Bank v. Wadsworth, 24 N. Y. 547; Niblo v. Harrison, 7 Abb.

the note has been destroyed or lost;[122] or as where the note is in possession of defendant.[123] In such cases he may sue, if he is the real party in interest, as a purchaser at execution sale,[124] a trustee of an express trust, or a person authorized by statute.[125] Although an allegation in an action upon a note that the "plaintiff is now the holder and owner of the said promissory note" is not sufficient in itself to show ownership in the plaintiff, yet where it is also alleged that the note when made was delivered to the payee named therein, and that thereafter such payee for value, and before maturity, assigned the note by indorsing the same in blank on the back thereof, such allegation, taken in connection with the allegation of possession, is sufficient to show the plaintiff's title.[126] A complaint alleging transfer, ownership, and possession of a note not indorsed, though vague and uncertain, may be sufficient after answer to admit of proof of the source of plaintiff's title.[127] Ownership is presumed to be in the person who has possession of the note.[128]

An allegation that the note sued on was assigned, transferred, delivered, and indorsed to the plaintiff is a sufficient allegation that it was transferred to the plaintiff by the owner.[129] A complaint showing title in the plaintiff, as assignee of a bank, to the notes sued on, and alleging that he is the lawful owner and holder of them, sufficiently shows his right to recover on the notes.[130] But in an action by the payee of a note against the maker a complaint alleging that the payee assigned said note to a certain bank as security for a loan, and that the bank, though requested thereto, refuses to bring suit after the maturity of said note, fails to show a right of action in the plaintiff.[131] A promissory note payable to the "order of A. B., or bearer," is payable to bearer, and suit can be maintained thereon in the name

Pr. 447; Skinner v. Stuart, 13 Abb. Pr. 442; Ohio etc. Co. v. Goodin, 1 Handy, 31.

122 Board of Supervisors v. White, 30 Barb. 72; Des Arts v. Leggett, 16 N. Y. 582.

123 Smith v. McClure, 5 East, 476; Selden v. Pringle, 17 Barb. 458.

124 Fishburn v. Londershausen, 50 Or. 363, 92 Pac. 1060, 14 L. R. A. (N. S.) 1234.

125 Root v. Price, 22 How. Pr. 372; Butterfield v. Macomber, 22 How. Pr. 150.

126 Eames v. Crosier, 101 Cal. 260, 35 Pac. 873. See Pryce v. Jordan, 69 Cal. 569, 11 Pac. 185; Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449.

127 Sturgis v. Baker, 43 Or. 236, 72 Pac. 744.

128 Berry v. Barton, 12 Okla. 221, 71 Pac. 1074, 66 L. R. A. 513.

129 Oishei v. Craven, 31 N. Y. Supp. 1021.

130 Geilfuss v. Gates, 87 Wis. 395, 58 N. W. 742.

131 Davis v. Erickson, 3 Wash. 654, 29 Pac. 86.

of any holder.[132] A transferee for collection may sue in his own name.[133] A complaint in an action on a note which avers the execution and delivery of the note for a valuable consideration, stating the date, consideration, parties, principal sum, rate of interest, the amount due and unpaid, and that the plaintiffs are now the owners thereof and entitled to receive the money due and unpaid thereon, and have not indorsed or transferred said note, but that the same since its maturity has been lost, states a cause of action.[134]

§ 5389. **Parties.**—Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.[135] Where the payee of a note transfers it under a written contract, whereby the holder agrees to collect the note for the benefit of himself and the payee, in a suit on the note by the holder the payee is improperly joined as defendant, his interest not being adverse to plaintiff.[136]

§ 5390. **Presentment.**—In an action against the maker of a note or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay.[137] But the averment of presentment and demand of note at the place specified is necessary to charge an indorser.[138]

§ 5391. **Real party in interest.**—If the holder of a promissory note legally has its possession, and is entitled to receive its payment, he is the proper plaintiff in its prosecution, and this without reference to the party who may ultimately be en-

132 Bitzer v. Wagar, 83 Mich. 223, 47 N. W. 210.

133 Meyer v. Foster, 147 Cal. 166, 81 Pac. 402; Eagle Min. etc. Co. v. Lund (N. Mex.), 94 Pac. 949.

134 Schuttler v. King, 13 Mont. 226, 33 Pac. 938. See Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; Graves v. Drane, 66 Tex. 658, 1 S. W. 905.

135 Cal. Code Civ. Proc., § 383.

136 New Blue Springs Milling Co. v. De Witt, 65 Kan. 665, 70 Pac. 647.

137 Montgomery v. Tutt, 11 Cal. 307.

138 Gay v. Paine, 5 How. Pr. 107; Ferner v. Williams, 14 Abb. Pr. 215; United States Bank v. Smith, 11 Wheat. 171, 6 L. Ed. 443; Woodworth v. Bank of America, 19 Johns. 419, 10 Am. Dec. 239.

titled to a participation in its proceeds.[139] But either the pledgor or the pledgee may sue, though the note be in the hands of the pledgee, who is then a necessary party.[140] Where, on the dissolution of a partnership, the outgoing partner takes from a debtor a note, in which are included debts due to each partner individually and to the firm, and after the outgoing partner's death his executrix turns the note over to the surviving partner, the latter may maintain suit thereon as administrator of the partnership estate, though the code provides that every suit shall be prosecuted in the name of the real party in interest.[141]

§ 5392. **Rate of interest.**—On a note made in another state, and bearing higher interest than is lawful by the law of the forum, the foreign statute need not be pleaded; for the court may presume that the common law, by which any rate of interest is lawful, prevails in the law of the place of the contract.[142]

§ 5393. **Substitute notes.**—A complaint in stating a cause of action is not deficient because, after alleging valid notes, it states that they were given up and canceled on the giving by defendant of new notes in which usurious interest was reserved for the extension of time. The plaintiff may in such case recover upon the original notes.[143]

§ 5394. **Value received.**—The legal effect of a promissory note is the same with or without the words "value received."[144] Where a note sued on was incorporated in a complaint as a part thereof, and contained the words "value received," the complaint was not defective for failure to allege a consideration for the paper.[145]

139 Williams v. Brown, 2 Keyes, 486; Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970; Harpending v. Daniel, 80 Ky. 449; Or. B. & C. Comp. Stats., § 27; First Nat. Bank v. McCullough, 50 Or. 508, 126 Am. St. Rep. 758, 93 Pac. 366, 17 L. R. A. (N. S.) 1105.

140 Graham v. Light, 4 Cal. App. 400, 88 Pac. 373.

141 Overholt v. Dietz, 43 Or. 194, 72 Pac. 695.

142 Buckinghouse v. Gregg, 19 Ind. (Kerr) 401.

143 Winsted Bank v. Webb, 39 N. Y. 325, 100 Am. Dec. 435. See Patterson v. Birdsall, 64 N. Y. 294, 21 Am. Rep. 609.

144 People v. McDermott, 8 Cal. 288; Carnwright v. Gray, 127 N. Y. 92, 24 Am. St. Rep. 424, 27 N. E. 835, 12 L. R. A. 845.

145 Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180.

§ 5395. Verbal conditions.—In Indiana,[146] it was held that a verbal condition could not be annexed to a promissory note; but in New York [147] it was held that a bill or note may be delivered to the person beneficially interested therein, upon conditions the observance of which is essential to its validity; and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it or others having notice.

§ 5396. Void notes.—Notes given for a gaming consideration are valid in the hands of a *bona fide* indorsee.[148] A negotiable note the consideration of which is against public policy becomes valid in the hands of an innocent holder before maturity.[149] A promissory note given for the release of property seized for a toll imposed by the state law, on lumber floated down a stream from that state into another, is void for want of consideration.[150] Where a note was given for the exclusive right to manufacture, use, and sell for use a patented invention in a specified territory for a particular period of time, and the words "given for a patent right" were not inserted therein, as required by statute, making a violation thereof punishable by fine and imprisonment, an answer alleging such facts was not demurrable, since, if they were true, the note was void.[151]

§ 5397. When due.—When days of grace are allowed, the day on which the note became due is excluded from the computation.[152] And the maker has all of the last day on which his note falls due to pay it, and suit commenced thereon on that day is premature.[153] A promissory note payable generally, without specifying any time, is due immediately.[154]

146 Potter v. Earnest, 45 Ind. 416.

147 Benton v. Martin, 52 N. Y. 570.

148 Haight v. Joyce, 2 Cal. 64, 56 Am. Dec. 311. See Tyler v. Carlisle, 79 Me. 210, 1 Am. St. Rep. 301, 9 Atl. 356; Sondheim v. Gilbert, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687, 5 L. R. A. 432; Snoddy v. American Nat. Bank, 88 Tenn. 573, 17 Am. St. Rep. 918, 13 S. W. 127, 7 L. R. A. 705.

149 Thorne v. Yontz, 4 Cal. 321.

150 Carson R. L. Co. v. Patterson, 33 Cal. 334.

151 Pinney v. First Nat. Bank, 70 Kan. 879, 78 Pac. 151.

152 Story on Promissory Notes, § 217; Chitty on Bills, 403; Bailey on Bills, 245. See Heise v. Bumpass, 40 Ark. 545; Hamilton Gin Co. v. Sinker, 74 Tex. 51, 11 S. W. 1056; Benson v. Adams, 69 Ind. 353, 35 Am. Rep. 220.

153 Wilcombe v. Dodge, 3 Cal. 260, 58 Am. Dec. 411. See Davis v. Eppinger, 18 Cal. 381, 79 Am. Dec. 184; Bell v. Sackett, 38 Cal. 407.

154 Holmes v. West, 17 Cal. 623;

§ 5398. **Causes of action.**—It would seem that several notes are several causes of action, and must be separately stated.[155] But it appears the contrary is held in Iowa.[156]

§ 5399. **Action on note executed by agent.**—A complaint averring that the principal, by his agent, made a promissory note is good.[157] It is not necessary to allege "agreed to deliver, and did make and deliver, to the plaintiffs," because the copies are annexed, showing possession in the plaintiff of the said notes, and because "made" implies delivery.[158] But it has been held that in the common counts it is not necessary to state that the defendants acted by an agent, but that an averment that the act was the act of the defendants would be supported by proof of the act of their agent;[159] that the want of authority to execute the note is then a matter of defense.[160] Evidence as to the authority of the cashier of a bank to transfer a negotiable note and corporate stock deposited as collateral security thereon is immaterial.[161] Where the pleading shows, by setting out a copy of the instrument, that the act was by an agent, his authority should be averred.[162] The ratification by a principal of an unauthorized act of an agent has a retroactive efficacy, and, being equivalent to an original authority, an allegation of due authority is sustained by proof of such ratification.[163] Where it is claimed that in the execution and delivery of a note the maker acted as agent for another, an action thereon cannot be maintained against both the alleged principal and agent.[164]

§ 5400. **The same—How alleged.**—The signature of a note, in the name of a firm, by a partner, may be alleged as made by

O'Neil v. Magner, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876; Cousins v. Partridge, 79 Cal. 228, 21 Pac. 745.

155 Van Namee v. Peoble, 9 How. Pr. 198; Dorman v. Kellam, 4 Abb. Pr. 202.

156 Merritt v. Nihart, 11 Iowa, 57; Ragan v. Day, 46 Iowa, 239.

157 Childress v. Emory, 8 Wheat. 642, 5 L. Ed. 705; Sherman v. Comstock, 2 McLean, 19, Fed. Cas. No. 12764. Compare Wilson v. Porter, 2 Cranch C. C. 458, Fed. Cas. No. 17827.

158 Brown v. Southern Michigan R. R. Co., 6 Abb. Pr. 237.

159 Sherman v. New York Cent. R. R. Co., 22 Barb. 239; Santa Rosa Bank v. Paxton, 149 Cal. 195, 86 Pac. 193.

160 McKinley v. Mineral Hill Consol. Min. Co., 46 Wash. 162, 89 Pac. 495.

161 Carson v. Old Nat. Bank, 37 Wash. 279, 79 Pac. 927.

162 McCullough v. Moss, 5 Denio, 567.

163 Hoyt v. Thompson's Exrs., 19 N. Y. 207; Wash. State Bank v. Dickson, 35 Wash. 641, 77 Pac. 1067.

164 First Nat. Bank v. Turner, 24 N. Y. Supp. 793.

the firm. It is sufficient to set forth a writing according to its legal effect.[165] All the joint makers of a promissory note are principals;[166] and suit must be brought against them all.[167]

§ 5401. **As receiver.**—The act should be averred as that of the party as such receiver.[168] Where, however, the plaintiff's character is once sufficiently stated, the word "plaintiff" in subsequent parts of the pleading requires no addition to the description.

§ 5402. **Partnership.**—An averment that the note was indorsed by the defendants under a certain name and description is sufficient.[169] In an action by a copartnership on a promissory note alleged to have been executed to the firm, one of the plaintiffs cannot recover a personal judgment upon proof that the note was executed to him individually.[170] Where the fact of partnership is likely to be drawn in question, it is better to aver the fact distinctly.[171] The denial of the copartnership of the plaintiffs is immaterial unless the defendant denies the execution of the note.[172] Where, on the dissolution of a partnership, the outgoing partner takes from a debtor a note, in which are included debts due to each partner individually and to the firm, and after the outgoing partner's death his executrix turns the note over to the surviving partner, the latter may maintain suit thereon as administrator of the partnership estate, though the code provides that every suit shall be prosecuted in the name of the real party in interest.[173]

§ 5403. **Corporation.**—"The president, by the order of the board of the A. B. Co., promises to pay," etc., signed "C. D., Pres., E. F.," et al., binds the individuals signing, and not the corporation.[174] "The president and directors of the A. B. Co.

165 Manhattan Co. v. Ledyard, 1 Caines, 192; Vallett v. Parker, 6 Wend. 615; Bass v. Clive, 4 Camp. 78.

166 Shriver v. Lovejoy, 32 Cal. 574.

167 Woodworth v. Spafford, 2 McLean, 168, Fed. Cas. No. 18020; Keller v. Blasdel, 1 Nev. 491.

168 Merritt v. Seaman, 6 N. Y. 168; Smith v. Levinus, 8 N. Y. 472. Gould v. Glass, 19 Barb. 179.

169 Kendall v. Freeman, 2 McLean, 189, Fed. Cas. No. 7692; Davis v. Abbott, 2 McLean, 29, Fed. Cas. No. 3622.

170 Weinreich v. Johnson, 78 Cal. 254, 20 Pac. 556.

171 Oechs v. Cook, 3 Duer, 161.

172 Whitwell v. Thomas, 9 Cal. 499.

173 Overholt v. Dietz, 43 Or. 194, 72 Pac. 695.

174 Caphart v. Dodd, 3 Bush, 584, 96 Am. Dec. 258.

will pay," etc., signed "C. D., Pres., E. F.," et al., does not bind the individuals signing, but only the corporation.[175]

§ 5404. **Insurance company.**—In an action by the indorsees against the maker of a note, of which an insurance company was the payee and indorser, the complaint showed that the defendant made his note to the insurance company, or order, and that the company indorsed it, and transferred and delivered it to the plaintiffs, but it did not expressly aver that the transfer was made pursuant to a resolution of the board of directors. It was held sufficient on demurrer. If such resolution was necessary, it was implied and provable under the allegation that the company transferred the note. But that is not true if the transfer was not made by the proper officer, and according to law.[176] Delivery of an insurance policy to the maker of a promissory note is sufficient consideration for the indorsement thereof by the payee.[177]

§ 5405. **Power of corporation to make note.**—In the absence of any prohibitory statute, a corporation may give a note for a debt contracted in the course of its legitimate business.[178] *Prima facie,* a corporation has power to take a promissory note.[179] An action may be maintained against a corporation directly on a note given by it, originally invalid, but subsequently validated by the conduct of the corporation.[180] Where there is nothing on the face of the note to show that it was issued contrary to law, or that the consideration or the purpose was illegal, the presumption is that it was given for a lawful purpose.[181]

§ 5406. **When action lies—Allegations.**—A joint action at law cannot be maintained against the survivor and administrator of

175 Yowell v. Dodd, 3 Bush, 581, 96 Am. Dec. 256. See Casco Nat. Bank v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908.

176 Nelson v. Eaton, 15 How. Pr. 305.

177 Muller v. Swanton, 140 Cal. 249, 73 Pac. 994.

178 Mott v. Hicks, 1 Cow. 513, 532, 13 Am. Dec. 550; Moss v. Oakley, 2 Hill, 665; Attorney-General v. Life etc. Ins. Co., 9 Paige, 470; Kelley v. Mayor etc. of Brooklyn, 4 Hill, 263; McCullough v. Moss, 5 Denio, 567; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318; Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

179 Mutual Benefit Life Ins. Co. v. Davis, 12 N. Y. 569.

180 Curtin v. Salmon River Hydraulic Gold Min. etc. Co., 141 Cal. 308, 99 Am. St. Rep. 75, 74 Pac. 851.

181 Safford v. Wyckoff, 4 Hill, 442; Barker v. Mechanics' Fire Ins. Co., 3 Wend. 94, 20 Am. Dec. 664. That a corporation has no implied power to become a party to bills or notes for the

the deceased maker of a promissory note. The rule in equity has been that the estate of a deceased joint obligor could only be reached when the survivor was bankrupt or insolvent.[182] But in New Mexico, the payee of a joint and a several note may look to either of the joint makers, and where one of them dies the payee is not compelled to pursue his remedy against the estate of the deceased; nor is his action barred because the time has expired wherein he might have presented his claim against the estate. Where an action is brought against two, as the survivors of one who executed a joint note, it is not essential to allege in the declaration that the note was not paid by the deceased.[183]

§ 5407. **Consideration.**—When the consideration passing between the indorsee and his indorser is not equal to the amount of the paper, the indorsee, as against his indorser, can recover only the amount of consideration he has paid.[184] The indorsement, as well as the making of a note, imports a consideration.[185] The phrase in a declaration on a note that the plaintiff received it "before maturity, *bona fide,* and in due course of trade," means that he took it for value.[186]

§ 5408. **Indorsement by firm.**—An indorsement or signature of a note in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect.[187] So, also, of joint makers not alleged to be partners.[188] It is sufficient in such cases to allege, generally, that M. N. & Co. indorsed it.[189] In an action by an indorsee against the makers of a note, the note, and not the indorsement, is the contract constituting the cause of action. And it is suffi-

accommodation of others, see National Park Bank v. German-American etc. Security Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673.

182 Maples v. Geller, 1 Nev. 233.

183 Silver v. Henderson, 3 McLean, 165, Fed. Cas. No. 12854. But see Winter v. Simonton, 3 Cranch C. C. 62, Fed. Cas. No. 17893.

184 Coye v Palmer, 16 Cal. 158.

185 Hughes v. Wheeler, 8 Cow. 77; Cruger v. Armstrong, 3 Johns. Cas. 5, 2 Am. Dec. 126; Conroy v. Warren, 3 Johns. Cas. 259, 2 Am. Dec. 156; Safford v. Wyckoff, 4 Hill, 442; Nelson v. Cowing, 6 Hill, 336; Wheeler v. Guild, 20 Pick. 550, 32 Am. Dec. 231; Collins v. Martin, 1 Bos. & P. 648; Luning v. Wise, 64 Cal. 410, 1 Pac. 495, 874.

186 Miller v. Mayfield, 37 Miss. 688.

187 Manhattan Co. v. Ledyard, 1 Caines, 192, Coke & C. Cas. 226; Vallett v. Parker, 6 Wend. 615; Bass v. Clive, 4 Camp. 68.

188 Mack v. Spencer, 4 Wend. 411.

189 Cochran v. Scott, 3 Wend. 229; Bacon v. Cook, 1 Sandf. 77. See Low v. Warden, 77 Cal. 94, 19 Pac. 235.

cient to aver in the complaint that the note was indorsed by the payee to the holder, without setting forth the indorsement.[190]

§ 5409. **Owner.**—The holder of a negotiable paper indorsed before maturity is supposed to be the *bona fide* owner of the same, and all intendments are in his favor.[191] Nor is it necessary that he should show how he became possessed of the note.[192] His right to maintain the action cannot be questioned on the ground that the note belongs to a third party, except defendant pleads payment to or offset against that party.[193] The pledgor of a note may sue on it while still in possession of the pledgee, but the pledgee is a necessary party to the action.[194] So it has been decided that the possession obtained before or after maturity is *prima facie* evidence of ownership.[195] It is no objection to a recovery that title be shown out of the payee by special indorsements, without any retransfer from the last indorsee, if there be proof that the indorsees had no interest in it.[196] An allegation that the plaintiff (indorsee) is owner, or owner and holder, is unnecessary, since, when title is shown, a denial that he is the lawful owner and holder is frivolous.[197]

§ 5410. **Accommodation indorsement.**—Where a promissory note was indorsed by a third person before delivery to the payee, it was held that such indorsement was *prima facie* an accommodation to the payee, but proof that his design was to become a surety or guarantor would make him liable to the payee.[198] Where a promissory note made payable to S., and previous to its delivery to payee was indorsed for the accommodation of the maker by H. and brother, and defendant, upon agreement that each would become surety if the other would, they were guarantors jointly and not severally liable. To create a several liability, express words are necessary.[199]

190 Bascom v. Toner, 5 Ind. App. 229, 31 N. E. 856. See Pryce v. Jordan, 69 Cal. 569, 11 Pac. 185.

191 Palmer v. Goodwin, 5 Cal. 458; Spencer v. Carstarpenphen, 15 Or. 445; Wulschner v. Sells, 87 Ind. 71; Best v. Nokomis Nat. Bank, 76 Ill. 608; Himmelman v. Hotaling, 40 Cal. 111, 5 Am. Rep. 600.

192 Id.

193 Price v. Dunlap, 5 Cal. 483.

194 Graham v. Light, 4 Cal. App. 400, 88 Pac. 373.

195 McCann v. Lewis, 9 Cal. 246.

196 Naglee v. Lyman, 14 Cal. 450.

197 Catlin v. Gunter, 1 Duer, 253; Fleury v. Roget, 5 Sandf. 646; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Felch v. Beaudry, 40 Cal. 439.

198 Clarke v. Smith, 2 Cal. 605.

199 Brady v. Reynolds, 13 Cal. 31.

§ 5411. Demand, how made and alleged.—Payment of the note must be first properly demanded of the makers, and due notice given to the indorser, before any legal liability attaches to the latter; and it is incumbent upon the pleader to state these facts.[200] As against the indorser, an averment of demand at the place designated is deemed necessary.[201] If there are stated business hours at the place where it is made payable, presentment and demand must be made within those hours.[202] If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused.[203] But if payable at sight or on demand, with interest, mere delay in presenting does not exonerate any party thereto.[204] The failure to make presentment and demand would not discharge the debt, but would only affect the question of costs and damages.[205] In an action against the indorser of a bill or note, an allegation of a demand in general terms, "although often requested," etc., is good after verdict.[206] But if the note was made payable at a particular place, an allegation as in the given form[206a] is a sufficiently specific averment of demand and notice. The contract of the indorser of a promissory note is a written one, and his liability a conditional one, to pay upon a proper demand and notice,[207] upon a demand upon the maker made within a reasonable time, and that in the event of his failure to do so, the indorser will pay.[208] And the contract cannot be changed from a conditional to an absolute contract by parol evidence.[209]

§ 5412. Demand and notice, allegation of excuse of omission of.—An express waiver of notice of non-payment is sufficient excuse of demand and notice of non-payment.[210] And this may be

200 Conklin v. Gandall, 1 Keyes, 228. See Pahquioque Bank v. Martin, 11 Abb. Pr. 291; Parker v. Stroud, 98 N. Y. 379, 50 Am. Rep. 685.

201 Bank of United States v. Smith, 11 Wheat. 171, 6 L. Ed. 443. See Cal. Civ. Code, § 3131. See, also, Applegarth v. Abbott, 64 Cal. 459, 2 Pac. 43; Brown v. Jones, 113 Ind. 46, 3 Am. St. Rep. 623, 13 N. E. 857; Farwell v. St. Paul Trust Co., 45 Minn. 495, 22 Am. St. Rep. 742, 48 N. W. 326.

202 McFarland v. Pico, 8 Cal. 626.

203 Cal. Civ. Code, § 3248.

204 Cal. Civ. Code, §§ 3214, 3247.

205 Montgomery v. Tutt, 11 Cal. 307.

206 Leffingwell v. White, 1 Johns. Cas. 99, 1 Am. Dec. 97.

206a See, post, § 5540, form No. 1557.

207 Goldman v. Davis, 23 Cal. 256.

208 Keyes v. Fenstermaker, 24 Cal. 329.

209 Goldman v. Davis, 23 Cal. 256.

210 Matthey v. Gally, 4 Cal. 62, 60 Am. Dec. 595; Minturn v. Fisher, 7 Cal. 573.

done by an agent of the indorser, and a verbal waiver of demand, or of demand and notice, may be proved.[211] But the declaration of the indorser, made to a third person, "that notice not having been given at the proper time would make no difference to him, and that he would do what was right," is not a waiver.[212] The fact that the maker of a note, before its maturity, notifies the president of a bank in which it was left for collection that he would not be able to pay it at maturity, does not excuse the holder from presenting it for payment so as to charge the indorsers.[213] Where payment by the maker to the indorser is relied upon as an excuse, it must be payment directly and specifically for the note, not as security for transactions in the aggregate.[214] If the waiver was before maturity, it operates as an estoppel to the indorser from denying that demand was made and notice given; and evidence of such waiver is admissible under the averment of demand and notice.[215]

§ 5413. **Indorsement, averment of.**—An averment in the declaration that the note was indorsed by the defendants under a certain name and description is sufficient. Where a contract shows a joint liability, it is unnecessary to allege a partnership.[216]

The fact of the indorsement only need be pleaded to show title in the plaintiff, and an averment that the plaintiff is the owner and holder is a conclusion of law, and need not be pleaded.[217] Where an indorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus indorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these facts, and also an allegation that this indorsement was thus made for the purpose of guaranteeing the note, was properly overruled.[218] In an action against a corporation as indorsers, it need not be averred that the note was in-

211 See Mills v. Beard, 19 Cal. 158.

212 Olendorf v. Swartz, 5 Cal. 480, 63 Am. Dec. 141. See further, as to waiver, Pool v. Anderson, 116 Ind. 88, 18 N. E. 445, 1 L. R. A. 712; Shaw v. McNeil, 95 N. C. 535.

213 Applegarth v. Abbott, 64 Cal. 459, 2 Pac. 43.

214 Van Norden v. Buckley, 5 Cal. 283.

215 Holmes v. Holmes, 9 N. Y. 525; Coddington v. Davis, 1 N. Y. 186. See Cal. Civ. Code, § 3156.

216 Kendall v. Freeman, 2 McLean, 189, Fed. Cas. No. 7692; Davis v. Abbott, 2 McLean, 29, Fed. Cas. No. 3622.

217 Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90.

218 Rey v. Simpson, 22 How. 341, 16 L. Ed. 260.

dorsed by the defendants in the course of their legitimate business.[219]

§ 5414. **Fraudulent indorsement.**—Where a bank, having received a deposit to the credit of a certain person, mistakenly wrote another person that a deposit had been made to his credit, and he immediately showed the letter to plaintiff, who had known him for over two years, and wrote requesting a draft for the amount of deposit, which was sent, and he indorsed it to plaintiff, who paid him the amount thereof, it was held that, between plaintiff and the bank, the latter was liable for the loss, even if the indorsement was a forgery. His indorsement did not amount to forgery.[220] Where the maker of a note payable to himself is induced by a fraudulent trick to indorse it, without knowledge on his part of having in fact indorsed it, and without having had any intention to indorse it at the time the indorsement was obtained, he is not liable thereon, even to a *bona fide* holder.[221]

§ 5415. **Indorsement, effect of.**—The presumption is that the indorsee of a promissory note is the holder thereof for value,[222] and entitled to receive payment;[223] but under the provisions of the Code of Procedure of Colorado, a note payable to order may be transferred by delivery only, without indorsement; and hence, in an action on such a note by an indorsee, plaintiff may recover without transfer of the note.[224] Where a promissory note is indorsed in blank, the title and right of action pass by delivery, and the note is payable to the bearer.[225] An unlawful diversion is not to be presumed, but negotiation to a *bona fide* holder may be presumed, where the paper bears the blank indorsement of the defendant.[225a] An agent who has received a promissory note by indorsement, holds the title as against all persons thereto except the principal, and may maintain an action thereon in his own name.[226]

219 Mechanics' Banking Assoc. v. Spring Valley Shot etc. Co., 25 Barb. 419; Nelson v. Eaton, 15 How. Pr. 305.

220 Heavy v. Commercial Nat. Bank, 27 Utah, 222, 101 Am. St. Rep. 966, 75 Pac. 727.

221 Yakima Valley Bank v. McAllister, 37 Wash. 566, 107 Am. St. Rep. 823, 79 Pac. 1119, 1 L. R. A. (N. S.) 1075.

222 Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90.

223 Lodge v. Lewis, 32 Wash. 191, 72 Pac. 1009.

224 Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103.

225 Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90.

225a Rice v. Isham, 1 Keyes, 44.

226 Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90.

§ 5416. Notice to charge indorser.—Notice of demand as well as of non-payment should be alleged.[227] And this is so, although the note was past due when the defendant indorsed it.[228] A general averment of notice of all the premises is sufficient.[229] Where a note is due on the first of July, the fourth being a non-judicial day, notice of protest on the third is premature, and will not charge the indorser.[230] In California, whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.[231] If much time intervenes between demand and notice in transfers after maturity, the question may arise whether the delay has not released the indorser.[232] When demand of payment is made upon the maker of a note payable on demand, notice of demand and non-payment must be given to the indorser within the same time which is required in the case of a bill made payable at a particular day; and it should be made on the day following the demand, unless good reason exists for not doing so.[233] An indorser who signs his name under the words, "holden on the within note," is entitled to notice of demand and non-payment.[234]

§ 5417. Notice, how given.—Notice should be personally served, if the indorser resides in the same city, and in such case service through the post-office is not sufficient.[235] To charge an indorser, it is not necessary to show that the notice of dishonor was actually received by him, nor even that it was addressed to him at his place of residence.[236] Notice left by a notary at the residence of the indorser, he being at the time absent, but not signed by any one, is insufficient to charge the indorser.[237] If the notary, in good faith, uses due diligence, and acts upon information from proper parties in mailing his notice, the indorser

227 Pahquioque Bank v. Martin, 11 Abb. Pr. 291; Clift v. Rodger, 25 Hun, 39; Cook v. Warren, 88 N. Y. 37.

228 Alleman v. Bowen, 15 N. Y. Supp. 318; Eisenlord v. Dillenback, 15 Hun, 23.

229 Boot v. Franklin, 3 Johns. 207.

230 Toothaker v. Cornwall, 3 Cal. 144.

231 Cal. Civ. Code, § 11.

232 Thompson v. Williams, 14 Cal. 160.

233 Keyes v. Fenstermaker, 24 Cal. 329.

234 Vance v. Collins, 6 Cal. 435.

235 Id. But see Cal. Civ. Code, § 3144.

236 Garver v. Downie, 33 Cal. 176.

237 Klockenbaum v. Pierson, 16 Cal. 375.

will be charged, notwithstanding the notice may be sent to the wrong place and never reach him.[238] Notice of protest of a note left at the house in Washington of a member of Congress, after Congress had adjourned, and he had left the city, as was his custom at such times, and his domicile was in the district he represented, and his Washington house was occupied by strangers, by his permission, who did not pay rent, is not sufficient.[239]

§ 5418. **Notice, sufficiency of.**—A notice is sufficient if from it it can be reasonably inferred that the note was presented and dishonored;[240] but if it state that the demand was made on a day subsequent to maturity, it will not bind the indorsers.[241] The certificate need not state the form of notice given, as any notice is sufficient which informs the party, either by express terms or by implication.[242] Whether verbal or written, and even without description of the note, if at the time of receiving notice he knew the paper referred to, it is sufficient.[243] Where notes are indorsed before maturity, the notice must state the time of the demand and dishonor; but it is otherwise where the note was indorsed after maturity. A notice by the holder that he had "demanded payment of that note," implies a demand of the maker; and the declaration that he intended to look to the indorser for payment implies non-payment.[244] Under a note providing that upon failure to pay any installment the whole sum should, at the option of the holder of the note, immediately become due, the holder has a reasonable time in which to make and exercise the option.[245]

§ 5419. **Notice, how alleged.**—Where the complaint against the indorser of a note alleges due demand, non-payment, and protest, and that due notice of such non-payment and protest was given, it is sufficient, without averring notice of demand also.[246]

238 Garver v. Downie, 33 Cal. 176.

239 Bayly's Admr. v. Chubb, 16 Gratt. 284. As to service of notice under the California statute, see Civ. Code, § 3144.

240 Stoughton v. Swan, 4 Cal. 213, 60 Am. Dec. 605; Cal. Civ. Code, § 3143.

241 Tevis v. Wood, 5 Cal. 393.

242 McFarland v. Pico, 8 Cal. 626.

243 Thompson v. Williams, 14 Cal. 160. That notice may be given verbally, see Pierce v. Schaden, 55 Cal. 406.

244 Thompson v. Williams, 14 Cal. 160.

245 Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620.

246 Spencer v. Rogers Locomotive Works, 17 Abb. Pr. 110.

A general averment of due notice is sufficient to charge an indorser.[247] "That the note, on the day it matured, was presented for payment at the banking-house of . . ., and payment thereof demanded, and thereupon the same was duly protested for nonpayment," is a sufficient notice of demand, refusal, and nonpayment to charge the indorser.[248]

But a complaint seeking to charge an indorser by notice of protest which shows upon the face of the pleading that the note was not in fact presented at maturity to the maker, but seeks to excuse the presentment merely upon the ground that the maker could not be found in the place at which the note was dated, and states no facts respecting the knowledge of the indorsees or their agents as to the actual place of residence or business of the maker of the note, and not alleging what was such last-known place of residence or business, or that an inquiry or presentment was made thereat, is held insufficient to charge the indorser.[249]

§ 5420. **Presentment.**—An averment that at maturity the notes were duly presented for payment to the makers is, upon demurrer, a sufficient averment of a presentment at the place specified in the notes.[250] Nor need it be shown by whom it was presented,[251] nor to whom it was presented, if to an agent of the payor, such being a matter of proof.[252] An allegation of presentment by a bank does not imply ownership, but at most a holding as agent for another.[253] Where it was alleged in a declaration that a note when due was presented to the bank for payment, to-wit, on the 23d of July, 1841, it was held that the statement of the date, being inconsistent with the allegation that the note was presented when due, should be rejected as surplusage.[254] If a waiver of presentment, demand, and notice is not pleaded in the complaint, it is inadmissible in evidence.[255]

247 Firth v. Thrush, 8 Barn. & Cress. 387, 2 Man. & R. 359; Dwight v. Wing, 2 McLean, 580, Fed. Cas. No. 4219; Smith v. McEvoy, 8 Utah, 58, 29 Pac. 1030.

248 Eastman v. Turman, 24 Cal. 379.

249 Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

250 Ferner v. Williams, 37 Barb. 9, 14 Abb. Pr. 215.

251 Boehm v. Campbell, Gow. 55, 5 Eng. Com. L. R. 459. See Hunt v. Maybee, 7 N. Y. 266.

252 Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620.

253 Farmers' etc. Bank v. Wadsworth, 24 N. Y. 547.

254 Hyslop v. Jones, 3 McLean, 96, Fed. Cas. No. 6990.

255 Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113.

§ 5421. Presentment and demand.—Where the addressee and payee of a check sent by mail never received the same, and it was paid by the drawee on a forged indorsement, a demand of payment by the payee was, in legal contemplation, as agent of the owner of the check, and was a good demand.[256] Where a check was paid by the drawee on a forged indorsement, a subsequent verbal demand of payment by the payee was good without a physical presentation of the check, the possession of the check by the drawee obviating the necessity of such presentation.[257] Where, on the day when a note was due, the indorsers thereof signed a provision on the note waiving demand, notice of protest, and protest, no consideration was necessary to uphold such waiver.[258]

To charge an indorser of a note payable on demand, presentment must be made within a reasonable time, and what constitutes a reasonable time depends upon the facts of each particular case. If delay has occurred, the holder must aver and prove the circumstances excusing the delay.[259] In case of indorsement of an overdue note, demand and notice should be made and given at least within the time for demand and notice in case of a note payable on demand.[260] A delay of thirteen months was held unreasonable.[261] After presentment and demand, the liabilities of the parties become fixed.[262] But the presentment and demand must be made in reasonable hours; and reasonable hours depend upon the question whether or not the bill is payable at a bank or elsewhere.[263] And when a promissory note is protested, the protest must be attended with all the incidents of a foreign bill of exchange.[264] Presentment of a note to a joint maker is excused if at the time of the execution and maturity of the note such maker resided in a state other than that in which payment should be made.[265]

§ 5422. Allegation of excuse for non-presentment—Maker not found.—When the maker of the note cannot be found, the follow-

256 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

257 Id.

258 Delsman v. Friedlander, 40 Or. 33, 66 Pac. 297.

259 Keyes v. Fenstermaker, 24 Cal. 329.

260 Beer v. Clifton, 98 Cal. 323, 35 Am. St. Rep. 172, 33 Pac. 204, 20 L. R. A. 580. See Smith v. Caro, 9 Or. 278; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75.

261 Jerome v. Stebbins, 14 Cal. 457.

262 McFarland v. Pico, 8 Cal. 626.

263 Id.

264 Tevis v. Randall, 6 Cal. 632, 65 Am. Dec. 547.

265 Luning v. Wise, 64 Cal. 410, 1 Pac. 495, 874.

ing allegation of excuse for non-presentment may be made: "That at the maturity of said note, search and inquiry was made for said John Doe, at [place of date of note], that the same might be presented to him for payment; but he could not be found, and the same was not paid." Any facts relative to search and inquiry, and failure to find the party, may be stated.[266] An allegation on information and belief that the payor had left the state is not a sufficient excuse for non-presentment of the note, unless the grounds for the belief are set out, and some diligence is shown.[267]

§ 5423. **Allegation of promise to pay.**—There is a distinction between a promise by the indorser to pay, proved as presumptive evidence of actual notice, and a promise proved as evidence of a waiver. The former should not be alleged; the latter should.[268]

§ 5424. **Protest.**—There is no necessity of protesting a promissory note. A demand of payment and refusal, and notice to the indorser, are all that is required.[269] It is but a form of evidence of demand and notice. A simple averment of presentment and refusal to pay is sufficient.[270] An averment of protest does not imply a proper demand.[271] An averment that a note is protested is not equivalent to an averment that it was duly presented for payment to the maker and payment was refused.[272]

Where a debtor purchased a bank's check on another bank, payable to his creditor, and such check, having been lost during transmission through the mail, was paid by the drawee on a forged indorsement, demand by the payee, and notice to the drawer of the drawee's refusal to pay, fixed the liability of the former to the original purchaser for the amount paid by him

266 Of course the allegation depends upon the facts in each case. As to sufficiency of this form, see 2 Chit. Pl. 134. See, also, Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

267 Wills v. Booth, 6 Cal. App. 197, 91 Pac. 759.

268 Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595; Leonard v. Gary, 10 Wend. 504; Tebbetts v. Dowd, 23 Wend. 379; Miller v. Hackley, 5 Johns. 375, 4 Am. Dec. 372; Duryee v. Dennison, 5 Johns. 248; Jones v. O'Brien, 26 Eng. L. & Eq. 283.

269 1 Parsons on Contracts, 238; Edwards on Bills, 268; Coddington v. Davis, 1 N. Y. 186; McFarland v. Pico, 8 Cal. 626; Cole v. Jessup, 10 How. Pr. 515.

270 Price v. McClave, 6 Duer, 544.

271 Graham v. Machado, 6 Duer, 515; Price v. McClave, 6 Duer, 544.

272 Price v. McClave, 3 Abb. Pr. 253.

for the check.[273] Where, on the day when a note was due, the indorsers thereof signed a provision on the note waiving demand, notice of protest, and protest, no consideration was necessary to uphold such waiver.[274]

§ 5425. **Discharge of indebtedness.**—Giving a note payable at a future time does not discharge the debt.[275] So when a note is given for an account.[276] The substitution of a new security will discharge the indorser.[277] Where a person sued on a note which had two indorsements, signed by the payee,—the first a receipt for the amount due, and the second in the words, "without recourse to me,"—there was no presumption that the indorsements were made at different times, or that payment was voluntary and unconditional.[278]

§ 5426. **Indorsement.**—The allegation of indorsement to the plaintiff is essential.[279]

§ 5427. **Joint and several liability.**—In New York, the assignor and maker of a non-negotiable paper cannot be joined in an action thereon by the assignee.[280]

§ 5428. **Indorsement essential.**—It would seem that when a note is drawn to the drawer's own order, the indorsement by the maker is necessary to pass the title.[281] But in New York it is provided otherwise by statute.[282]

§ 5429. **Allegation of indorsements.**—The use of the words "and others" will perhaps obviate the necessity of proving the indorsements, which, if stated, must be proved. It is not necessary to state all the indorsements, as possession by plaintiff and production at the trial is a legal presumption that he is the

273 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

274 Delsman v. Friedlander, 40 Or. 33, 66 Pac. 297.

275 Brewster v. Bours, 8 Cal. 502; Smith v. Owens, 21 Cal. 11.

276 Higgins v. Wortell, 18 Cal. 330.

277 Smith v. Harper, 5 Cal. 329.

278 Frank v. Brady, 8 Cal. 47.

279 Montague v. Reineger, 11 Iowa, 503; Bennett v. Crowell, 7 Minn. 385.

280 White v. Low, 7 Barb. 204. See Allen v. Fosgate, 11 How. Pr. 218.

281 Macferson v. Thoytes, Peake N. P. C. 29; Bosanquet v. Anderson, 6 Esp. 43; Smith v. Lusher, 5 Cow. 688.

282 2 N. Y. Rev. Stats. 53. See Plets v. Johnson, 3 Hill, 112; Masters v. Barrets, 2 Car. & K. 715, 61 Eng. Com. L. 714.

owner, and for value.[283] Nor is it necessary to allege genuineness of indorsements.[284] If defendant on the trial prove loss or theft of the note in rebuttal of such presumption, the plaintiff may prove that he took the note in good faith, and for a valuable consideration.[285]

§ 5430. **Indorsement for collection.**—An indorsee of a note for collection takes the same subject to all equities existing between the indorsee and the maker.[286]

§ 5431. **Indorsement without recourse.**—Since an indorsement without recourse of negotiable paper merely operates to transfer the title, it may be shown by parol that the buyer agreed to relieve the indorsee from all liability; and such parol agreement cannot be superseded by a contract implied from the delivery of the paper until the indorsement without recourse, since these gave rise to no contract.[287] An indorsement without recourse merely relieves the indorser of liability, and is not out of the usual course of trade, so as to make the note subject to equitable defenses in the hands of the indorsee.[288]

§ 5432. **Transfer by indorsement.**—The indorsement and delivery of a note by the payee thereof to an insurance company, in consideration of the company delivering a policy on the life of the maker, is supported by a sufficient consideration.[289] A commercial indorsement by the payee of a note, and a contemporaneous written agreement limiting the effect of the indorsement, are to be construed together.[290] Where an indorser of a note signed the following provision thereon: "I hereby guarantee payment of the within, and waive demand, notice of protest,

283 Smith v. Schanck, 18 Barb. 344; James v. Chalmers, 6 N. Y. 209; Farrell v. Lovett, 68 Me. 326, 28 Am. Rep. 59; Lee v. Whitney, 149 Mass. 448, 21 N. E. 948; Johnson v. Hanover Nat. Bank, 88 Ala. 371, 6 South. 909.

284 Pentz v. Winterbottom, 5 Denio, 51.

285 Catlin v. Hauser, 1 Duer, 309; Rochester v. Taylor, 23 Barb. 18; Peacock v. Rhodes, 2 Dougl. 633, 4 Sandf. 97; Millis v. Barber, 1 Mees. & W. 425; De la Chaumette v. Bank of England, 9 Barn. & Cress. 208, 2 Campb. 5; Miller v. Race, 1 Burr. 452; Grant v. Vaughan, 3 Burr. 1516.

286 Smith v. Bayer, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497.

287 Carroll v. Nodine, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

288 Beach v. Bennett, 16 Colo. App. 459, 66 Pac. 567.

289 Muller v. Swanton, 140 Cal. 249, 73 Pac. 994.

290 New Blue Springs Milling Co. v. De Witt, 65 Kan. 665, 70 Pac. 647.

and protest," demand and notice of non-payment not being necessary in a case of guaranty, the undertaking was as indorser.[291]

§ 5432a. **Transfer without indorsement.**—A holder of a note secured by a mortgage is not precluded from recovering thereon by the fact that title was derived as an heir of a decedent by delivery from the executrix of the estate, and not by indorsement.[292]

§ 5433. **Allegations of assignment.**—An averment that the note was assigned on the day or at the time of its execution is sufficient.[293] But consideration need not be averred.[294] By the assignment of the note alleged, the plaintiff acquired title to the note, and the action, under the code, could be maintained in his own name.[295] A complaint on a note setting out a note payable to a third person, and alleging that thereby defendant "promised to pay plaintiff," etc., but containing no allegation of any transfer to plaintiff, is demurrable for not showing title to the note in plaintiff.[296] In an action on a note an allegation that the payee "indorsed and transferred" a note to plaintiff is sufficient to entitle the assignee to sue in his own name, it not being necessary that he should aver "that the payee, by indorsement on the note and under his hand, assigned and then delivered the note to the assignee."[297] Under the common law, if it appeared from the declaration that the note was not yet payable, a demurrer would lie.[298] If the complaint, not verified, sets out the note, and avers assignment by payee to plaintiff, and the answer is a general denial, the plaintiff must prove the assignment.[299] In an action against the maker of negotiable

291 Delsman v. Friedlander, 40 Or. 33, 66 Pac. 297.

292 Perry v. Wheeler, 63 Kan. 870, 66 Pac. 1007; Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999.

293 Silver v. Henderson, 3 McLean, 165, Fed. Cas. No. 12854. Compare Earhart v. Campbell, Hempst. 49, Fed. Cas. No. 4211a; Thomson v. Madison etc. Aid Assoc., 103 Ind. 279, 2 N. E. 735; Eichelberger v. Old Nat. Bank, 103 Ind. 401, 3 N. E. 127.

294 Wilson v. Codman's Exrs., 3 Cranch, 193, 2 L. Ed. 408.

295 Savage v. Bevier, 12 How. Pr. 166; Hastings v. McKinley, 1 E. D. Smith, 273. See Rising v. Teabout, 73 Iowa, 419, 35 N. W. 499; Elmquist v. Markoe, 45 Minn. 305, 47 N. W. 970; Stevens v. Hannan, 86 Mich. 305, 24 Am. St. Rep. 125, 48 N. W. 951.

296 Ball v. Lowe, 135 Cal. 678, 68 Pac. 106.

297 Louisville Coal Min. Co. v. International Trust Co., 18 Colo. App. 345, 71 Pac. 898.

298 Waring v. Yates, 10 Johns. 119; Lowry v. Lawrence, 1 Caines, 69.

299 Hastings v. Dollarhide, 18 Cal. 391.

paper payable to bearer, it is sufficient, after alleging that the defendants drew it, to allege that it was transferred and delivered to the plaintiff, without saying by whom, if it be also alleged that the transfer was for value, and that the plaintiff was the owner.[300] The allegation on a note payable to bearer is sufficient, if it allege that it is his property, and that the amount is due.[301] In case the note is payable to the order of a fictitious person, and in case it is payable to the maker's own order, it is in law payable to bearer.[302] The words "before its maturity," and "for value," are not material to the cause of action. Unless the contrary is shown, the indorsement will be presumed to have been made before maturity.[303]

§ 5434. Allegations on information and belief.—In an action upon promissory notes assigned to the plaintiff, and for goods sold, the plaintiff may properly allege in his complaint, on his "information and belief," that the notes were executed by the defendant; and he might allege in the same way that the goods were sold to the defendant, for they might have been sold by his agent. A motion to strike out the words "on information and belief" should be denied.[304] The fact that all of the allegations of the complaint by an assignee of a note, including the allegation of non-payment, are prefaced with a statement that they are made upon information and belief does not affect the cause of action, and is not a ground for general demurrer.[305]

§ 5435. Defenses against assignee.—A non-negotiable instrument transferred to an innocent purchaser before maturity, and for a valuable consideration, is subject to all the defenses which could be interposed against the note in the hands of the original payee.[306] Where defendant assigned notes given as consideration on the sale of a business, which he induced by fraud, to a third person as security for a pre-existing debt, such third person was not a *bona fide* holder, and the notes were subject

300 Mechanics' Bank v. Straiton, 5 Abb. Pr. (N. S.) 11.

301 Dabney v. Reed, 12 Iowa, 315.

302 Minet v. Gibson, 1 H. Bl. 569; Plets v. Johnson, 3 Hill, 112.

303 Pinkerton v. Bailey, 8 Wend. 600; Pratt v. Adams, 7 Paige, 615; Nelson v. Cowing, 6 Hill, 336; Case v. Mechanics' Banking Association, 4 N. Y. 166. See James v. Chalmers, 6 N. Y. 209.

304 St. John v. Beers, 24 How. Pr. 377.

305 Stanton v. Quinan, 91 Cal. 1, 27 Pac. 517.

306 Cotton v. John Deere Plow Co., 14 Okla. 605, 78 Pac. 321.

to all the defenses which might have been urged against them in the hands of defendant.[307]

§ 5436. **Notice to assignee.**—The president of a bank sold it a note, the only consideration for which was a past-due debt of the maker's husband, which was barred by limitation. The note was accepted at a meeting of the directors at which the president was not present, and none of them knew the consideration for the note. It was held that the bank was a *bona fide* purchaser without notice.[308] A purchaser of a note before maturity who pays full value therefor cannot be required to defend his purchase against all equities and defenses which the maker may urge merely because "the circumstances are such as to invite inquiry" on his part, but only in the event that he purchased under circumstances "creating a presumption that he knew facts impeaching its validity."[309] That a note bore the indorsement of a former president of a company who is transferring the same is not notice to a purchaser of any infirmities, where the party has ceased to be president, though the transfer may be for the benefit of the former president.[310]

§ 5437. **Assignee after maturity.**—An indorsee of a note for valuable consideration, taking the same after maturity, does not take subject to the equities of a third person whose rights are latent and do not appear from an inspection of the note or the indorsement thereon, and such indorsee will be deemed an innocent purchaser.[311] Where the payee of a note made a mere equitable assignment thereof, and after maturity indorsed the same, the doctrine of relation would not apply to cut off the right of the makers to set up any defense against the payee.[312] Section 3123 of the Civil Code provides that an indorsee in due course is one who in the ordinary course of business, and for value, before its apparent maturity, and without knowledge of the dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally. Where a note was duly indorsed

307 Sathre v. Rolfe, 31 Mont. 85, 77 Pac. 431.

308 McDonald v. Randall, 139 Cal. 246, 72 Pac. 997.

309 Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024.

310 Jones v. Stoddard, 8 Idaho, 210, 67 Pac. 650.

311 Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11.

312 Reese v. Bell, 138 Cal. xix, 71 Pac. 87.

to plaintiff before its apparent maturity, in an action thereon by him, the maker might set up any equitable defense.[313]

§ 5438. **Law of place.**—An assignment of a negotiable instrument, as between the parties to that assignment, is subject to the law of the place where the assignment is made; and if by such law the assignment is void, as against law, the assignee can exercise no right under such assignment;[314] and what is a discharge of a contract in a place where it was made will be of equal avail in every other place. Except that where a contract is to be executed at a place different from that where it is made, the law of the place of execution will apply.[315]

§ 5439. **Note with a blank for name of payee, how pleaded.**—Where, in an instrument for the payment of money, the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, since any lawful holder may fill the blank with his own name as payee, he may plead it in an action thereon as having been delivered to some persons unknown, for a consideration from them received, and as having thereafter come lawfully into plaintiff's possession, and that he is the owner thereof.[316] There must be two parties to every promissory note —a maker and a payee; if the payee named is not *in esse*, there is no note.[317] The *bona fide* holder of a note, when the payee's name is left blank, must make himself a party to such note, by actually writing his name in the blank left for that purpose, before a recovery can be had on such instrument.[318]

§ 5440. **Partnership and individual liability.**—A complaint would seem to be bad which shows a partnership note as a cause of action against an individual. If there was no real firm, it should have been alleged that the note was signed by A. B., in

313 Reese v. Bell, 138 Cal. xix, 71 Pac. 87.

314 5 East, 123; Hicks v. Brown, 12 Johns. 142; Powers v. Lynch, 3 Mass. 77; McClintick v. Cummins, 3 McLean, 158, Fed. Cas. No. 8699; Dundas v. Bowler, 3 McLean, 397, Fed. Cas. No. 4141.

315 Van Reimsdyk v. Kane, 1 Gall. 371, Fed. Cas. No. 16871. See Wayne Co. Sav. Bank v. Low, 81 N. Y. 566, 37 Am. Rep. 533; Staples v. Nott, 128 N. Y. 403, 26 Am. St. Rep. 480, 28 N. E. 515.

316 Hubbard v. New York etc. R. R. Co., 14 Abb. Pr. 275.

317 Wayman v. Torreyson, 4 Nev. 124.

318 Thompson v. Rathbun, 18 Or. 202, 22 Pac. 837.

the name of A. B. & Co. The words "& Co." indicate a firm. The defendant may have been a member of that firm, and yet never have made the note, nor have had any such knowledge of its existence. It may have been the objection is not strictly for defect of parties, but that the complaint does not on its face show an individual liability on the part of "A. B."[319] In an action upon a promissory note executed in the firm name by one of the partners, an allegation that the defendants (naming them), partners doing business under the firm name, by one of the partners named, made and executed the note, sufficiently implied authority from the other members of the firm to make the note, and such authority to all is admitted by the default of the defendants.[320] Ratification, even after action is commenced, makes the principal liable from the beginning for the indorsement or execution of a note.[321]

§ 5441. Condition precedent.—Where a note was made payable on the contingency of the confirmation of a grant of land, the confirmation was a condition precedent to the payment of the note.[322] Where the complaint on a promissory note shows that, by agreement of the parties, its payment was made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made.[323] Plaintiff furnished materials for a building, and took an order from the contractor, indorsed by defendant corporation, to secure the purchase price. Defendant corporation held, at the time of the acceptance, money and securities belonging to the owner more than sufficient to pay the order. It was held that the acceptance was conditional on the building being completed, and there was no liability where the building, before completion, was destroyed by fire.[324] A promise by a contractor, on acceptance of a subcontractor's order, to pay to a third person a certain sum out of moneys due the subcontractor under his contract for the stone-work on a building, when the money is due him, is conditional on the performance

319 Price v. McClave, 6 Duer, 544; affirming 5 Duer, 670.

320 Redemeyer v. Henley, 107 Cal. 175, 40 Pac. 230.

321 Washington State Bank v. Dickson, 35 Wash. 641, 77 Pac. 1067.

322 Sanders v. Whitesides, 10 Cal. 88.

323 Rogers v. Cody, 8 Cal. 324.

324 Hogan v. Globe Mut. Bldg. etc. Assoc., 140 Cal. 610, 74 Pac. 153.

of the contract by the subcontractor, and until the performance any question as to payments to the subcontractor is immaterial.[325]

§ 5442. **Demand.**—The demand should be made at the place of business of the maker of the note, when the note is payable in chattels.[326] But if the day of delivery of chattels be defined in the note, as "on or before" a day named, no demand is necessary, unless the holder exercises an election as to choice of goods.[327] Where the payee of a note of forty dollars, payable on demand, in "hemlock bark, at the going price," in the summer of 1863, requested the maker to have the bark peeled in the course of the summer (the peeling season) and delivered the next winter, which the maker agreed to do, but the bark was not delivered, it was held that the demand was appropriate to the note, and that on defendant's failure to furnish the bark, the payee could recover on the money counts.[328]

§ 5443. **Effect of indorsement.**—The indorser of such a note has no right to insist on a previous demand on the maker, but is immediately liable thereon.[329]

§ 5444. **Maturity.**—It seems such notes are generally due on demand, and a special demand is necessary.[330]

§ 5445. **Measure of damages.**—Upon such notes, the measure of damages is the sum of money named,[331] and interest.[332]

§ 5446. **Non-payment.**—The allegation of non-payment of the money is alone sufficient.[333] The possession of a note by the payee raises a presumption of non-payment.[334]

325 Pohlman v. Wilcox, 146 Cal. 440, 80 Pac. 625.

326 Vance v. Bloomer, 20 Wend. 196; Rice v. Churchill, 2 Denio, 145.

327 Johnson v. Seymour, 19 Ind. 24.

328 Read v. Sturtevant, 40 Vt. 521.

329 Seymour v. Van Slyck, 8 Wend. 403; affirmed, sub nom. Stone v. Seymour, 15 Wend. 19.

330 Lobdell v. Hopkins, 5 Cow. 516. But see Barns v. Graham, 4 Cow. 452, 15 Am. Dec. 394.

331 Pinney v. Gleason, 5 Wend. 393, 21 Am. Dec. 223; Rockwell v. Rockwell, 4 Hill, 164. See Gilbert v. Danforth, 6 N. Y. (2 Seld.) 585.

332 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

333 Rockwell v. Rockwell, 4 Hill, 164.

334 Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497.

§ 5447. **Certificate of deposit.**—Where the indorsee, on payment to him of the amount, guarantees the genuineness of the signature, which is afterwards found to be a forgery, and the payee recovers from the makers the amount of certificate and costs, the maker may recover from the indorsee and guarantor the costs of the former action.[335]

§ 5448. **Demand and notice.**—Where it is agreed "that if the holder should not be able to collect the note from the maker by due course of law, then the guarantor would be responsible without requiring notice," it is a waiver of demand on the maker.[336] A note indorsed, "I guarantee the collection of the within note when due," contemporaneous with the signing of the note, constitutes a guaranty, and the party is entitled to the legal notice of non-payment before he can be charged on his contract.[337] A complaint is sufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice.[338] "I assign the within to K., for value received, and bind myself to pay it promptly after maturity," indorsed upon a note, is a guaranty, and demand and notice are not necessary to fix the guarantor's liability on failure of the makers to pay at maturity.[339] So in case of a lease.[340]

§ 5449. **Discharge of surety.**—Mere extension of time to the maker is not sufficient to discharge a surety or indorser, unless it will be such as will suspend the right of action against the maker.[341] The failure of a holder of a note to sue when requested by the surety does not in general operate to discharge the liability of the latter. If the surety desires to protect himself, he must pay the note, and proceed against the principal.[342]

§ 5450. **Guarantor, who is.**—One who puts his name upon a promissory note, out of the usual course of regular negotiability, is a guarantor, whether the inscription is in blank or is accompanied by the words, "I guarantee," etc.[343] Or if the indorser

335 Mills v. Barney, 22 Cal. 240.

336 Backus v. Shipherd, 11 Wend. 629.

337 Reeves v. Howe, 16 Cal. 152.

338 Lightstone v. Laurencel, 4 Cal. 277.

339 Baker v. Kelly, 41 Miss. 696, 93 Am. Dec. 274.

340 Voltz v. Harris, 40 Ill. 155.

341 Williams v. Covillaud, 10 Cal. 419; Draper v. Romeyn, 18 Barb. 166.

342 Hartman v. Burlingame, 9 Cal. 557.

343 Riggs v. Waldo, 2 Cal. 485, 56 Am. Dec. 356; Chitty on Contracts, 397; 3 Kent Com. 121. See Fuller-

accompanies his signature with the words, "I hereby waive demand, notice of non-payment, and protest," he is a guarantor.[344] Where the holder of a note, after its maturity, obtained from a stranger a guaranty of its payment within sixty days from date of guaranty, there is no presumption of law that the guaranty was taken for the benefit of the maker, or that it extended to him the time of payment.[345]

§ 5451. **Joint liability.**—Each one who writes his name upon a promissory note is a party to it, and each party an original undertaker,[346] as the note itself imports consideration. Where a party signs a joint and several note, he is not entitled to notice of non-payment, though in act he signed as surety.[347] When a promissory note is signed by two persons in the same manner, with nothing to show that one was surety, one of such signers cannot set up that he was a surety only.[348] Where, in the body of the note, one party signs as principal, and one as surety, both are liable.[349]

§ 5452. **Liability of guarantor.**—The liability of an indorser is a guaranty that he will pay if the maker does not, upon presentment, if he receives notice. And the liability of a guarantor is the same, and he is entitled to all his rights *stricti juris*.[350] Where the defendant signed a negotiable note as surety, and delivered it to his principal, on the condition that it should not be delivered to the payee or negotiated until another party should have signed the same as co-surety, and it was delivered without such other signature, but the payee did not know of such condition, and there was nothing on the face of the note to put him on inquiry, it was held that defendant was liable.[351]

ton v. Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33; Talley v. Burtis, 45 Kan. 151, 25 Pac. 603.

344 Ford v. Hendricks, 34 Cal. 673. See, also, Brady v. Reynolds, 13 Cal. 31; Story on Promissory Notes, § 434; Fell on Guaranty and Suretyship, 1; Hall v. Farmer, 5 Denio, 484; Miller v. Gaston, 2 Hill, 191; Meech v. Churchill, 2 Wend. 630; Buck v. Davenport etc. Sav. Bank, 29 Neb. 407, 26 Am. St. Rep. 392, 45 N. W. 776; Heard v. Dubuque etc. Bank, 8 Neb. 10, 30 Am. Rep. 811.

345 Williams v. Covillaud, 10 Cal. 419.

346 Riggs v. Waldo, 2 Cal. 485, 56 Am. Dec. 356.

347 Hartman v. Burlingame, 9 Cal. 557; Dane v. Corduan, 24 Cal. 157, 85 Am. Dec. 53.

348 Kritzer v. Mills, 9 Cal. 21.

349 Humphreys v. Crane, 5 Cal. 173.

350 Riggs v. Waldo, 2 Cal. 485, 56 Am. Dec. 356; Ford v. Hendricks, 34 Cal. 673; Pierce v. Kennedy, 5 Cal. 138.

351 Merriam v. Rockwood, 47 N. H.

§ 5453. **Nature of contract.**—A guaranty is an independent contract which does not suspend any right of action of the holder of the note against its maker.[352] An indorsement of a guaranty of a note is an agreement of itself, a new contract undertaken for another.[353] The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security.[354]

§ 5454. **Notice of protest.**—In California, prior to the adoption of a Civil Code, a notice of protest was as essential to charge a guarantor as an indorser,[355] as the liability of a guarantor was the same as that of the indorser, and he was entitled to all his rights *stricti juris*.[356] Under the California code, the general rule is that guarantors are liable immediately upon default of the principal without demand or notice, unless they are in effect indorsers.[357] Subsequent to the adoption of the California Civil Code, a guarantor is not entitled to demand or notice.[358] "I hereby waive demand, notice of non-payment and protest, Q. R.," indorsed on the note of a third party before it is delivered by the maker, is a guaranty, and not within the statute of frauds.[359]

§ 5455. **Primary liability.**—One who signs a note to pay absolutely at a certain time is making his own contract, although he puts "surety" with his name.[360] When, in consideration of a conveyance, a party agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, he is primarily liable for the note.[361]

§ 5456. **Surety—Security.**—The word "surety" does not in any way control the words of the note, as between the payor and payee.[362] Where three parties purchased property together,

81. See Hoboken City Bank v. Phelps, 34 Conn. 92.

352 Williams v. Covillaud, 10 Cal. 419.

353 Aud v. Magruder, 10 Cal. 282.

354 Brady v. Reynolds, 13 Cal. 31.

355 Riggs v. Waldo, 2 Cal. 485, 56 Am. Dec. 356.

356 Geiger v. Clark, 13 Cal. 580; Crooks v. Tully, 50 Cal. 254.

357 Chafoin v. Rich, 77 Cal. 476, 19 Pac. 882.

358 Cal. Civ. Code, § 2807.

359 Ford v. Hendricks, 34 Cal. 673.

360 Aud v. Magruder, 10 Cal. 282.

361 Palmer v. Tripp's Admr., 8 Cal. 95.

362 Aud v. Magruder, 10 Cal. 282.

one taking an undivided half, and each of the others taking an undivided fourth, and for the purchase money executed their joint note, the purchaser of the half-interest was a principal and co-surety with the others for their interests.[363] The position of the signature, whether above or below, and whether overlapped by the other signature to the note, is to be considered in determining whether defendant was a maker or a surety.[364] Where a promissory note was made jointly by A. and B. and delivered to C., the consideration being delivered to A. alone, and as between A. and B. the latter signed as surety for A., who had deposited collateral security with C., of which transaction as a whole C. had notice when the note was executed, as between the makers and the payee, A. and B. were principals, and liable as such to C.[365]

§ 5457. **Trustee.**—Where a party signs a promissory note, with the addition to his name of the word "trustee," he is personally liable.[366] A note stating that "we the undersigned, trustees of, etc., on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is a note of the association.[367]

§ 5458. **What contract imports.**—The difference between a maker and indorser or guarantor is that the contract of the first imports an unconditional obligation, that of the last a conditional obligation.[368]

§ 5459. **When action lies.**—Where a guaranty is given in consideration of an extension of time to the maker, the holder of the note must exhaust his remedy on the original demand, and can then compel the guarantor to make good the deficiency.[369] A creditor having legally fixed the liability of the guarantor is not bound to sue the debtor in order to hold the guarantor. The guarantor should pay the debt, and then sue the principal, or file a bill to compel the creditor to sue.[370]

363 Chipman v. Morrill, 20 Cal. 130.
364 Shead v. Moore, 31 Wash. 283, 71 Pac. 1010.
365 Damon v. Pardow, 34 Cal. 278.
366 Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529.
367 Haskell v. Cornish, 13 Cal. 45.
368 Aud v. Magruder, 10 Cal. 282.
369 Donahue v. Gift, 7 Cal. 242; but see, also, Gross v. Parrott, 16 Cal. 143.
370 Whiting v. Clark, 17 Cal. 407.

§ 5460. Action on note—Variance.—In an action upon a promissory note, in which the complaint alleges that the plaintiff had loaned the defendant the money, there is no variance, when the evidence shows that the money had been loaned to the defendant by the plaintiff's wife, but was in fact the plaintiff's money.[371] An allegation in an action against a surviving maker of a joint note that it is joint and several is an immaterial variance, as the survivor is liable to suit thereon without the personal representatives of the other deceased maker being joined therein.[372] A promissory note is not itself the payment of a debt, but is the written evidence of the debt, and, therefore, in an action to recover money due on a non-negotiable instrument, where the answer averred facts showing an indebtedness from the plaintiff's assignor to the defendant for money loaned, the fact that such indebtedness was proved to be evidenced by a note does not create a variance between the pleadings and proof.[373] Where the complaint alleged that the defendent made, executed, and delivered his promissory note to the Portland Savings Bank, a note payable to . . . cannot be received in evidence under such allegation.[374] It is not a variance to offer in evidence a note sued on, although, besides being signed by the defendant as maker, it contains an indorsement over the signatures of others as co-makers.[375]

Where in an action on a note an indorsement was alleged to have been made, and the note delivered on November 20th, it was competent to prove that the note was actually delivered, indorsed in blank, in the previous August, and that on November 20th, an indorsement of a waiver of demand and notice of protest was made on the note.[376]

§ 5461. Demand note—Stipulation for attorney's fee.—The maker of a demand note, which contains a stipulation for payment of a reasonable attorney's fee and all legal expenses, in case the note is collected by suit, is not in default as respects the liability for such special damage until there has been a breach of the contract according to its terms, by failure to pay upon

371 Pilling v. Morse, 5 Wash. 797, 32 Pac. 748.

372 Creecy v. Joy, 40 Or. 28, 66 Pac. 295.

373 Kleinschmidt v. Kleinschmidt, 13 Mont. 64, 32 Pac. 1.

374 Thompson v. Rathbun, 18 Or. 202, 22 Pac. 837.

375 Hinchman v. Point Defiance Ry. Co., 14 Wash. 349, 44 Pac. 867.

376 Delsman v. Friedlander, 40 Or. 33, 66 Pac. 297.

demand; and a denial that payment of the note was ever demanded raises a material issue as to such liability which will preclude a judgment upon the pleadings for an attorney's fee. The attorney's fee being in the nature of special damage authorized by the contract to be recovered in addition to general damages, must be specially averred.[377] An attorney's fee should not be allowed where there is no necessity for the suit, or where the suit is erroneously brought, so that the services are of no value.[378] No evidence being offered thereon, no more than the statutory fee can be allowed.[379]

§ 5462. Answer.—The drawer of a dishonored check, who has been notified of its dishonor, is not relieved of any part of his liability by the insolvency of the drawee occurring after notice of dishonor.[380] A defendant, when sued as a maker on a note payable to plaintiff, cannot, as a set-off to the note, charge plaintiff with expenses of a trip, made upon invitation of defendant.[381] It is no defense to a note sued on that there was an account stated between the maker and the payee after the same was due, and a settlement of the account so stated, where it does not appear that the note sued on was included therein.[382] In an action on a note, a special defense that defendant was an Indian, and that all his property was exempt from lawful sale or forfeiture, under certain acts of Congress, was irrelevant, and properly stricken.[383] In an action on a note, a denial that defendant "for any consideration whatever made, executed, and delivered to the plaintiff a certain promissory note," is a denial of the consideration, but is not a denial of the making and delivery of the note.[384] It is not error to sustain the demurrer to an answer in an action on a note which alleges want of consideration and pleads the specific facts from which such conclusion is deduced, when the facts alleged do not support the conclusion.[385] Where, on execution of a note payable to a person named, or his order, the maker fails to

377 Prescott v. Grady, 91 Cal. 518, 27 Pac. 755.

378 Graham v. Light, 4 Cal. App. 400, 88 Pac. 373.

379 Lassas v. McCarty, 47 Or. 474, 84 Pac. 76.

380 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326; Lodge v. Lewis, 32 Wash. 191, 72 Pac. 1009.

381 Zane v. De Onativia, 139 Cal. 328, 73 Pac. 856.

382 Newhall v. Field, 13 N. Mex. 82, 79 Pac. 711.

383 Warnock v. Itawis, 38 Wash. 144, 80 Pac. 297.

384 Farmers' etc. Bank v. Copsey, 134 Cal. 287, 66 Pac. 324.

385 Metz v. Winne, 15 Okla. 1, 79 Pac. 223.

pay it, and the payee files a petition reciting the execution of a note for a valuable consideration, and the default of defendant, ownership is presumed in the plaintiff, and it is not absolutely necessary for him to allege that he is still the owner and holder of such note, and an answer denying that he is the owner and holder states no defense, so that plaintiff is entitled to judgment on the pleadings.[386]

In an action on a note the defenses of payment and lack of consideration are affirmative defenses which it is necessary to plead, and they cannot be raised under a mere denial.[387] Where a note in suit stipulated that the entire amount was to become due at failure to pay the interest, but when a copy set out in the complaint did not contain such provision, equitable defenses were not available against a purchaser before the date of final maturity, but after an interest coupon had become delinquent.[388] In a suit on a note, denials of its indorsement and assignment to plaintiff, and ownership thereof, are proper, as casting on him the burden of proving ownership.[389] An answer in an action on a note expressly admitting the execution of the note, and pleading payment thereof, is a sufficient admission of its execution to dispense with proof thereof.[390] Where in an action on a note defendant did not deny an allegation in the complaint that the payee, before maturity, indorsed, assigned, and delivered the note to plaintiff for value, an allegation coupled with a defense of failure of consideration, denying that plaintiff was an innocent purchaser for value, raised no issue.[391] In Colorado, under section 62 of the Civil Code of 1877, providing that when an action is brought upon a written instrument, and the complaint contains a copy of it, its genuineness and due execution are admitted, unless the answer denying the same is verified, does not apply to an action by an indorsee against the maker of a note, so that an unverified answer in such an action may put in issue the allegation in the complaint of the transfer of the note by the payee of the indorsee.[392]

386 Berry v. Barton, 12 Okla. 221, 71 Pac. 1074, 66 L. R. A. 513.

387 Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681.

388 Beach v. Bennett, 16 Colo. App. 459, 66 Pac. 567.

389 Overholt v. Dietz, 43 Or. 194, 72 Pac. 695.

390 Creecy v. Joy, 40 Or. 28, 66 Pac. 295.

391 Brown v. Feldwert, 46 Or. 363, 80 Pac. 414.

392 Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103.

§ 5463. Cross-complaint.—In an action on a note defendant alleged, by way of counterclaim, that she had purchased a boiler of plaintiff, and was deceived by false representation. It was alleged that the note in the suit was given to settle the balance of an account, but there was no statement that this account represented the balance due on the boiler. It was held that facts constituting a defense or counterclaim were not stated.[393]

§ 5464. Amended answer.—An application by defendants for leave to amend their answer by adding an allegation that plaintiff had notice of the defects in a note sued on, as alleged in defendant's first and second defenses, was within the legal discretion of the trial court.[394]

§ 5465. Defenses — Non-presentment — Time — Place.—The holder of a check did not present it for payment until twenty-five days after it was drawn, the drawer having failed in the mean time. The deposit with the drawee was made in funds which had become depreciated, but which did not appear to have been so at the time of the deposit. In a suit on the check as a bill of exchange, it was held that the drawer was discharged.[395] Plaintiff took from her debtor's agent the agent's check for the amount of the debt, and did not present it for payment for four weeks. When presented it was dishonored, but there was a reasonable chance, though not a certainty, that it would have been paid if presented at once. The debtor, a week after the check was made, paid his agent part of the amount, the rest being in the agent's hands already. The agent absconded. It was held that the debtor was discharged.[396] The mere fact that one in a regular course of business, in good faith, and for value, receives a check ten days after it was drawn and dated, does not subject him to the equities between the original parties to the same.[397] The failure to make presentment at the place named would not discharge a debt, but could only be pleaded in defense as to the question of costs and damages.[398] A plea

393 Butte Hardware Co. v. Knox, 28 Mont. 111, 72 Pac. 301.

394 Brown v. Feldwert, 46 Or. 363, 80 Pac. 414.

395 Willets v. Paine, 43 Ill. 432.

396 Hopkins v. Ware, L. R., 4 Exch. 268.

397 Ames v. Meriam, 98 Mass. 294. As to how and when presentment must be made, see Cal. Civ. Code, § 3131.

398 Montgomery v. Tutt, 11 Cal. 307.

that a bill of exchange, on which the action is founded, was not drawn and accepted at the place alleged is bad on demurrer.[399]

§ 5466. **Defense of accommodation indorser.**—An accommodation indorser may set up any defense available to the maker.[400] But diversion of an accommodation note from its original purpose is no defense in the mouth of the maker, unless injury to him is shown.[401] The want of consideration for the undertaking of a maker, acceptor, or indorser of a negotiable instrument does not exonerate him from liability thereon to an indorsee in good faith for a consideration.[402]

§ 5467. **Defense of no authority.**—Where a bill in equity alleges that the defendant gave authority to A. to draw a bill of exchange, the answer, to completely negative such allegation, must deny the authority, and also any subsequent ratification.[403]

§ 5468. **Defense of set-off.**—The drawee of a check certified as "good" cannot set off a claim on the holder against the amount so transferred.[404]

§ 5469. **Defense of unreasonable delay.**—When an unreasonable delay in the presentment of a check is meant to be relied on as a defense in an action against the drawer, such delay should be so averred as to raise a distinct issue in the answer. By the California Civil Code, checks are declared to be bills of exchange, and subject to all its provisions concerning them, except that the drawer and indorser are exonerated by delay in presentment only to the extent of the injury which they suffer thereby; and an indorsee after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.[405]

§ 5470. **Defense of bona fide holder.**—The purchaser of a promissory note from the payee before it is due, but after the payee has

399 Jones v. Heaton, 1 McLean, 317, Fed. Cas. No. 7468.

400 Sawyer v. Chambers, 44 Barb. 42; Cal. Civ. Code, § 3120.

401 Corbitt v. Miller, 43 Barb. 305.

402 Cal. Civ. Code, § 3122. See, also, Cal. Civ. Code, §§ 3123, 3124.

403 Clarke's Exrs. v. Van Reimsdyke, 9 Cranch, 153, 3 L. Ed. 688.

404 Brown v. Leckie, 43 Ill. 497; Bickford v. First Nat. Bank of Chicago, 42 Ill. 238, 89 Am. Dec. 436; Rounds v. Smith, 42 Ill. 245.

405 Cal. Civ. Code, §§ 3254, 3255.

executed to the maker a release of the same, without knowledge of such release, is a *bona fide* holder, although he purchases for less than the face of the note and as a speculation, and although by the exercise of a little diligence he might have ascertained that the release had been given.[406] Where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorser taking it in good faith as collateral security for an antecedent debt for the payee and indorser, without other consideration, is a holder for value, and may recover thereon against the maker.[407] In absence of showing to the contrary by indorsement or other evidence, it is presumed that the note is for the personal benefit of the payee named in it.[408]

§ 5471. **Defense of bankruptcy.**—If the defendant plead the bankruptcy of the indorser in bar, a replication stating that the note was given to the indorser in trust for the plaintiff is good, and is not a departure from a declaration which alleges the note to be for value received.[409] The answer to a suit on a note set up defendant's discharge in insolvency. It was held that, under section 59 of the Practice Act,[410] it was sufficient to allege in the answer that a judgment had been duly rendered, discharging defendant from the demand sued on; and that whether the demand was sufficiently described in defendant's schedule was matter of evidence, to be determined at the trial by inspection of the record.[411]

§ 5472. **Defense of collateral contract.**—A contract made at the time of the execution and delivery of a promissory note, and which clearly refers to it, may be read in connection with the note as though it were incorporated into it; and in an action on the note by the payee, the maker may prove that plaintiff has violated the contract, but the contract must be pleaded.[412]

§ 5473. **Defense of composition.**—Where to an action upon a promissory note an agreement of composition between the debtor and his creditors, including the plaintiff, is relied upon as a

406 Schoen v. Houghton, 50 Cal. 528.

407 Grocers' Bank v. Penfield, 69 N. Y. 502, 25 Am. Rep. 231.

408 McGuffin v. Coyle, 16 Okla. 648, 85 Pac. 954, 86 Pac. 962, 6 L. R. A. (N. S.) 524.

409 Wilson v. Codman's Exrs., 3 Cranch, 193, 2 L. Ed. 408.

410 Cal. Code Civ. Proc., § 456.

411 Hanscom v. Tower, 17 Cal. 518.

412 Goodwin v. Nickerson, 51 Cal. 166.

defense, such agreement must be specially pleaded, and cannot be considered under a plea of accord and satisfaction by the giving of new notes.[413] If defendant sets up a composition agreement, and inserts a copy showing signature of plaintiff by an attorney, the plaintiff must deny its execution by affidavit, or the authority of the attorney will be presumed, and the due execution of the agreement admitted.[414] In an action against the maker of a promissory note, he answered that the plaintiff, with other creditors, signed a composition deed, agreeing to exchange the notes they had against the defendant for other extended notes to be drawn by him; and it appeared on the trial that the defendant called on the plaintiff and offered him the new notes which the agreement provided for, but the plaintiff refused to receive them; but that he had not the new notes drawn at the time of the offer. To complete such defense, the party must plead and prove not only tender of the new notes, but also aver a readiness at all times to perform his part of the agreement, and must bring the new notes thus tendered into court on the trial.[415]

§ 5474. **Conclusion of law.**—In an action on a promissory note, where the complaint contains a copy of the same, a denial of indebtedness is no denial at all.[416] A denial that the plaintiff is "owner and holder" of a note is a denial of a conclusion of law; and an answer admitting the other facts, but denying this, raises no material issue.[417] So of an averment that the note in suit "was obtained from the said defendant by fraud, and is without consideration and void."[418] So of an averment that "the plaintiff is not an innocent holder for value of said note," and such averment is insufficient to justify the admission of evidence as to want of good faith in the acquisition of the note.[419]

§ 5475. **Defense of counterclaim—Set-off.**—It is enough if the answer states a cause of action against the plaintiff and in favor

413 Smith v. Owens, 21 Cal. 11.

414 Cal. Code Civ. Proc., § 448; Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 89 Pac. 610.

415 Warburg v. Wilcox, 7 Abb. Pr. 336.

416 Kinney v. Osborne, 14 Cal. 112; Sneed v. Wister, 8 Wheat. 690, 5 L. Ed. 717.

417 Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Wedderspoon v. Rogers, 32 Cal. 569. But see Oliver v. Depew, 14 Iowa, 490; McKnight v. Hunt, 3 Duer, 615.

418 McMurray v. Gifford, 5 How. Pr. 14.

419 Voorhees v. Fisher, 9 Utah, 303, 34 Pac. 64.

of the defendant, arising out of contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.[420] In an action on a promissory note by the payee against one of two joint and several obligors, the defendant pleaded a demand, as a counterclaim, for damages for the unskillful construction of a mill by the plaintiff for the defendant, his co-obligor, and T., for the construction of which the note in suit was given in part payment. It was held that said counterclaim being for unliquidated damages, and in part a demand in favor of a stranger to the note and suit, it was unavailable as a defense to the action.[421] But where the claim of the defendant arose out of the same contract or transaction which is the subject of plaintiff's claim, it may be considered in the same action, though the damages be unliquidated.[422]

§ 5476. Defense of counterclaim—Set-off.—Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the parties.[423] In an action on a promissory note the defendant cannot set up by way of counterclaim a cause of action in his favor against the plaintiff and other persons arising out of a partnership relation existing between them, until an accounting has been had and a balance struck.[424] In such action a defendant may set up a counterclaim for an indebtedness upon an account for nursery stock destroyed by the cattle of the plaintiffs before the commencement of the action, which the plaintiffs promised and agreed to pay to the defendant.[425]

§ 5477. Covenant that certain sum is due.—The assignee of a promissory note who purchases it in good faith before it falls due, without knowledge that payments have been made on it, and receives a covenant from the payee that the sum he pays for it is due, cannot maintain an action on the covenant if the

420 Allen v. Haskins, 5 Duer, 332; Wood v. Brush, 72 Cal. 224, 13 Pac. 627.

421 Hoock v. White, 36 Cal. 299; King v. Wise, 43 Cal. 635.

422 Cal. Code Civ. Proc., § 438; Stoddard v. Treadwell, 26 Cal. 305; Pattison v. Richards, 22 Barb. 146; Wheelock v. Pacific P. G. Co., 51 Cal. 226.

423 Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; affirmed in Robinson v. Smith, 14 Cal. 94.

424 Wood v. Brush, 72 Cal. 224, 13 Pac. 627.

425 Poly v. Williams, 101 Cal. 648, 36 Pac. 102.

amount is not due, for he sustains no loss, as the payor is liable to him for the face of the note.[426]

§ 5478. **Defense of delivery.**—To a complaint on a promissory note, where plaintiff alleged the making of the note by defendant, and delivery to plaintiff, and the answer denied the delivery to plaintiff, it was held that denial raised the issue on the making of the note so far as making includes delivery.[427]

§ 5479. **Denial of non-payment.**—The complaint in an action on a note must allege its non-payment.[428] A specific denial of the allegation in the complaint that the note was not paid, and the answer stated that on, etc., the note had been paid, forms a good issue between the parties.[429] A general denial puts in issue only the allegation of non-payment, if the ownership is not alleged.[430]

§ 5480. **Defense of duress.**—A plea of duress by the maker of a note, as against the assignee, is bad, unless there be an averment of notice to the assignee.[431]

§ 5481. **Former judgment.**—In an action against an indorser of a promissory note, a former verdict and judgment in favor of the defendant, in an action where the note was offered in evidence under a count on an account stated, is no bar.[432] Judgment against plaintiff, as holder of a note under one title, is no estoppel to a subsequent suit upon it under another.[433]

§ 5482. **General issue.**—Where a declaration was upon a joint note, and the defendant pleaded that the note was the separate note of one of the defendants, and was given to and accepted by the plaintiff in full satisfaction of a debt, it was held that the plea was bad upon special demurrer, as amounting to the general issue.[434]

426 Swall v. Clarke, 51 Cal. 227.

427 Russell v. Whipple, 2 Cow. 536; Sawyer v. Warner, 15 Barb. 886.

428 Arcata etc. R. R. Co. v. Murphy, 71 Cal. 122, 11 Pac. 881.

429 Van Giesen v. Van Giesen, 12 Barb. 520. See Farmers' etc. Bank v. Christensen, 51 Cal. 571.

430 Graham v. Light, 4 Cal. App. 400, 88 Pac. 373.

431 McClintick v. Johnson, 1 McLean, 414, Fed. Cas. No. 8700.

432 Lindell v. Liggett, 1 Mo. 432, 14 Am. Dec. 298.

433 Wheeler v. Ruckman, 2 Abb. Pr. (N. S.) 186.

434 Van Ness v. Forrest, 8 Cranch, 30, 3 L. Ed. 478.

§ 5483. **General denial.**—Suit was instituted on a promissory note made by defendants. The complaint, not verified, sets out the note, and avers assignment thereof by payee to plaintiff. The answer contained a general denial. It was held that the answer does not admit, but denies, the assignment, and hence the plaintiff must prove it, and is not entitled to judgment on the pleadings.[435] That the plaintiff is not the owner and holder of the note in suit may be proved under a general denial of a complaint which alleges that he is.[436] But a denial that he is the owner and holder raises no material issue.[437] But it is otherwise where no indorsement or delivery is averred.[438] A complaint to subject to sale a contract for the sale and purchase of land held as collateral security for the payment of promissory notes, where the general denial is in a paragraph of the answer, alleging that the defendant was not a maker but merely an indorser of the notes, and did not assign the contract for the sale of the land to the plaintiff, either by delivery or indorsement, is demurrable.[439]

§ 5484. **Holder in good faith.**—A negotiable note taken after maturity is taken subject to all the equities between maker and payee.[440] So with a certificate of deposit.[441] An indorsee after maturity takes the same interest that the indorser had, and his claim is subject to the same defense.[442] But he takes it free from all equities subsisting between the maker and any intermediate holder.[443] As a general rule, a *bona fide* holder of a negotiable instrument for a valuable consideration before the same is overdue or presumptively dishonored, and taken without notice of any facts which tend to impeach its validity as between antecedent parties thereto, may recover thereon, although as between such antecedent parties the legal validity of the instrument or the title thereto may be successfully impeached.[444] A purchaser of a negotiable note before due, and without notice of payment made on it, can collect the face of the note and interest.[445] Any defense

435 Hastings v. Dollarhide, 18 Cal. 390.

436 Hull v. Wheeler, 7 Abb. 411.

437 Wedderspoon v. Rogers, 32 Cal. 569; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Butterfield v. Macomber, 22 How. Pr. 150; Fleury v. Roget, 5 Sandf. 646.

438 McKnight v. Hunt, 3 Duer, 615; Metropolitan Bank v. Lord, 4 Duer, 630, 1 Abb. Pr. 185; Hull v. Wheeler, 7 Abb. Pr. 411.

439 Vaughn v. Cushing, 23 Ind. 184.

440 Vinton v. Crowe, 4 Cal. 309.

441 Coye v. Palmer, 16 Cal. 158.

442 Folsom v. Bartlett, 2 Cal. 163.

443 Hayward v. Stearns, 39 Cal. 58.

444 Himmelman v. Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

445 Swall v. Clarke, 51 Cal. 227.

good as against the original owner of a non-negotiable note is good as against the transferee or assignee.[446]

§ 5485. **Information and belief.**—In a suit brought by a firm upon a note, an answer which denies any knowledge sufficient to form a belief as to whether plaintiffs comprise the firm to whose order the note was payable is erroneously stricken out.[447]

§ 5486. **Injurious diversion of note.**—An answer setting up that the note was made as an accommodation note does not show a misappropriation of the note sufficient to constitute a defense by merely alleging that it was expected and intended that the plaintiff should have the proceeds of the note after it was negotiated, and that instead he had taken the note. The answer should show a diversion of the note injurious to the defendant.[448]

§ 5487. **Insufficient denials.**—The complaint set out the note *in hæc verba*, and averred "that said note had not been paid, nor any part thereof," etc.; the answer thereto denied that said note had not been paid, and further denied "that there is due the plaintiff on said note any sum of money or anything." It was held that said denials were of immaterial averments only; that said answer raised no issue, and was sham and irrelevant.[449] An answer by the maker which admits the making and dishonor of the note, and notice of non-payment given to the indorsers, and merely denies the corporate character of the plaintiffs, the partnership of the indorsers, and plaintiff's title to the note, is insufficient.[450] Where the pleadings are verified, and it is alleged in the complaint that the note sued on was assigned to plaintiff for a valuable consideration, the fact of the assignment is not put in issue by denying that it was in writing and for a valuable consideration.[451] Where the complaint contained two counts, each upon a promissory note, an answer referring simply to "the note mentioned in the complaint" was held bad for uncertainty.[452]

446 Stebbins v. Lardner, 2 S. Dak. 127, 48 N. W. 847; First Nat. Bank v. Larsen, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. 67.

447 Wales v. Chamblin, 19 Mo. 500.

448 Corbitt v. Miller, 43 Barb. 305.

449 Hook v. White, 36 Cal. 299.

450 People v. McCumber, 18 N. Y. 315, 72 Am. Dec. 515; President etc. Agawam Bank v. Egerton, 10 Bosw. 669.

451 Randolph v. Harris, 28 Cal. 561, 87 Am. Dec. 139.

452 Kneedler v. Sternberg, 10 How. Pr. 67.

A declaration in *assumpsit* contained a special count on a due-bill and the common counts. A special plea commenced thus: "Now comes the defendant, and defends the wrong and injury, etc., and says that after making and delivering said due-bill in said plaintiff's first count in said declaration mentioned, to-wit," etc., proceeding to allege payment of the bill. It was held that the plea did not purport to answer the whole allegation, but only the special count on the due-bill.[453]

§ 5488. **Denial of lost note.**—Where in an action on a lost note a verified complaint alleges that on a particular day the note in question was made by defendant and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time.[454] Where in an action on a lost note the complaint, verified, alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial.[455]

§ 5489. **Payment, what constitutes.**—Where a note was taken in payment for another note, it must be averred that such note was taken in full satisfaction and payment.[456] In a suit on a promissory note an answer stating that defendant made two payments, the last of which extinguished the note, is sufficient.[457] One who purchases a promissory note past due, but which has been paid before the purchase, takes it subject to the defense of payment.[458] The surrender of a note is *prima facie* evidence of payment.[459] But if surrendered by mistake, the maker is still liable for the balance unpaid.[460] So an assignment to the maker amounts to payment.[461] If a promissory note is assigned by the payee before maturity, payment to the assignor is no defense to an action brought by the assignee against the maker.[462] But it

453 Allen v. Breusing, 32 Ill. 505.
454 Castro v. Wetmore, 16 Cal. 379.
455 Id.
456 Homas v. McConnell, 3 McLean, 381, Fed. Cas. No. 6656.
457 Joy v. Cooley, 19 Mo. 645.
458 Elgin v. Hill, 27 Cal. 372.
459 Smith v. Harper, 5 Cal. 329.
460 Banks v. Marshall, 23 Cal. 223.
461 Gordon v. Wansey, 21 Cal. 77.
462 Morrill v. Morrill, 26 Cal. 288; Patterson v. Atherton, 3 McLean, 147, Fed. Cas. No. 10822.

would be a defense if the payment were made before assignment, and the assignee took with notice.[463] Arrangement between the indorser and the holder of a note is not pleadable as a payment;[464] nor can the indorser set up that the holder of a note past due has taken a fresh obligation from the maker merely as collateral security.[465] A bill of sale made by the payee of a promissory note "of all debts, notes, and accounts of whatever nature due me," is not evidence of the payment of the note.[466] A plea to a suit brought by an assignee that the defendant paid the amount of the note to the assignor before he had notice of an assignment cannot be sustained against the assignee. It should aver that the payment was made before the note was assigned, or before it was due.[467]

§ 5490. **Replication—Denial of date.**—Where a complaint upon a promissory note alleged payments of certain sums upon certain dates, and the answer admitted the payment of such sums, but denied that they were made upon the dates alleged in the complaint, and averred other dates, such allegations and denials form an issue as to the dates of the payments, and the dates alleged in the answer are not admitted by a failure to deny them in the replication.[468]

§ 5491. **Joint debtors.**—If judgment is rendered against A. upon several promissory notes signed by him, and one of the notes is also signed by B. and C., who are made parties defendant, but who are not served with process and do not appear, B. and C. may be brought into court to show cause why they should not be bound by the judgment to the extent of the note which they signed, and they may be declared bound by it, A. having been served, and having permitted judgment to go against him by default.[469]

§ 5492. **Several defenses—Sham answers.**—Where the makers and several indorsers of a note are sued in one action, an answer

463 Morrill v. Morrill, 26 Cal. 288. See Cal. Civ. Code, §§ 3164, 1697-1700.

464 East River Bank v. Butterworth, 45 Barb. 476. But see Jones v. Snow, 64 Cal. 456, 2 Pac. 28.

465 Taylor v. Allen, 36 Barb. 294. See Wright v. Storrs, 32 N. Y. 691.

466 Morrill v. Morrill, 26 Cal. 288.

467 Patterson v. Atherton, 3 McLean, 147, Fed. Cas. No. 10822.

468 Anderson v. Perkins, 10 Mont. 154, 25 Pac. 92.

469 Sneath v. Griffin, 48 Cal. 438.

by the makers will not inure as an answer by the indorser, nor will the answer of one of several indorsers inure as an answer of the others.[470] Defendant may deny that he made the note, and may also aver that at the time of the alleged making of the note he was an infant, although it was true that if he never made the note it is quite immaterial whether he was an infant or not.[471] He may also set up as a defense that no consideration was ever given for it, and as a second defense set forth the circumstances under which it was executed and came into the plaintiff's hands. It was held that the first branch of the answer must be interpreted by the second, and that so interpreted it was no defense.[472] Where a complaint in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note, it is the denial of an immaterial averment.[473] Plaintiff sued on a note made by defendants to his order, the complaint not being verified, but setting out the note. Defendants pleaded payment. Plaintiff, on affidavits that the plea was false and pleaded in bad faith, moved to strike out the answer and for judgment. This was granted. It was held that the ruling of the court was right; that under the fiftieth section of the Practice Act,[474] "sham" answers and defenses are such as are good in form but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out.[475] In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all.[476] So an answer which simply denies a legal conclusion will be struck out as a sham.[477]

§ 5493. **Special indorsee.**—In an action on a promissory note by a special indorsee against the maker, the plaintiff must prove at the trial the genuineness of the indorsements, although the defendant has not denied their genuineness under oath.[478] A

470 Alfred v. Watkins, 1 Edm. 369.

471 Mott v. Burnett, 2 E. D. Smith, 50.

472 Ryle v. Harrington, 4 Abb. Pr. 421.

473 Whitwell v. Thomas, 9 Cal. 499.

474 Cal. Code Civ. Proc., § 453.

475 Gostorfs v. Taaffe, 18 Cal. 385.

476 Kinney v. Osborne, 14 Cal. 112.

477 Wedderspoon v. Rogers, 32 Cal. 569.

478 Grogan v. Ruckle, 1 Cal. 158; reconsidered and affirmed in Hastings v. Dollarhide, 18 Cal. 390.

general indorsement is one by which no indorsee is named.[479] A special indorsement specifies the indorsee.[480]

§ 5494. Substitution of parties.—On the death of the defendant, in an action on a promissory note, the substitution of his administrator and the continuance of the suit subject the proceedings to such rules as are applicable for the collection of claims against the estate of a deceased person.[481]

§ 5495. Defense of surety.—Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest.[482]

§ 5496. Defense of tender.—That the maker of a note, payable at a particular place, was ready at the time and place to pay is matter of affirmative defense.[483] So, also, a bill of exchange, as against the acceptor thereof.[484] It would seem that in New York it is essential to an answer setting up a tender to aver that the money had been actually brought into court.[485]

§ 5497. Verification.—A copy of the note sued on being attached to and made a part of the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment.[486]

§ 5498. Denial of indorsement.—In New York, a denial of indorsement and delivery of note by the payee to the plaintiff forms a material issue.[487] In an action on a promissory note an

479 Cal. Civ. Code, § 3112.

480 Cal. Civ. Code, § 3113. As to liability of an indorser "without recourse," see Cal. Civ. Code, § 3118.

481 Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49. See Cal. Code Civ. Proc., § 1502.

482 Kritzer v. Mills, 9 Cal. 21.

483 Kendall v. Badger, 1 McAll. 523, Fed. Cas. No. 7691; Wolcott's Admr. v. Van Santvoord, 17 Johns. 248, 8 Am. Dec. 396; Caldwell v. Cassidy, 8 Cow. 271; Troy City Bank v. Grant, Hill & D. Supp. 119; Haxton v. Bishop, 3 Wend. 13.

484 Foden v. Sharp, 4 Johns. 183; Green v. Goings, 7 Barb. 652; Carley v. Vance, 17 Mass. 389; Gay v. Paine, 5 How. Pr. 107; Wallace v. McConnell, 13 Pet. 136, 10 L. Ed. 95.

485 Hill v. Place, 5 Abb. Pr. (N. S.) 18.

486 Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Cal. Code Civ. Proc., § 447.

487 Sherman v. Bushnell, 7 How.

answer denying the indorsement of the note does not put in issue the partnership.[488] The action being to charge the defendants as indorsers, the allegation of their partnership is material. A plea that the defendant who is sued as principal indorsed the note as guarantor, and not as principal, is good on demurrer.[489] A defendant is not required to deny under oath a matter of which he is not presumed to have any knowledge, and though the genuineness and due execution of a note are admitted if not specifically denied, yet it is otherwise with the indorsement where the defendant was not privy thereto, as the indorsement is alleged merely to show the deraignment of title to the instrument sued on.[490]

§ 5499. **Indorsers and guarantors, liability of.**—The contract of one who indorses a promissory note after it falls due, and as additional security to prevent legal proceedings being taken against the payee and indorser, is that of a guarantor, and, even if based on a valid consideration, is fatally defective, unless the writing express the consideration.[491] A guarantor is entitled to notice of non-payment.[492] It is immaterial to an indorser having no legal defense whether subsequent transfers were made in good faith for valuable consideration and before maturity.[493]

§ 5500. **Partnership—Insufficient denial.**—A complaint stating a promissory note, whereby the maker promised to pay the defendant named, "doing business under the partnership name or firm of C. J. & Co.," and that said note was "duly indorsed by said defendant by their said partnership name," sufficiently avers the partnership; and an answer thereto denying "the indorsement in the complaint alleged" does not put the partnership in issue. Hence, under such pleadings, evidence offered by one of the defendants that he was never a member of the firm of C. J. & Co. is inadmissible.[494]

Pr. 171; Caswell v. Bushnell, 14 Barb. 393.

488 Anable v. Steam Engine Co., 16 Abb. Pr. 286.

489 Dibble v. Duncan, 2 McLean, 553, Fed. Cas. No. 3880. Compare Janney v. Geiger, 1 Cranch C. C. 547, Fed. Cas. No. 7212.

490 Mahe v. Reynolds, 38 Cal. 560; Youngs v. Bell, 4 Cal. 201.

491 Crooks v. Tully, 50 Cal. 254.

492 Id. But see, as to changes made in this rule, Cal. Civ. Code, § 2807.

493 Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

494 Anable v. Conklin, 25 N. Y. 470; affirmed sub nom. Anable v. Steam Engine Co., 16 Abb. Pr. 286.

§ 5501. Controverting presentment, waiver of. — That the maker of the note payable at a particular place was ready at the time and place to pay is matter of affirmative defense.[495] A denial of the allegation of presentment and non-payment of note is sufficient.[496] If the indorser of a promissory note, after it falls due, promises to pay the same, with a knowledge that the holder has failed to make demand of payment and give notice of non-payment, the promise dispenses with the necessity of demand and notice.[497]

§ 5502. Denial of notice of protest.—The denial in a verified answer of the indorsers, in an action on a promissory note, that notice of protest was received by them is not sufficient denial that notice was given.[498]

§ 5503. Defense of alteration.—Where an answer to a suit on a promissory note by the assignee set up as one defense: 1. That the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" in lieu of the word "order"; 2. That the defendant paid the note before assignment to plaintiff after maturity, etc.—it was held not fatally defective.[499] Where an answer contains an allegation of alteration of an instrument, it must state that such alteration was made with the knowledge or consent or by the authority of the plaintiff.[500] In an action upon a promissory note or other written obligation, the defendant, under an answer containing merely a general denial, may prove that the instrument has been materially altered since its execution.[501]

§ 5504. Foreign usury laws.—Usury is no defense in California, there being no usury laws in that state. Where the statute of another state is relied upon as a defense, it must be pleaded by setting out in terms so much thereof as may be applicable, and an

495 Kendall v. Badger, 1 McAll. 523, Fed. Cas. No. 7691.

496 Dickerson v. Kimbal, 1 Code Rep. 49.

497 Curtis v. Sprague, 51 Cal. 239; Bryant v. Wilcox, 49 Cal. 47.

498 As to form of notice, service, etc., see Cal. Civ. Code, § 3142 et seq.; Edgerton v. Smith, 3 Duer, 614; Arnold v. Rock River Valley Union R. R. Co., 5 Duer, 207. Compare Burrall v. De Groot, 5 Duer, 379, 382.

499 Sherman v. Rollberg, 11 Cal. 38.

500 Humphreys v. Crane, 5 Cal. 173. For form of answer for mistake in amount of note, see Seeley v. Engell, 13 N. Y. 542.

501 Schwarz v. Oppold, 74 N. Y. 307. To same effect, see Farmers' etc.

averment that a contract is by the laws of another state illegal and void is insufficient.[502] To set up the defense that a foreign contract is void by foreign usury laws, defendant should first state what those laws were at the time of the transaction, and then set out the facts which rendered the securities void according to those laws.[503] A general allegation of usury is not enough; the answer should state what the usurious agreement was, and between whom it was made, and the amount of the usury,[504] as well as the amount of the loan.[505] The rate should be stated with definiteness.[506]

§ 5505. Usury, how alleged.—It is not necessary to allege in terms that the transaction was "usurious" or "corrupt," if facts which amount to usury are stated with sufficient certainty.[507] An answer pleading usury in the discount by the plaintiff should show that the note never had any valid existence as a contract or promise to pay at the time it was discounted by the plaintiff.[508] An allegation that one received goods "without paying any consideration therefor" is not sustained by proof that the advances made by him were at a usurious rate of interest.[509] Usury is a defense which cannot be made available on the trial of a cause unless it is specially pleaded.[510] Usury can no longer be proved under a denial of making the contract. Evidence of it in the transfer of a note, if not alleged in the pleadings, is inadmissible, even as a circumstance to show that the holder did not take the note in good faith.[511]

§ 5506. Usury as a defense.—To a complaint on a note the answer of an indorser alleged usury, and demanded judgment

Trust Co. v. Siefke, 144 N. Y. 355. 39 N. E. 358; Boomer v. Koon, 6 Hun, 645.

502 Bank of Commerce v. Fuqua, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588; Dunham v. Holloway, 3 Okla. 244, 41 Pac. 140.

503 Curtis v. Masten, 11 Paige, 15.

504 Manning v. Tyler, 21 N. Y. 567; Griggs v. Howe, 31 Barb. 500. See, also, Woodall v. Kelly, 85 Ala. 368, 7 Am. St. Rep. 57, 5 South. 164.

505 Smalley v. Doughty, 6 Bosw. 66.

506 Dagal v. Simmons, 23 N. Y. 231.

507 Miller v. Schuyler, 20 N. Y. 522. For a form of answer of usury, in the transfer of an accommodation note, see Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; approved in Manning v. Tyler, 21 N. Y. 567.

508 Burrall v. Bowen, 21 How. Pr. 378.

509 Williams v. Birch, 6 Bosw. 299.

510 Morford v. Davis, 28 N. Y. 481. For a sufficient statement of such defense, see Butterworth v. Pecare, 8 Bosw. 671.

511 Scott v. Johnson, 5 Bosw. 213.

that his name be canceled and discharged from the note. It was held that the answer was not to be deemed as setting up a counterclaim, so that failure to reply admitted its allegations. When the facts alleged may possibly constitute a counterclaim, but are such as always constitute a flat bar at law to the action, they should be deemed to be set up as a defense merely, unless the answer expressly states that they are set up by way of counterclaim. To preclude a plaintiff from recovery, on the idea that he has admitted the allegations of such an answer to be true by omitting to reply to it, when the same allegations viewed merely as a defense would be put at issue by the code, would operate as a surprise in all actions in which the defense of usury is interposed.[512]

§ 5507. **Deceit.**—It is no defense to a note given by one partner to the other for his interest in land held jointly by both that the payee of the note had deceived his partner, the maker, in the division of partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note. When such a defense was set up in the answer, in an action on the note, it was held that all of the answer, except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out.[513] The defense of false and fraudulent representations as to value is not available, unless the seller knew or had reason to believe that the representations were untrue.[514]

§ 5508. **Defenses—Fraud.**—In an action on a negotiable note, by the payee against the maker, a plea which amounts to an averment of fraud on the part of both parties and a third person, with a view to defraud the creditors of the latter, is bad, as it tenders an issue foreign to the case.[515] In such case the court will refuse to enforce payment, but will leave the parties as they are, no matter which party first exposes the fraud.[516] Where the defense set up is that defendant executed said note as the consideration for a deed from plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein, defendant, if he would avoid payment, must offer to

512 Burrall v. De Groot, 5 Duer, 379. See Gildersleeve v. Mahony, 5 Duer, 383, 385.

513 Case v. Maxey, 6 Cal. 276.

514 Davidson v. Jordan, 47 Cal. 351.

515 Moore v. Thompson, 6 Mo. 353.

516 Ager v. Duncan, 50 Cal. 325.

surrender the deed to be canceled, so that both parties can be reinstated in their original rights.[517] Where fraud is set up as a defense, the answer must aver that the defendant has done all in his power to restore the plaintiff to his former condition, or the fact cannot be proved.[518]

§ 5509. **Defenses—Fraud—Continued.**—Where, in an action on a note by an alleged *bona fide* holder, defendants alleged that the note was procured by fraud, in that defendants were induced to believe, through the fraudulent statements of the payee, that they were signing an agreement to pay on a consideration which never came to pass, etc., but failed to allege that such note was obtained without any negligence on their part, the facts did not state a defense.[519] Where in an action on a negotiable paper it is shown to have been obtained from the maker or owner by fraud, the question whether the plaintiff has shown himself a *bona fide* holder for value is for the jury.[520] In an action on a bank check, where the answer claims it was obtained from the payee by fraud, of which plaintiff had notice, the burden is on defendant to show the fraud, and then on plaintiff to show himself a *bona fide* holder.[521] In an action on a note the burden of proving duress is on defendant.[522]

§ 5510. **Fraud, how alleged.**—In the defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud; the answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud.[523] Fraud cannot be alleged generally.[524] As defense to a note in plain terms, there must be some showing that defendant could not understand the same, as that he cannot read, and was misled by representations of the payee.[525] To avoid the contract sued on

517 Tissot v. Throckmorton, 6 Cal. 471.

518 Devendorf v. Beardsley, 23 Barb. 656.

519 Brown v. Feldwert, 46 Or. 363, 80 Pac. 414.

520 Harrington v. Butte etc. Min. Co., 27 Mont. 1, 69 Pac. 102.

521 Id.

522 Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

523 Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116. That the facts which constitute the fraud must be stated, see Voorhees v. Fisher, 9 Utah, 303, 34 Pac. 64.

524 McMurray v. Gifford, 5 How. Pr. 14; Anderson v. Johnson, 3 Sandf. 1; Howard v. Pensacola etc. R. R. Co., 24 Fla. 560, 5 South. 356.

525 Guthrie etc. Ry. Co. v. Rhodes, 19 Okla. 21, 91 Pac. 1119.

by an answer setting up false representations, it must be alleged that the plaintiff knew the representations were false, and that the defendant was misled thereby, or that his belief in their truth induced him to enter into the contract.[526] An answer setting up fraud or deceit as a defense to an action on a promissory note should show damage therefrom and the extent thereof.[527]

§ 5511. Fraud must be specially pleaded.—Fraud cannot be proved on the trial if not alleged in the pleadings.[528] To a complaint in the usual form upon a promissory note an answer was filed admitting the signing of the note, but averring that it was made, not on account of an indebtedness existing between the parties, but for the purpose of being used as collateral security for a debt due to a third person from the maker and payee jointly; that the joint debt was subsequently paid, and that the note, having thus become *functus officio,* should have been canceled, but through fraud was taken and held by the payee, and transferred without consideration by him to the plaintiff. It was held that these allegations were not new matter which, under the system of replication then in force, was admitted by a failure to reply; that their only effect was to deny that any obligation of the character counted upon in the complaint was ever created by the signing of the instrument, and thus to traverse its essential allegations.[529] If a defendant would resist the payment of a promissory note given for mining stock, on the ground that the seller made fraudulent representations as to the value of the mine, the answer should set up the defense and aver either that the stock was valueless to either party or that the defendant had offered to return it and rescind the contract.[530] In an action by an indorsee of a promissory note a plea setting forth that such note was procured by the fraud of the payee is demurrable, unless it also alleged that the plaintiff took the note with knowledge of the fraud.[531]

526 Van de Sande v. Hall, 13 How. Pr. 458; Palmer v. Smedley, 18 How. Pr. 321. For substance of a sufficient answer, setting up that the defendant was induced to make the contract sued on by the fraud of a broker who was the plaintiff's agent, see Cassard v. Hinman, 6 Bosw. 8.

527 Parker v. Jewett, 52 Minn. 514, 55 N. W. 56.

528 Ogden v. Raymond, 5 Bosw. 16.

529 Goddard v. Fulton, 21 Cal. 430.

530 Gifford v. Carvill, 29 Cal. 589. See Davidson v. Jordan, 47 Cal. 351.

531 Banks v. McCosker, 82 Md. 518, 51 Am. St. Rep. 478, 34 Atl. 539.

§ 5512. **Form of plea.**—The nature of the defect should be stated,[532] and the extent of the depreciation caused by it, as nearly as may be.[533] In an action against the maker of a note the defendant answered, setting up a failure of consideration, in that the goods sold by the plaintiff, in payment for which the note was given, were not of the quality warranted, and claimed damages for the breach of warranty. It was held that the defense set up by the answer did not constitute a counterclaim, and required no reply.[534] A plea to an action on a note given for merchandise, which avers that the goods purchased are of no value to the defendant, is not good. It should show that the goods, if they had been returned to the plaintiff, would have been valueless.[535] Where defendants gave their note for a tract of land as a part of the public domain, defendants might plead the fact in an action on the notes.[536]

§ 5513. **Counterclaim—Recoupment.**—In an action on a promissory note for one hundred and twenty dollars the answer of the defendant, the maker, stated that the note was given on the purchase of goods, that the goods were not of the quality warranted, and that upon the discovery of their defects he offered to return them; and he claimed damages in the sum of one hundred dollars, to be recouped from the amount of the note. It was held, on demurrer to the answer, that the answer was not insufficient because it did not present a defense to the whole demand of the plaintiff. If there was a breach of warranty, the plaintiff would have a cause of action against the plaintiff.[537] A counterclaim to a set-off may be proved without pleading, where there has been no opportunity to plead it.[538]

§ 5514. **Assignment before maturity.**—If the complaint in an action by the assignee of a promissory note against the maker avers that the note was assigned to the plaintiff for a valuable consideration before maturity, and is sworn to, an answer which denies that the note was for a valuable consideration, indorsed and delivered by the payee to the plaintiff before maturity, or at

532 Castles v. Woodhouse, 1 Code Rep. 71.

533 Deifendorff v. Gage, 7 Barb. 18.

534 Nichols v. Boerum, 6 Abb. Pr. 290.

535 Christy v. Cummins, 3 McLean, 386, Fed. Cas. No. 2708.

536 Scudder v. Andrews, 2 McLean, 464, Fed. Cas. No. 12564.

537 Allen v. Haskins, 5 Duer, 332. See, also, Beirne v. Dord, 5 N. Y. 95, 55 Am. Dec. 321; Hargous v. Stone, 5 N. Y. 73.

538 Hart v. Cooper, 47 Cal. 77.

any other time, does not put in issue the fact of the assignment before maturity; but if it puts in issue anything, it is only the allegation that the assignment was made for a valuable consideration.[539] In an action on a note a plea that the note has been assigned should be supported by some proofs that the beneficial interest is still in the assignee. Assignments are often made to banks for the mere purpose of collection.[540] Commercial paper transferred before maturity as collateral security for a pre-existing debt is not subject to the defenses of payor against payee.[541] An indorser with no legal defense cannot set up the defense of assignment after maturity.[542]

§ 5515. Real party in interest.—That plaintiff is not the holder and owner of a note, nor the real party in interest, should be specially alleged, showing how and why he is not the real party in interest.[543] It is not a good plea to allege that a note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff.[544] In an action upon a promissory note, if it appears that the legal title is wholly in the plaintiff, it is error for the court to permit another to be joined with him as plaintiff, although such other may have an equitable right to a part of the proceeds of the note when collected.[545] The pledgor may bring suit upon a note held by the pledgee as collateral security; but unless the note is reassigned to the pledgor before the day of trial, the pledgee is a necessary party to the suit.[546]

§ 5516. Want of consideration.—A plea of want of consideration in an action on a bill of exchange must, besides showing the circumstances, distinctly allege that there was no other consideration than that mentioned.[547] Under an answer merely averring that the note was void for want of consideration, and that the

539 Morrill v. Morrill, 26 Cal. 288.

540 Conant v. Wills, 1 McLean, 427, Fed. Cas. No. 3087. Compare Hartshorn v. Green's Admr., 1 Minn. 92.

541 Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Naglee v. Lyman, 14 Cal. 450.

542 Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

543 Arthur v. Beales, 1 Exch. 608; Fraser v. Welsh, 8 Mees. & W. 629; De Santes v. Searle, 11 How. Pr. 477.

544 Gushee v. Leavitt, 5 Cal. 160, 63 Am. Dec. 116; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

545 Curtis v. Sprague, 51 Cal. 239.

546 Graham v. Light, 4 Cal. App. 400, 88 Pac. 373.

547 Boden v. Wright, 12 C. B. 445.

plaintiffs are *bona fide* holders, the defense of usury, though it appears by the evidence on the trial, is not available.[548] A partial failure of consideration cannot be pleaded in bar of an action upon a note given for the purchase money of land.[549] In an action upon a promissory note want of consideration is a legal defense, and the defendant does not make a case for equitable relief by averring said legal defense affirmatively, and praying that the note be delivered up and canceled. If there be any circumstances which show a right to equitable relief, they should be averred.[550] Stock in a corporation being a non-negotiable security, as to which there is no implied warranty, an answer in an action on a promissory note given for the purchase of shares of such stock, which pleads failure of consideration only, does not state facts sufficient to constitute a defense.[551] In an action on a promissory note against the maker by an indorser, after maturity, an allegation in the answer that the consideration received by the defendant for the note was less than the amount stated therein does not constitute any defense. In such an action the defendant may set up any defense which he could have interposed against the assignor, and which existed at the time of or before notice of the assignment, but he cannot set up a defense or counterclaim which has arisen since the commencement of the action.[552] The defense of want of consideration is personal between the parties to the original transaction. It cannot be set up against an independent liability of maker or indorser of negotiable paper given in payment.[553] If a person delivers to his agent a promissory note with the place for the name of the payee left blank, with directions to insert therein the name of a bank, and have the note discounted at the bank, and with the proceeds pay another note on which the principal is indebted, and the agent fills the blank with the name of the holder of such other note, and delivers it to him in payment of the other note, the agent violates his authority, and the note is without consideration and void in the hands of the payee.[554]

548 Mechanics' Bank of Williamsburg v. Foster, 44 Barb. 87, 19 Abb. Pr. 47, 29 How. Pr. 408.

549 Reese v. Gordon, 19 Cal. 147.

550 Shain v. Belvin, 79, Cal. 262, 21 Pac. 747.

551 Jones v. Garlington, 44 S. C. 533, 22 S. E. 741.

552 Wood v. Brush, 72 Cal. 224, 13 Pac. 627.

553 Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Delano v. Rawson, 10 Bosw. 286. See, also, Agawam Bank v. Egerton, 10 Bosw. 669; Cal. Civ. Code, § 3122.

554 Beeman v. Lovett, 46 Cal. 387.

§ 5517. Consideration—Extension of time of payment.—In an action upon a promissory note executed in bank, which by its terms is past due, an answer states a good defense when it alleges that on the day of the execution of the note and after its delivery the plaintiff and defendants entered into an oral agreement, in consideration of the deposit of certain collateral with the plaintiff, whereby it was agreed that the time of payment of the note should be extended for an additional three months beyond the time expressed upon the face of the note, and that the plaintiff retains said security and refuses to extend the payment or permit a renewal of the note; and that by reason of such facts said note is not due, and will not be due until the expiration of the extension agreed upon.[555]

§ 5518. Consideration—Burden of Proof.—The note being in evidence, the burden of proving want of consideration is on defendant.[556] If there is evidence both *pro* and *con*, besides the note itself, as to defendant being a mere accommodation signer, the burden of showing consideration is upon plaintiff.[557] The consideration being shown to be illegal, the burden is on plaintiff to show a purchase for value and without notice;[558] or that some person under whom he claims had such title in due course of trade.[559]

§ 5519. Bona fide holder—Presumption.—A plaintiff who holds negotiable paper before maturity is presumed, *prima facie*, to be a holder for value, and is not obliged to show that he paid value for it, until the defendant, under proper pleadings, offers evidence to overcome this presumption.[560]

§ 5520. Burden of proof.—In an action on a bank check, where the answer claims it was obtained from the payee by fraud, of

555 Commercial Bank v. Hart, 10 Wash. 303, 38 Pac. 1114. See Staver v. Missimer, 6 Wash. 173, 36 Am. St. Rep. 142, 32 Pac. 995.

556 Cal. Civ. Code, § 1615; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677.

557 Best v. Rocky Mountain Nat. Bank, 37 Colo. 149, 85 Pac. 1124, 7 L. R. A. (N. S.) 1035.

558 Union Col. Co. v. Buckman, 150 Cal. 159, 119 Am. St. Rep. 164, 88 Pac. 708; Le Tourneaux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627; Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322; Matlock v. Scheuerman, 51 Or. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747.

559 Keene v. Behan, 40 Wash. 505, 82 Pac. 884.

560 Voorhees v. Fisher, 9 Utah, 303, 34 Pac. 64. See Miller v. Ottaway, 81 Mich. 196, 21 Am. St. Rep

which plaintiff had notice, the burden is on defendant to show the fraud, and then on plaintiff to show himself a *bona fide* holder.[561] In an action on a note the burden of proving duress is on defendant.[562] Where an action on a note executed in Montana was brought in Washington, and defendant claimed, under the law, that the mortgage securing the note must have been foreclosed before action could be maintained on the note, plaintiff was not required to prove that the mortgage had been foreclosed and the proceeds applied on the debt, the burden of proving such facts being on defendant.[563] In an action on a note, where its execution is denied by defendant, the burden of proving that it is defendant's note is on plaintiff.[564] Where a negotiable paper is shown to have been obtained from the maker by fraud, a subsequent transferee must show that he is a *bona fide* purchaser.[565] Where the holder of a note properly indorsed, payable to order, sues thereon, and the maker claims he is not a holder for value, the burden is on him to prove the same.[566] The possession of a note by the payee raises a presumption of non-payment.[567]

§ 5521. **Possession, evidence of ownership.**—The mere possession of a note payable to order and properly indorsed is *prima facie* evidence of ownership in good faith for value before maturity, without notice of any circumstances that would impeach its validity.[568] In an action to recover the amount paid by the drawee on a forged indorsement the introduction of the check without the indorsement of the payee was, in the absence of evidence to the contrary, sufficient to show that it had not been paid to him.[569]

§ 5522. **Answer raising no issue.**—A complaint alleged that the plaintiff and defendant together executed a certain note;

513, 45 N. W. 665, 8 L. R. A. 428; Battles v. Laudenslager, 84 Pa. St. 446; Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402.

561 Harrington v. Butte etc. Min. Co., 27 Mont. 1, 69 Pac. 102; Murto v. Lemon, 19 Colo. App. 314, 75 Pac. 160.

562 Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

563 Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866.

564 Sears v. Daly, 43 Or. 346, 73 Pac. 5.

565 Harrington v. Butte etc. Min. Co., 27 Mont. 1, 69 Pac. 102.

566 Price v. Winnebago Nat. Bank, 14 Okla. 268, 79 Pac. 105.

567 Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497.

568 Price v. Winnebago Nat. Bank, 14 Okla. 268, 79 Pac. 105; Gumaer v Sowers, 31 Colo. 164, 71 Pac. 1103; Gumaer v. Jackson, 37 Colo. 39, 86 Pac. 885; Pastene v. Pardini, 135 Cal. 431, 67 Pac. 681.

569 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

that subsequently, for a valuable consideration, the defendant agreed to pay the whole of said note; that the defendant failed to pay, and plaintiff was forced and compelled to pay said note. An answer to this complaint denying that the defendant agreed to pay said note to plaintiff; that plaintiff was forced or compelled to pay the same, or that the same was paid by plaintiff for the use and at the request of defendant, raises no issue.[570]

§ 5523. Pleas—Set-off—New Mexico practice.—Under the New Mexico practice, new matter constituting a cause of action in favor of defendant is available as a set-off, even in an action on a note given in final settlement of account between the parties.[571] In *assumpsit* on a bill of exchange, the proper plea is *non assumpsit*, a denial under oath of the signature. The plea under oath of *non est factum*, as required by the statute, is only applicable to instruments under seal.[572]

FORMS—ACTIONS ON PROMISSORY NOTES.

§ 5524. Complaint by maker of accommodation note, having paid it.

Form No. 1541.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff made his promissory note, of which the following is a copy: [Copy of note.]

II. That the plaintiff never received any consideration therefor; but that it was an accommodation note, made and given to the defendant, at his request, and upon his promise that he would pay it at maturity.

III. That as the plaintiff is informed and believes, the defendant thereafter and before its maturity negotiated it for value.

IV. That the defendant failed to pay the same at maturity, and the plaintiff paid it.

V. That defendant has not repaid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

570 Buell v. Burlingame, 11 Colo. 164, 17 Pac. 509.

571 Staab v. Ortiz, 3 N. Mex. 53 (33), 1 Pac. 857.

572 Luna v. Mohr, 3 N. Mex. 56 (63), 1 Pac. 860.

§ 5525. Complaint by joint maker of a note, having paid it, against the other, for contribution.

Form No. 1542.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., this plaintiff and the defendant made their joint [or joint and several] promissory note in writing, of which the following is a copy: [Copy of note.]

II. That at the maturity of said note, the plaintiff was compelled to pay, and did pay, the same.

III. That no part thereof has been repaid to him.

[DEMAND OF JUDGMENT.]

§ 5526. Complaint by indorser of note, having paid a part.

Form No. 1543.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made his promissory note, whereby he promised to pay to the order of the plaintiff, . . . days after date, the sum of . . . dollars, for value received. [Or copy the note.]

II. That thereafter, and before the maturity of said note, the plaintiff indorsed it and negotiated it for value.

III. That at the maturity it was presented for payment to the defendant [or allege excuse for non-presentment], but was not paid, whereof the plaintiff had due notice.

IV. That on the . . . day of . . ., 19.., at . . ., the plaintiff paid to one A. B., the holder thereof, the sum of . . . dollars, the amount due on said note.

V. That no part thereof has been repaid to the plaintiff.

[DEMAND OF JUDGMENT.]

§ 5527. Complaint of payee against maker.

Form No. 1544.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and delivered to the plaintiff his promissory note, of which the following is a copy: [Set out copy of note.]

II. That he has not paid the same [except . . . dollars, paid on the . . . day of . . ., 19..].

[DEMAND OF JUDGMENT.]

§ 5528. The same—On two notes, one being partly paid.

Form No. 1545.

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and delivered to the plaintiff his promissory note, of which the following is a copy: [Insert copy of note.]

II. That he has not paid the same [except . . . dollars, paid on the . . . day of . . ., 19..].

Second.—For a second cause of action:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and delivered to the plaintiff his promissory note, of which the following is a copy: [Insert copy of note.]

II. That he has not paid the same, nor any part thereof.

Wherefore the plaintiff demands judgment against the defendant for the sum of [aggregate principal], with interest on . . . dollars thereof, from the . . . day of . . ., and with interest on . . . dollars thereof, from the . . . day of . . ., and costs of suit.

§ 5529. The same—Several notes given as security.

Form No. 1546.

[TITLE.]

The plaintiffs complain and allege:

I. That upon the . . . day of . . ., 19.., the defendants were indebted to the plaintiffs in the sum of . . . dollars.

II. That to secure the payment of that sum, the defendants made their promissory notes, copies of which are hereto annexed, marked Exhibits "A," "B," and "C."

III. That at the same time the defendants agreed with the plaintiffs, in writing, that in case of default in the payment of any of the said notes, at any time when the same should become due and payable, the whole amount of said sum of . . . dollars and interest, then remaining unpaid, should forthwith, at the option of the plaintiffs, become at once due and payable.

IV. That the first of said notes became due and payable on the . . . day of . . ., 19..

V. That defendants have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of note.]

§ 5530. Complaint in action on note signed by agent.

Form No. 1547.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by his agent [or, attorney in fact], duly authorized thereto, made his promissory note, and thereby promised to pay to the plaintiff [or, his order] . . . dollars, . . . months after said date.

II. That he has not paid the same [except . . . dollars, paid on the . . . day of . . ., 19..].

[DEMAND OF JUDGMENT.]

[Annex copy of notes.]

§ 5531. Complaint in action on note made by partners.

Form No. 1548.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendants, under their firm name of A. B. & Co., made and delivered to the plaintiff their promissory note, of which the following is a copy: [Insert copy of note.]

II. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5532. Another form, averring partnership.

Form No. 1549.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of making the note hereinafter mentioned, the defendants were partners doing business at . . ., under the firm name of A. B. & Co.

II. That on the . . . day of . . ., 19.., at . . ., the defendants, under their said firm name, made their promissory note,

and thereby promised to pay the plaintiff . . . dollars . . . months after said date.

III. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5533. Allegation by payee as receiver against partners.

Form No. 1550.

That heretofore the defendants, under the firm name of A. B. & Co., made their promissory note, and thereby promised to pay to the plaintiff, as such receiver [or to his order], . . . dollars on the . . . day of . . ., 19..

§ 5534. Sight note, allegation of.

Form No. 1551.

That on the . . . day of . . ., 19.., at . . ., said note was duly presented to the defendant [maker], with notice that payment was required according to the terms thereof.

§ 5535. Complaint in action on note wrongly dated.

Form No. 1552.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and delivered to the plaintiff his certain promissory note, of which the following is a copy: [insert copy of note]; that by inadvertence or mistake said note was dated as of the . . . day of . . ., instead of the said . . . day of . . . [the date of delivery].

II. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5536. Complaint of domestic corporation, payee, against a foreign corporation.

Form No. 1553.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation of plaintiff.]

II. That the defendant is a corporation, chartered by and under the laws of the state of Nevada, and pursuant to an act of the leg-

islature of said state [title of act], passed [date of enactment].

III. That on the . . . day of . . ., 19.., at . . ., the defendant, as such corporation, by one A. B., its agent [or, attorney in fact], made its promissory note, and thereby promised to pay to the plaintiff, under its corporate name of E. F. [or, to its order], . . . dollars, . . . months after said date. A copy of said note is hereto attached, marked "Exhibit A," and made part of this complaint.

IV. That the same has not been paid, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex copy of note.]

§ 5537. Complaint of payee against surviving maker.

Form No. 1554.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of the making the note hereinafter mentioned the defendant and one A. B. were partners, doing business under the firm name of A. B. & Co.

II. That on the . . . day of . . ., 19.., at . . ., they made, under their said firm name, their promissory note of that date, of which the following is a copy: [Insert copy of note.]

III. That on the . . . day of . . ., 19.., at . . ., said A. B. died, leaving the defendant the sole surviving partner of said firm.

IV. That said note has not been paid, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5538. Complaint of payee against maker and indorser, on note taken on the faith of the indorsement.

Form No. 1555.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B. made his promissory note, and thereby promised to pay to the order of the plaintiff, at . . ., the sum of . . . dollars, . . . months after said date.

II. That the defendant C. D. indorsed said note, when said A. B. delivered the same to plaintiff.

III. That said note at maturity was presented to said A. B. for payment, and payment thereof demanded, but the same was

not paid; of all which due notice was given to the defendant C. D.

IV. That said note was made by the defendant A. B., and indorsed by the defendant C. D., for the purpose of paying for [state what], on the credit of such indorsement; that the defendant C. D. indorsed the same for the purpose of procuring for the said maker a credit with the plaintiff, knowing that it would be so applied, and that said note was so passed and so indorsed by the defendant with his privity, to the plaintiff in payment for [state what].

V. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 5539. Complaint of first indorsee against maker.

Form No. 1556.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by his promissory note, promised to pay to the order of one C. D., the sum of . . . dollars.

II. That the said C. D. indorsed the same to the plaintiff.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5540. The same—Against first indorser.

Form No. 1557.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to the plaintiff a promissory note, made [or, purporting to have been made] by one A. B., on the . . . day of . . ., 19 . ., at . . ., to the order of the defendant in the sum of . . . dollars.

II. That on the . . . day of . . ., 19.., the same was presented to the said A. B. for payment, and payment thereof demanded, but the same was not paid. [Or state facts excusing want of presentment.]

III. That due notice thereof was given to the defendant.

IV. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5541. The same—Against maker and first indorser.

Form No. 1558.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B., by his promissory note, promised to pay to the defendant C. D. . . . dollars, . . . months after date.

II. That the said C. D. indorsed the same to the plaintiff.

III. That on the . . . day of . . ., 19.., the same was presented to the said A. B. for payment, but was not paid.

IV That due notice thereof was given to the said C. D.

V. That they have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5542. Complaint by indorsee against maker, on note drawn to maker's own order.

Form No. 1559.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by his promissory note, promised to pay to bearer [or, to his own order], . . . dollars, . . . months after date [or, on demand].

II. That the same was by the indorsement of the defendant transferred to the plaintiff.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5543. Complaint by subsequent indorsee against maker.

Form No. 1560.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege making of note.]

II. That the same was, by the indorsement of the said C. D. and L. M. and N. O. [or, and others], transferred to the plaintiff.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5544. The same—Against first indorser—Indorsement special.

Form No. 1561.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to one A. B. a promissory note by one C. D., on the . . . day of . . ., 19. . . at . . ., to the order of the defendant, for the sum of . . . dollars, payable . . . days after date.

II. That the same was by the indorsement of the said A. B. transferred to the plaintiff [or, that the said E. F. indorsed the same to the plaintiff].

[DEMAND OF JUDGMENT.]

§ 5545. The same—Against intermediate indorser.

Form No. 1562.

[TITLE.]

The plaintiff complains, and alleges:

I. That a promissory note made by one A. B. on the . . . day of . . ., 19. . , at . . ., to the order of one C. D., for the sum of . . . dollars [payable . . . days after date], and indorsed by the said C. D. to the defendant, was by the indorsement of the defendant transferred to the plaintiff.

II, III, and IV. [Same as III, IV, and V, in form No. 1558.]

[DEMAND OF JUDGMENT.]

§ 5546. The same—Against his immediate indorser.

Form No. 1563.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant indorsed to him a promissory note made by one A. B. on the . . . day of . . ., 19. . , at . . ., to the order of one C. D., for the sum of . . . dollars, payable . . . days after date, and indorsed by the said C. D. to the defendant.

II, III, and IV. [Same as III, IV, and V, in form No. 1558.]

[DEMAND OF JUDGMENT.]

§ 5547. The same—Against all prior parties.

Form No. 1564.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . ., the defendant A. B., by his promissory note, promised to pay to the order of the defendant C. D. . . . dollars, . . . months after date.

II. That the said C. D. indorsed the same to the defendant E. F., who indorsed it to the plaintiff.

III. That on the . . . day of . . ., 19.., the same was presented [or, state facts excusing presentment] to the said A. B. for payment, but it was not paid.

IV. That notice thereof was given to the said C. D. and E. F.

V. That the same has not been paid, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5548. Transfers by delivery—By assignee of note.

Form No. 1565.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, by his promissory note, promised to pay to the order of one A. B. . . . dollars, . . . days after date.

II. That said A. B. sold and delivered said note to the plaintiff [for a valuable consideration, before it was payable].

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5549. Complaint by the treasurer of unincorporated company, on note payable to former treasurer.

Form No. 1566.

[TITLE.]

The plaintiff complains, and alleges:

I. That the Mountain View Homestead Association is an association consisting of . . . persons, in the city of . . ., in this state.

II. That at the time hereinafter mentioned, one A. B. was treasurer thereof.

III. That on the . . . day of . . ., 19.., the defendant made his promissory note, of which the following is a copy: [copy of

note], and thereupon delivered the same to said A. B., as the treasurer of the association, who was duly authorized to receive it on its behalf.

IV. That said note was given for the benefit of the association, and that it is the property of the members thereof, and owned by them in common.

V. That this plaintiff is now the treasurer of said association, and, as such, is the lawful holder of said note on and for its behalf.

VI. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5550. Complaint in action on note payable on contingency.

Form No. 1567.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant made and delivered to the plaintiff his promissory note, in writing, of which the following is a copy:

$300. SHASTA, January 1, 1869.

For value received, I promise to pay to A. B., one year after date, three hundred dollars, in case the proceeds of the newspaper route I have this day bought of him shall exceed the sum of one thousand dollars. C. D.

II. That the proceeds of said newspaper route did, before the expiration of said year, exceed the sum of one thousand dollars.

III. That no part of the said note has been paid.

[DEMAND OF JUDGMENT.]

§ 5551. Complaint in action on note for voluntary subscription, payable on conditions.

Form No. 1568.

[TITLE.]

The plaintiff complains, and alleges:

I. [If plaintiff is a corporation, allege the fact.]

II. That the said defendant heretofore [or, on or about the . . . day of . . ., 19..], for a valuable consideration, made and delivered to the plaintiff his promissory note, in writing, whereby he promised to pay to the plaintiff or order . . . dollars, with interest [etc.], payable [here set forth condition upon which

note was given, as:] when the sum of . . . dollars shall have been in good faith subscribed toward the endowment of said institution [or other condition, according to the fact].

III. That prior to the commencement of this action the full sum of . . . dollars was in good faith subscribed to the endowment of said institution. [Or allege compliance with the conditions of the note in apt terms.]

IV. [Allege ownership and non-payment of note.]

[DEMAND OF JUDGMENT.]

§ 5552. Complaint against executor or administrator of maker of note.

Form No. 1569.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore [or, on or about the . . . day of . . ., 19 . .] one C. D. made and delivered to the plaintiff his promissory note, in writing, dated on the said day, and thereby promised to pay to the plaintiff [or, to his order], at . . . , the sum of . . . dollars, . . . months after said date [or, on the . . . day of . . . , 19 . . ; or, on demand], with interest at the rate of . . . per cent per annum after date [or, after maturity].

II. That no part of said note has been paid [except the sum of, etc.]; and that the plaintiff is now the owner and holder thereof.

III. [Allege death of maker, and appointment of the defendant as administrator or executor.]

[DEMAND OF JUDGMENT.]

§ 5553. Complaint by executor or administrator of payee.

Form No. 1570.

[TITLE.]

The plaintiff complains, and alleges, upon information and belief:

I. That heretofore [or, on or about the . . . day of . . ., 19 . .] the defendant made and delivered to one C. D. his promissory note, in writing, dated on the said day, and thereby promised to pay to the said C. D. [or, to his order], at . . . , the sum of . . . dollars, . . . months after said date [or, on the . . . day of . . . , 19 . . ; or, on demand] with interest at the rate of . . . per cent per annum after date [or after maturity].

II. [Allege death of maker, and plaintiff's appointment as executor or administrator.]

[DEMAND OF JUDGMENT.]

§ 5554. Complaint in action on note payable in chattels.

Form No. 1571.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant, for value received [or, where the consideration is expressed in the note, for a valuable consideration therein expressed], made and delivered to plaintiff his promissory note, of which the following is a copy:

For value received, thirty days after date, I promise to pay A. B. five hundred dollars, in clothing, at the usual market rates; the same to be delivered within two days after the same is selected or demanded by the said A. B.; and on default thereof, I agree to pay the said amount in money.

January 1, 1869. C. D.

II. That the plaintiff thereafter demanded of defendant the said clothing, but defendant refused to deliver it, or any part thereof, to him [or, that the plaintiff thereafter performed all the conditions of the same on his part].

III. That no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 5555. Complaint in action on guaranty—Against maker and guarantor of promissory note.

Form No. 1572.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the defendant A. B., and C. D. as his security, by their promissory note promised to pay to the order of one E. F., . . . dollars [. . . days after date].

II. That the said E. F. indorsed the same to the plaintiff.

III. That on the . . . day of . . ., 19.., the same was presented [or state facts excusing presentment] to the said A. B. for payment, but was not paid.

IV. That notice thereof was given to the said C. D.

V. That the defendants have not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

ANSWERS.

§ 5556. Bill of exchange—Denial of acceptance.

Form No. 1573.

[TITLE.]

The defendant answers to the complaint, and denies that he accepted the bill mentioned therein.

§ 5557. The same—That acceptance was unauthorized.

Form No. 1574.

[TITLE.]

The defendants answer to the complaint, and allege:

That the said bill was made without the authority or consent of these defendants, and out of the course of their regular business, and without consideration to them, accepted in their name by one A. B., fraudulently pretending to act under their authority, but who in fact had no authority to accept the same.

§ 5558. The same—Denial of presentment.

Form No. 1575.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the bill mentioned therein was never presented to A. B., as alleged, or at all.

§ 5559. The same—That acceptance was for accommodation.

Form No. 1576.

[TITLE.]

The defendant answers to the complaint, and alleges:

That he accepted the bill mentioned in the complaint for the accommodation of the plaintiff; and that there was never any value or consideration for the acceptance or payment of said bill by the defendant.

§ 5560. The same—Denial of acceptance, presentment, and protest.

Form No. 1577.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the bill of exchange mentioned in the complaint was not presented for acceptance nor accepted, as alleged, or at all, and that it was not presented for payment, nor was it protested for non-payment.

§ 5561. The same—Controverting excuse for non-presentment.

Form No. 1578.

[TITLE.]

The defendant answers to the complaint, and denies:

That any search was made when the said bill of exchange became due, to discover the residence and person of the said . . ., at . . ., or elsewhere, or at all, in order that the said bill might be presented to the said . . . for payment.

§ 5562. The same—Payment before indorsement.

Form No. 1579.

[TITLE.]

The defendant answers to the complaint:

I. That after the bill mentioned in the complaint was due, to-wit, on or after the . . . day of . . ., 19.., [date of maturity], and while said [drawer] was the holder thereof, and before this action, the defendant satisfied and discharged the principal and interest [and damages] due on said bill, by payment to the said [drawer].

II. That said [drawer] indorsed said bill to the plaintiff after said payment and after the maturity thereof.

§ 5563. Promissory note—Denial of note.

Form No. 1580.

[TITLE.]

The defendant answers to the complaint, and denies that he made, executed, or delivered the note mentioned [or, set forth] therein.

§ 5564. The same—Denial of indorsement.

Form No. 1581.

[TITLE.]

The defendant answers to the complaint:

That he did not indorse the note mentioned therein.

§ 5565. The same—That defendant indorsed as agent.

Form No. 1582.

[TITLE.]

The defendant answers to the complaint:

I. That he did not indorse the note mentioned therein, and that the said note was not protested for non-payment.

II. The defendant alleges that the following is a true copy of the promissory note made by the said firm of B. & Co., and on which this action is brought: [Copy of note and indorsement, with addition of "treasurer" to the defendant's signature.]

III. That at the time of the making and indorsement of said note, this defendant was the treasurer of the . . . Company, at . . ., a foreign corporation, duly incorporated by and under the laws of the state of . . .; and that he was authorized by it to receive the said note, and to indorse the same to the plaintiffs, as such treasurer; of all which facts the plaintiffs had notice.

IV. That said corporation was, at the time of said indorsement, indebted to the plaintiffs to the amount of . . . dollars, for [state what]; and said note was received by him as such treasurer, and not in his individual capacity, and was received by the plaintiffs as an obligation of the said corporation, on account of said precedent debt due to them from the said corporation, and for and on account of no other consideration whatever, and that the defendant received no consideration therefor.

§ 5566. Alteration of instrument.

Form No. 1583.

[TITLE.]

The defendant answers to the complaint:

That after the making [or, acceptance] and issue of said note [or, bill], and before this action, the same was materially altered, without the consent of the defendant, by adding the signature of A. B. as a joint maker thereof [or, by cutting off the signature of A. B. as a joint maker thereof; or, by adding the words "payable at . . ."; or otherwise, as the case may be].

§ 5567. Usury as defense upon note.

Form No. 1584.

[TITLE.]

The defendant answers to the complaint:

I. That the note mentioned therein was given to the plaintiff in pursuance of a mutual agreement between the plaintiff and defendant that the plaintiff should lend the defendant money at the rate of [ten] per cent per annum.

II. That defendant received from the plaintiff . . . dollars only as a consideration for the said note, the plaintiff retaining . . . dollars as interest thereon.

§ 5568. That note was for goods sold by means of deceit.

Form No. 1585.

[TITLE.]

The defendant answers to the complaint:

I. [Allege sale as in case of an action for damages for deceit.]

II. That said note was given to the plaintiff without any other consideration than [said sale].

III. That immediately on discovering said fraud, the defendant rescinded said [contract], and tendered to the plaintiff all that he had received under said contract, upon condition of his returning said note, which the plaintiff refused to do.

§ 5569. Illegal interest in note.

Form No. 1586.

[TITLE.]

The defendant answers to the complaint:

As to the sum of . . . dollars, parcel of said sum of . . . dollars, in said complaint demanded, the said defendant admits that he owes the said sum of . . . dollars to the said plaintiff; but as to the sum of . . . dollars, the residue of the said sum of . . . dollars, the said defendant says that the said promissory note in the complaint mentioned was given by the said defendant to the said plaintiff for the loan of . . . dollars for . . . years, and no more; and that the said sum of . . . dollars was included in said note, as interest on the said sum of . . . dollars for the said term of . . . years, at the rate of . . . per cent per annum.

§ 5570. Fraud—Note procured by fraud.

Form No. 1587.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time the note in the complaint set forth was made, he was indebted to one E. F., by book account, in the sum of . . . dollars.

II. That the plaintiff at the time falsely and fraudulently represented to the defendant that he was the owner and assignee of said account and indebtedness, and thereby, and without any consideration whatever, induced the defendant to make said note to him in satisfaction and discharge of said account.

III. That the said representations were false, and that the plaintiff never was the owner or assignee of said account, nor had he any beneficial interest in the same.

IV. That the defendant was misled by said false representations [or, that the belief of the defendant in the truth of said representations induced him to make said note].

§ 5571. That note was for goods sold on false warranty.

Form No. 1588.

[TITLE.]

The defendant answers to the complaint:

I. That the defendant made, executed, and delivered the note mentioned in the complaint for and on account of certain goods [describe them] theretofore furnished by the plaintiff to him, the defendant, under a representation and warranty by the plaintiff, at the time of so furnishing them made to the defendant, that the said goods were [state facts relative to the warranty].

II. That the defendant then accepted and purchased said goods for the purpose of [state purpose], trusting in the said representation and warranty of the plaintiff, all of which the plaintiff then well knew.

III. That the same were not the kind of goods purchased, nor such as they were so warranted to be by the plaintiff, as aforesaid, in this [state wherein], nor would they answer the purpose designated.

IV. That the defendant upon the discovery that the said goods were not such as they were warranted to be, as aforesaid, returned [or, offered to return] the same to the plaintiff, and demanded of the plaintiff that he return said note to the defend-

ant. [If plaintiff received the goods back, so state; if he refused, allege that the goods are still held by the defendant for the plaintiff, of all which the plaintiff had notice.]

§ 5572. Recoupment for breach of warranty.

Form No. 1589.

[TITLE.]

The defendant answers to the complaint:

I. That the said note was not, before it became due, transferred and delivered to the plaintiff for value.

II. That the said note was made and delivered by the defendant to one A. B., who was at that time an agent or servant of the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of cigars, which were sold by sample to the defendant at that time by said A. B., as such agent.

III. That when said cigars were delivered to this defendant, they did not correspond with the samples, and were not worth more than . . . dollars.

IV. That as soon as the defendant learned the character of said cigars, he offered to said A. B., as such agent, to return them, which he is still ready and willing to do.

Wherefore the defendant claims to recoup . . . dollars, his damages in this behalf, from the amount of the said note.

§ 5573. That note was for accommodation, and was misapplied.

Form No. 1590.

[TITLE.]

The defendant answers to the complaint:

I. That the note mentioned and described in the complaint was given by this defendant to [the payee] therein named, without any other consideration than is hereinafter stated.

II. That theretofore this defendant had loaned his promissory note for . . . dollars, dated on the . . . day of . . ., 19.., to said [payee], without consideration, and solely for the accommodation of said [payee], and upon his promise to take up and pay the same at maturity.

III. That the said note fell due on the . . . day of . . ., 19.., and that, at the request of said [payee], this defendant then gave him the note in suit, for the special purpose of enabling him

therewith to take up and renew said first note of . . . dollars, he paying the balance, and upon the agreement with him that it should be so used, and not otherwise.

IV. That the plaintiff having a claim then overdue against the said [payee], he, said [payee], wrongfully diverted said note from the purpose for which it was given, and fraudulently misapplied the same by giving it to plaintiff as collateral to secure the payment of said note.

V. That the plaintiff is not a *bona fide* holder of the note in suit for a valuable consideration; but received the same with notice of the foregoing facts, and as collateral to secure the payment of an antecedent debt, and without paying any consideration therefor.

VI. This defendant denies each and every allegation of the complaint inconsistent with the foregoing statement.

§ 5574. Failure of consideration.

Form No. 1591.

[TITLE.]

The defendant answers to the complaint:

I. The defendant admits that he made the promissory note as stated in the complaint; that the same was indorsed by the payee; that the plaintiff is the lawful owner and holder thereof; and that no part thereof has been paid.

II. But defendant alleges, on information and belief, that the plaintiff became the purchaser, holder, and owner of said note, on or about the . . . day of . . . , 19.. , and after the same had become due.

III. Defendant alleges that said note was made and delivered by the defendant to the plaintiff as the purchase price of a certain horse [or, certain goods and merchandise], which the plaintiff, on the . . . day of . . . , 19.. , sold and delivered to this defendant, and not otherwise.

IV. That in truth and in fact the said plaintiff did not own the said [describe property] at the time of such pretended sale and delivery; but the same was then the property of E. F., who thereafter, and on the . . . day of . . . , 19.. , recovered the same from this defendant by a judgment duly given in his favor in an action of replevin.

V. That defendant has received no consideration for the said note.

§ 5575. That notes were given for purchase money, and plaintiff failed to convey.

Form No. 1592.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the only consideration of the said three several notes was and is the sale of a certain piece of land, situate in the county of . . . and state of . . ., and known and described as [description].

II. That at the time of making said several promissory notes the said plaintiff agreed to convey the said premises to this defendant, at the time when the sum named in the note described in the first count of the said complaint should become due and payable, to-wit, on the said . . . day of . . ., 19.., and take a mortgage from this defendant on said premises, to secure the payment of the sums mentioned in the two notes described in the second and third counts of the said complaint.

III. That the defendant duly performed all the conditions of said agreement on his part, and on said day was, and ever since has been, ready and willing to pay the first-named sum, and execute and deliver said mortgage, on the delivery by the said plaintiff of such deed of conveyance.

IV. That said plaintiff did not, on the said . . . day of . . ., 19.., nor at any time since, offer to convey the said premises to the said defendant, on the payment of the sum mentioned in the said first note, and the execution of a mortgage by the said defendant as aforesaid, to secure the sums of money mentioned in the two other notes. [Or, if by the agreement it was necessary, allege demand and refusal.]

§ 5576. That note was for goods sold with false warranty.

Form No. 1593.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant gave the note mentioned in the complaint for and on account of certain goods, called . . ., theretofore furnished by the plaintiff to him, the defendant, under a representation and warranty by the plaintiff, at the time of so furnishing them, made to the defendant, that the said goods were fit and proper material for . . . [stating the warranty], and

suitable for such purpose, and for no other consideration whatever.

II. That the defendant then accepted and purchased said goods for the purpose of . . ., trusting in the said representation and warranty of the plaintiff; all of which the plaintiff then well knew.

III. That the same were not fair or proper for said purpose, but altogether unsuitable and worthless, in this, that [here state particularly the defects].

§ 5577. That note was given on purchase of diseased sheep, and that they injured other sheep of defendant.

Form No. 1594.

[TITLE.]

The defendant answers to the complaint, and, for a counterclaim, alleges:

I. That the said note was given for sheep purchased by the defendant of the plaintiff.

II. That the plaintiff, in making said sale, represented himself to the defendant as a dealer in sheep, and acquainted with their diseases, and that the said sheep were sound and free from disease.

III. That defendant was ignorant of the disease called foot-rot; and that he purchased said sheep, relying upon the said representations of the said plaintiff.

IV. That in fact the sheep were not sound and free from disease, but were diseased with the foot-rot, which is contagious.

V. That the defendant was then the owner of five thousand other sheep, with which he desired those he purchased of plaintiff to run; of all of which the plaintiff had notice at the time of making the said sale.

VI. That before he had any knowledge that the sheep so purchased were diseased, and while they were running with his other sheep, the latter became diseased with the said foot-rot from so running together; and that he has been thereby compelled to expend . . . dollars in their cure and endeavoring to cure them, and been damaged by reason of allowing said sheep to run with his other sheep, to the amount of . . . dollars.

[Demand of judgment for damages sustained.]

§ 5578. Answer by accommodation indorsers, alleging extension given.

Form No. 1595.

[TITLE.]

The defendants answer to the complaint, and allege:

I. That said note was indorsed by the defendants without consideration, and for the accommodation of the defendant Z., the maker thereof.

II. That the plaintiffs, at the time they received said note, had notice thereof.

III. That about the time of its maturity, the plaintiffs, for a valuable consideration, and without the knowledge or assent of these defendants, made an agreement with said [maker], whereby they agreed to extend the time for the payment of said note by said [maker] . . . days.

IV. [Allege facts showing damage on account of such extension of time.]

§ 5579. That defendant was surety, and that plaintiff holds collateral securities to which defendant asks to be subrogated.

Form No. 1596.

[TITLE.]

The defendant answers to the complaint, and, for a counterclaim, alleges:

I. That said draft was accepted by the defendant without any consideration for the accommodation of said [drawers], which the plaintiff well knew.

II. That the same was made under an agreement between said [drawers] and the plaintiff, whereby said [drawers] executed to the plaintiff a bond for . . . dollars, together with a mortgage on house and lot No. . . . street, in . . ., as security for the payment thereof, which securities the plaintiff still holds, and are ample to secure and satisfy plaintiff's demand.

III. That said [drawers] are insolvent and unable to pay said acceptance, and the defendant has no recourse for the payment or security of the sum for which he is liable to the plaintiff, except the said mortgages and securities held by the plaintiff.

IV. That the defendant has offered to pay the said draft, with interest and costs, if the plaintiff will surrender and transfer to the defendant upon such payment the mortgages and securities held by the plaintiff; which the plaintiff refuses to do, but claims

to hold said securities for some other demand due to the plaintiff from said [drawers].

V. That the plaintiff is a foreign corporation, created and doing business in the state of . . ., and the defendant will be remediless under the laws of the state of . . ., where the defendant resides, except by the aid and interposition of this court.

Wherefore, the defendant demands that upon his paying said draft, with interest and costs, the plaintiff be adjudged to transfer said bond and mortgage to the defendant [and that he may hold and enforce them for his reimbursement, with interest].

§ 5580. That note was given to compound felony.

Form No. 1597.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on or about the . . . day of . . ., 19. . , this defendant [or, one E. F., the son of this defendant] feloniously [here state crime committed], and that thereafter it was agreed by and between this defendant and the said plaintiff that the defendant should execute and deliver to the said plaintiff his promissory note for the sum of . . . dollars in settlement and satisfaction of the said crime, and for the purpose of compounding the same; and that in pursuance of said agreement the said note described in the complaint was executed and delivered to the plaintiff, and upon no other or different consideration.

§ 5581. Denial of genuineness of signature.

Form No. 1598.

[TITLE.]

The defendant specifically denies that he at any time signed or executed the said supposed promissory note set forth in the complaint herein, and alleges that if the name of this defendant appears upon said promissory note, either as maker or indorser, the said signature is a forgery.

[VERIFICATION.]

§ 5582. Mistake in amount of note.

Form No. 1599.

[TITLE.]

The defendant answers to the complaint, and alleges:

That said note was given upon a settlement of account between

the defendant and the plaintiff, and was intended by them to be made and received for the sum of . . . dollars, then claimed by the plaintiff to be the amount due him from this defendant; but that when it was made it was, by mistake of the parties, given for the sum of . . . dollars mentioned in the complaint, instead of the sum of . . . dollars, which was all that was due; and as to the excess, to-wit, . . . dollars, the same is without consideration.

CHAPTER CXXXI.

ON JUDGMENTS AND STATUTES.

§ 5583. Action lies on judgment or decree.—Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. An action may be brought upon a domestic judgment to recover a second judgment thereon, if the first judgment has not become dormant, and there is no necessity to have execution issue on, or to have a revivor of, the judgment in order to preserve the cause of action.[1] It is in this way that judgments of foreign courts are enforced, and the rule applies equally whether they be courts of record or not.[2] The same rule prevails in the United States, where such action has been maintained in one state on a judgment rendered by a justice of the peace in another.[3] In Virginia, debt was maintained upon a judgment obtained in a court the office of which had been consumed by fire, and the record of judgment wholly destroyed.[4] An action lies upon an unpaid judgment, although the execution has not been returned.[5] It is not necessary to allege an unsuccessful effort to collect the judgment.[6] It was formerly doubted whether an action could be maintained upon a decree, for the reason that the plaintiff had no legal right to the money, but only that upon certain views peculiar to a court of equity the payment ought to be made, and that no promise could be implied from a decree.[7] It is now established, both in England and the United States, that an action will lie on such a decree.[8] Such action lies although the judgment could have an execution issued thereon.[9]

1 Treat v. Wilson, 65 Kan. 729, 70 Pac. 893.

2 Williams v. Jones, 13 Mees. & W. 628.

3 Cole v. Driskell, 1 Blackf. 16. See Gutta Percha Mfg. Co. v. Mayor, 108 N. Y. 276, 2 Am. St. Rep. 412, 15 N. E. 402; Moore v. Ogden, 35 Ohio St. 433.

4 Newcomb v. Drummond, 4 Leigh (Va.) 57.

5 Linton v. Hurley, 114 Mass. 76.

6 King v. Blood, 41 Cal. 314.

7 See Carpenter v. Thornton, 2 Barn. & Ald. 52.

8 Henderson v. Henderson, 51 Eng. Com. L. 288; Pennington v. Gibson, 16 How. 76, 14 L. Ed. 847; Freeman on Judgments, §§ 432-441.

9 Brooks v. Todd, 1 Handy, 169; Headley v. Roby, 6 Ohio, 521; Linton v. Hurley, 114 Mass. 76; Hummer v.

§ 5584. **Against counties.**—A judgment against a county under the act authorizing counties to sue and be sued, has the effect of converting a demand into an audited claim.[10] After such judgment has been obtained, the proper mode of enforcing it is by a writ of mandate. An ordinary action on such judgment does not lie.[11]

§ 5585. **Parties plaintiff.**—An assignee of the legal title to a judgment is, as to the judgment debtor, the real party in interest, and entitled to sue notwithstanding a trust exists between the assignor and assignee.[12] Where a foreign court ordered defendant to pay a certain sum of money to a trustee, thereafter to be appointed by an insolvency court, the trustee so appointed is the one entitled to sue on the judgment.[13] On the transfer of interest in a suit it may be continued in the name of the original party;[14] so it is immaterial that the attorney signed the receipt and satisfaction of the judgment as attorney for the original plaintiff in the action.[15]

§ 5586. **Judgment against a decedent.**—A judgment against a decedent must be presented to the executor or administrator in the same manner as any other claim. As the judgment itself cannot be presented, a certified copy of it (not a mere copy of the docket entry) should be used.[16]

§ 5587. **Parties defendant.**—One of a number of joint judgment debtors may be sued alone on the judgment.[17]

§ 5588. **Judgments, how pleaded.**—In pleading a judgment, especially of a court of general jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment may

Lamphear, 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865. See McDonald v. Dickson, 85 N. C. 248; Lambson v. Moffett, 61 Md. 426; Pitzer v. Russell, 4 Or. 124.

10 Sharp v. Contra Costa County, 34 Cal. 284.

11 Alden v. County of Alameda, 43 Cal. 270.

12 Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962.

13 Poll v. Hicks, 67 Kan. 191, 72 Pac. 847.

14 Cal. Code Civ. Proc., § 385.

15 Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785.

16 Cal. Code Civ. Proc., §§ 1505, 577; Alaska Codes, pt. 4, ch. 84, § 825; Ariz. Civ. Code, par. 1754; Idaho Rev. Codes, § 5475; Mont. Rev. Codes, § 7537; Nev. Comp. Laws, § 2904; Or. B. & C. Codes, § 1163; Utah Rev. Stats., § 3863; Wash. Bal. Codes, § 6240; Wyo. Rev. Stats., § 4760.

17 Childs v. Blethen, 40 Wash. 340, 82 Pac. 405.

be stated to have been duly given or made, and if controverted, the facts conferring jurisdiction must be established on the trial.[18] This rule applies also to determinations made by boards of supervisors and like bodies in the granting of franchises.[19] In California, the code expressly makes the above rule applicable to all judgments or other determinations of a court, officer, or board.[19a] It was formerly held that in pleading the judgment of a court of limited jurisdiction, it is necessary to set forth the facts which give jurisdiction,[20] as the law presumes nothing in favor of their jurisdiction.[21] The decisions in New York seem to bear the other way on this point, and would appear to conform more nearly to the language of the statute than the early California decisions. There, it seems, it is no longer necessary to state the facts conferring jurisdiction on a court or officer of limited jurisdiction.[22] If it be denied, jurisdiction and all jurisdictional facts must be proved.[23] It was so held in pleading an insolvent discharge.[24]

In pleading a judgment, the precise words of the record need not be observed, and surplusage or immaterial omissions in matters of substance in such pleas are attended with no other consequences than in other cases. But in matters of description, the record produced must conform strictly to the plea.[25]

But this section does not refer to foreign judgments, and a general averment of jurisdiction of a foreign tribunal is not sufficient;[26] therefore, facts showing jurisdiction, both of person and subject-matter, must be stated.[27] But in California, where

18 Cal. Code Civ. Proc., § 456; N. Y. Code Civ. Proc., § 532; Nev. Comp. Laws, § 3154; Idaho Rev. Codes, § 4211; Ariz. Rev. Stats., par. 836; Mont. Rev. Codes, § 6571; Or. B. & C. Codes, § 87; Low v. Burrows, 12 Cal. 181; Hanscom v. Tower, 17 Cal. 518; Hunt v. Dutcher, 13 How. Pr. 538; Chaquette v. Ortet, 60 Cal. 594; Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799.

19 Gurnsey v. Northern California Power Co., 7 Cal. App. 534, 96 Pac. 858.

19a Code Civ. Proc., § 456.

20 Smith v. Andrews, 6 Cal. 652.

21 Swain v. Chase, 12 Cal. 283; Rowley v. Howard, 23 Cal. 403; McDonald v. Katz, 31 Cal. 169. But see Cal. Code Civ. Proc., § 456.

22 Wheeler v. Dakin, 12 How. Pr. 542.

23 Id. See Wise v. Loring, 54 Mo. App. 259.

24 Livingston v. Oaksmith, 13 Abb. Pr. 133; Carter v. Koezley, 14 Abb. Pr. 147. Contra, McDonald v. Katz, 31 Cal. 169.

25 Whitaker v. Bramson, 2 Paine, 209, Fed Cas. No. 17526. Compare Riddle v. Potter, 1 Cranch C. C. 288, Fed. Cas. No. 11811.

26 Hollister v. Hollister, 10 How. Pr. 539; citing Barnes v. Harris, 3 Barb. 603; Ayres v. Covill, 18 Barb. 260; Bemet v. Wisner, 1 N. Y. Code Rep. (N. S.) 143.

27 McLaughlin v. Nichols, 13 Abb. Pr. 244. But in Halstead v. Black, 17 Abb. 227, the contrary is held. Com-

the transcript of the judgment shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction.[28] A judgment of the probate court may be pleaded in the mode prescribed by the statute.[29] And it is presumed that the probate court acted only in probate matters.[30] In an action upon a judgment, the complaint must show that a final judgment was recovered, and an allegation that in the prior action the court "adjudged" that the defendant should pay to the plaintiff a certain sum of money, without the use of the word "judgment," is sufficient to show a cause of action.[30a] In pleading a judgment or award, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.[31] This applies, however, to judgments of courts of general jurisdiction.

A complaint in an action on a judgment is sufficient, in the matter of description, when it sets forth the court in which it was rendered, the place at which the court was held, the names of the parties in favor of and against whom it was entered, the date of its rendition, and the sum recovered.[32] Additional averments as to the contract on which the judgment is found are unnecessary and superfluous.[33] In suing on a judgment of a foreign court of inferior jurisdiction, facts must be stated showing jurisdiction of the person and the subject-matter.[34] In Ohio, it was held that this section was not intended to apply to the judgments of the superior courts of general jurisdiction of that state, or to the

pare De Nobele v. Lee, 61 How. Pr. 272. As to sufficiency of complaint in an action upon a Canadian judgment, see Wright v. Chapin, 74 Hun, 521, 26 N. Y. Supp. 825, 31 Abb. N. C. 137.

28 Low v. Burrows, 12 Cal. 181; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254; Cal. Code Civ. Proc., § 456; Gurnsey v. Northern California Power Co., 7 Cal. App. 534, 94 Pac. 858.

29 Beans v. Emanuelli, 36 Cal. 117.

30 Nolan v. Hughes, 51 Or. 187, 93 Pac. 362, 94 Pac. 504.

30a Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799. See Weller v. Dickinson, 93 Cal. 108, 28 Pac. 854; Nolan v. Hughes, 51 Or. 187, 93 Pac. 362, 94 Pac. 504.

31 Cal. Code Civ. Proc., § 456; N. Y. Code Civ. Proc., § 532; Ohio Code, § 120; Weller v. Dickinson, 93 Cal. 108, 28 Pac. 854; Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799; Campe v. Lassen, 67 Cal. 139, 7 Pac. 430; Mears v. Shaw, 32 Mont. 575, 81 Pac. 338; Scanlan v. Murphy, 51 Minn. 536, 53 N. W. 799; Wheeler v. Dakin, 12 How. Pr. 542. It is said, in great measure obiter, in Hollister v. Hollister, 10 How. Pr. 532, that this section does not apply to foreign judgments, and that a general averment of jurisdiction would not be sufficient; but in Halstead v. Black, 17 Abb. Pr. 227, the contrary is held.

32 Andrews v. Flack, 88 Ala. 294, 6 South. 907.

33 Sims v. Hertzfeld, 95 Ala. 145, 10 South. 227.

34 McLaughlin v. Nichols, 13 Abb. Pr. 244.

judgments of the courts of other states.[35] But section 120 of the Ohio code refers only to "pleading a judgment or other determination of a court or officer of special jurisdiction." In Indiana, it is held that in a complaint on a judgment of a justice of the peace of another state the averment that the judgment or decision was duly given or made is equivalent to an averment that the justice had jurisdiction of the person and subject-matter.[36]

§ 5589. **The same—Complaint on foreign judgment.**—In an action on an English judgment, an allegation that at the date of the judgment "the value of said judgment in lawful money of the United States of America was seven thousand and fifty-five dollars" sufficiently alleges the value of the judgment, and an allegation "that said Queen's Bench division of said high court of justice had jurisdiction of the subject-matter of said action and of the parties thereto," and "that said judgment was duly given, made and entered, in and by" said court, sufficiently alleges jurisdiction, in absence of a demurrer.[37]

§ 5590. **The same—Date of entry.**—Where in an action on a judgment the *postea* in the record stated that the judge presiding at *nisi prius* sent up the record of proceedings had before him on the nineteenth day of November, 1855, and it appeared that judgment was signed September 26, 1856, it was held that it was properly averred in the complaint that the judgment was recovered on the latter day; and if this had been an error it was amendable at the trial, and would be disregarded on appeal.[38]

§ 5591. **The same—Appeal.**—A judgment unreversed and not suspended may be enforced.[39] But it need not be averred in the complaint that it was unreversed.[40]

§ 5592. **Amended answer.** — Where the judgment creditor assigns the judgment to two different parties, defendant should be allowed to amend his answer upon his learning of an agree-

35 Memphis Medical College v. Newton, 2 Handy, 163.

36 Crake v. Crake, 18 Ind. 156; Halstead v. Black, 17 Abb. Pr. 227.

37 Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053.

38 Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

39 Raun v. Reynolds, 18 Cal. 276; Weaver v. San Francisco, 146 Cal. 728, 81 Pac. 119.

40 1 Chit. Pl. 321; Chaquette v. Ortet, 60 Cal. 594; Freeman on Judgments, §§ 432-434.

ment made contemporaneously with one of the assignments.[41] A denial that defendant is indebted to plaintiff puts nothing in issue.[42]

§ 5593. **Pleading assignment.**—In an action by an assignee on a money judgment, where the complaint alleges the assignment, it is not necessary for it to further state that plaintiff was the owner of the judgment at the commencement of the action.[43] And the question whether any equitable interest was left in the assignor after the assignment could not be litigated under a denial of the fact of the assignment.[44] If the defendant wishes to make the defense that he had no notice of a contemporaneous assignment, made at the time of the assignment of which he was notified, he should be allowed to amend his answer, or the court may direct the fact to be found according to the evidence.[45] A denial in an answer in an action on a judgment, that defendant is indebted to plaintiff, puts nothing in issue, and an allegation on information and belief that the judgment was obtained by collusion and fraud of plaintiff and defendant's attorney does not sufficiently plead the facts supposed to constitute fraud.[46]

§ 5594. **Pleading in federal courts.**—A declaration is sufficient which avers that "at a general term of the supreme court in equity, for the state of New York," etc., being thus averred to be a court of general jurisdiction, no averment was necessary that the subject-matter in question was within its jurisdiction, and the courts of the United States will take notice of the judicial decisions in the several states in the same manner as the courts of those states.[47] Indeed, it has become a settled practice in declaring in an action upon a judgment, not, as formerly, to set out in the declaration the whole record of the proceedings in the general suit, but only to allege generally that the plaintiff, by the consideration and judgment of the court, recovered the sum mentioned therein, the original cause of judgment having passed *in rem judicatum*.[48]

41 Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785.

42 Harter v. Shull, 17 Colo. App. 162, 67 Pac. 911.

43 Curtin v. Kowalsky, 145 Cal. 431, 78 Pac. 962.

44 Id.

45 Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785.

46 Harter v. Shull, 17 Colo. App. 162, 67 Pac. 911.

47 Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847.

48 Biddle v. Wilkins, 1 Pet. 686, 7 L. Ed. 315.

§ 5595. **Judgment by confession.**—A judgment creditor, made such by confession of judgment, who seeks to reach money of the judgment debtor in the hands of junior judgment creditors, upon the ground that he has a prior lien on the same, must aver in his complaint that at the time his judgment was rendered the amount for which it was rendered was unpaid and due.[49]

§ 5596. **Defense of dismissal.**—Where the defendant relies in defense upon an agreement under which a former action for the same cause was dismissed, settled, or released, he must raise such defense by plea; otherwise, it will not be available as a bar.[50] The plea of *nil debet* is an insufficient answer to an action on a judgment.[51]

§ 5597. **Limitations.**—In California, a judgment does not become final until six months from the date of its entry, and is not barred until after five years from the date it becomes final.[52] Section 312 of the California Code of Civil Procedure declares that civil actions must be commenced within the time prescribed, after the cause of action shall have accrued; and section 336 limits the time for bringing action on a judgment to five years; and section 1049 provides that an action is pending from the time of filing till the time for appeal has passed. Thus, where a judgment becomes final one year from date of its entry, an action on the judgment is not barred until six years from the date of its entry.[53] The right of action on a deficiency judgment after foreclosure sale accrues at the date the amount of the deficiency is ascertained, and not the date of entry of the foreclosure decree.[54] Revivor of a judgment in a foreign state extends the time for bringing action on it in another state.[55] The absence of a judgment debtor from the state will not prevent the running of limitations on a domestic judgment against him.[56] In Washington, a judgment creditor's right to bring an action on the judgment is not postponed until the expiration of the time

49 Denver v. Burton, 28 Cal. 549.

50 Haldeman v. United States, 91 U. S. 584, 23 L. Ed. 433.

51 Indianapolis etc. Ry. Co. v. Risley, 50 Ind. 60.

52 Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038.

53 Feeney v. Hinkley, 134 Cal. 467, 66 Pac. 580.

54 Howe v. Sears, 30 Utah, 344, 84 Pac. 1107.

55 Leman v. Cunningham, 12 Idaho, 135, 85 Pac. 212.

56 Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630.

during which execution may issue, but accrues on rendition of the judgment; and the statute[56a] providing that action on a judgment or decree of any court of the United States, or of any state or territory within the United States, must be commenced within six years applies to domestic as well as foreign judgments.[57]

In an action on a foreign judgment by confession, the eighteen months preceding the date that the judgment became operative under the laws of the state in which the judgment was rendered must be excluded in applying the statute of limitations.[58] In Oklahoma, an action on a foreign judgment must be brought within one year from the time the right of action accrues;[59] but execution may issue on a domestic judgment any time within five years,[60] and a longer time is allowed to bring suit thereon.[61]

§ 5598. **Fraud—Jurisdiction.**—The fact that defendant was induced by fraud to submit himself to jurisdiction of the court of a sister state is a good defense on an action on a judgment so obtained.[62] An allegation on information and belief that plaintiff colluded and conspired with H., defendant's attorney, whereby H. was not to, and did not, make any defense, but allowed judgment to be entered against defendant, does not sufficiently plead the facts constituting fraud.[63]

§ 5599. **Fraud.**—In an action on a foreign judgment, matters of defense alleging fraud in the obtaining of that judgment, even if conceded to be frivolous, cannot be held irrelevant, so as to be stricken out.[64] A plea of fraud in obtaining a judgment sued upon cannot be demurred to generally, because not showing the particulars of the fraud set up. Going to a matter of form, the demurrer should be special.[65] The prevailing doctrine is that a plea of fraud is not admissible in actions on judgments of sister states, where there was jurisdiction of the person and subject-

56a 2 Bal. Annot. Codes & Stats., § 4798.

57 Citizens' Nat. Bank v. Lucas, 26 Wash. 417, 90 Am. St. Rep. 748, 67 Pac. 252, 56 L. R. A. 812. See, also, Meek v. White, 26 Wash. 491, 67 Pac. 256.

58 Gaumer v. Terrel, 65 Kan. 15, 68 Pac. 1071.

59 Bank of Stockham v. Weins, 12 Okla. 502, 71 Pac. 1073.

60 Mansf. Dig., § 4103.

61 Reaves v. Turner, 20 Okla. 492, 94 Pac. 543.

62 Abercrombie v. Abercrombie, 64 Kan. 29, 67 Pac. 539.

63 Harter v. Shull, 17 Colo. App. 162, 67 Pac. 911.

64 Fassnacht v. Stehn, 5 Abb. Pr. (N. S.) 338.

65 Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475.

matter, unless it can be set up in the courts of the state rendering the judgment.[66]

§ 5600. **Defenses—No jurisdiction.**—The defense of lack of jurisdiction of the defendant is available in an action on the judgment.[67]

§ 5601. **Res adjudicata.**—A former adjudication must be pleaded.[68] The issue of *res adjudicata* may be raised by demurrer where the facts of the bringing and disposing of the former suit is fully set forth in the complaint.[69] Otherwise, defendant must, in a suit in equity, plead and prove facts establishing a former adjudication of the issue by judgment, decree, or final order of a court of competent jurisdiction.[70] But if the former action was not decided upon the merits, it is upon plaintiff to show it.[71] Where the decree rendered on appeal in a suit in equity is ambiguous, the opinion may be examined to determine the extent of the decree as *res adjudicata*.[72] Where the parties to a prior action were not the same, and the relief demanded was not the same, the court should decide whether the former action was *res adjudicata*.[73]

§ 5602. **Judgments of justices' and probate courts.**—It is a general rule that the law presumes nothing in favor of the jurisdiction of a justice's court. Where such rule prevails, a complaint on a judgment of a justice must affirmatively show every fact conferring jurisdiction.[74] This was originally the rule in California, but it has since been changed by statute.[75] In pleading the judgment of a probate court, in California, it was formerly necessary to set forth the facts which give jurisdiction.[76] This, however, has been changed by code section 456, and judgments

66 Ambler v. Whipple, 139 Ill. 311, 32 Am. St. Rep. 202, and note, 28 N. E. 841.

67 Symes v. People, 17 Colo. App. 466, 69 Pac. 312.

68 McLean v. Baldwin, 136 Cal. 565, 69 Pac. 259.

69 Lockhart v. Leeds, 12 N. Mex. 156, 76 Pac. 312.

70 Ortiz v. First Nat. Bank, 12 N. Mex. 519, 78 Pac. 529; Ex parte Stevenson, 20 Okla. 549, 94 Pac. 1071; Grand Valley Irr. Co. v. Fruita Improvement Co., 37 Colo. 483, 86 Pac. 324.

71 Sweeney v. Waterhouse Co., 43 Wash. 613, 86 Pac. 946.

72 Gentry v. Pacific Live Stock Co., 45 Or. 233, 77 Pac. 115.

73 Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 Pac. 775.

74 Swain v. Chase, 12 Cal. 283; Rowley v. Howard, 23 Cal. 401.

75 Cal. Code Civ. Proc., § 456.

76 Smith v. Andrews, 6 Cal. 652; Townsend v. Gordon, 19 Cal. 189.

of that court are now pleaded as other judgments of courts of general jurisdiction.[77] In pleading a judgment of a justice's court, in Montana, the pleader must either aver that the judgment was "duly given or made," as permitted by the statute,[78] or the facts conferring jurisdiction must be alleged and proved.[79] In New York, it must be alleged that the judgment, if of a justice's court, was recovered in a county of the state, docketed in that county and execution issued, and that the judgment debtor was a resident of the state and county.[80]

§ 5603. **Averment of leave of court.**—In New York, an action upon a judgment cannot be maintained between the original parties thereto, except as otherwise prescribed, without leave of court, and it is necessary to aver that leave to prosecute the action has been obtained.[81] And if this averment is not made, it does not state a sufficient cause of action.[82] The practice in California is, however, different, as the suit may be commenced without leave of court previously obtained.[83] And this is so although the suit is brought on a judgment of a court of another state, by the law of which no action can be maintained on a judgment without leave.[84] Yet there are in our practice numerous instances where leave of court must be first obtained; such as suits against receivers, etc.

§ 5604. **Demand.**—It is not necessary to aver any demand of payment by the assignee, or any refusal to pay by the debtor,[85] except that a judgment against a decedent must be presented to the executor or administrator in the same manner as any other claim.[86]

§ 5605. **Allegations on foreign judgment.**—In pleading the judgment of a sister state, it is sufficient to allege that it was

77 Beans v. Emanuelli, 36 Cal. 117.

78 Mont. Rev. Codes, § 6571.

79 Harmon v. Comstock etc. Cattle Co., 9 Mont. 243, 23 Pac. 470; Weaver v. English, 11 Mont. 84, 27 Pac. 396.

80 Tuttle v. Robinson, 36 N. Y. Supp. 346, 91 Hun, 187.

81 N. Y. Code Civ. Proc., § 1913.

82 Graham v. Scripture, 26 How. Pr. 501. For cases excepted from this rule, see Smith v. Britton, 45 How. Pr. 428; Carpenter v. Butler, 29 Hun, 251; Baldwin v. Roberts, 30 Hun, 163; Goodyear etc. Co. v. Frisselle, 22 Hun, 174.

83 Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254.

84 Weber v. Yancy, 7 Wash. 84, 34 Pac. 473.

85 Moss v. Shannon, 1 Hilt. 175.

86 Cal. Code Civ. Proc., § 1505.

duly recovered. Facts conferring jurisdiction need not be stated in the complaint.[87] It is necessary to allege jurisdiction only in the case of a court whose title indicates that it may be one of limited jurisdiction. In such a case, it is better to aver that the court had a general jurisdiction. This was held necessary in an action on the judgment of a county circuit court of another state.[88] In a New York decision,[88a] it is said that courts of common pleas and county courts of other states are to be presumed of general jurisdiction.[89] A judgment of a court of a foreign country, complete and regular upon its face, is *prima facie* valid, and a complaint upon such foreign judgment need not allege that the court by which it was rendered had jurisdiction either of the cause or the parties.[90] In an action upon a judgment rendered in the Queen's Bench division of the high court of justice, in England, an allegation that the plaintiff in the action in which the judgment was rendered signed final judgment for a specified sum in accordance with the terms of an order of the said court, "which said judgment was then and there duly given, made, and entered," is sufficient as against a general demurrer.[91]

§ 5606. **Evidence.**—A judgment being a matter of record, it cannot be overcome by evidence of a lower degree.[92] A judgment reciting due service is a judicial determination by the court of the sufficiency of the service; and though entitled to the same presumption of verity as on any other issue, it may be impeached by some extraneous matter.[93] Want of jurisdiction is a direct attack, and can be shown by matter outside the record.[94]

87 Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. 431; Hollister v. Hollister, 10 How. Pr. 532; Ayres v. Covill, 18 Barb. 260; Halstead v. Black, 17 Abb. Pr. 227. See Kronberg v. Elder, 18 Kan. 150; Coughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005; Ritchie v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380; Gilchrist v. West Virginia Oil Co., 21 W. Va. 115, 45 Am. Rep. 555. But compare Gebhard v. Garnier, 12 Bush, 321, 23 Am. Rep. 721.

88 McLaughlin v. Nichols, 13 Abb. Pr. 244.

88a Foot v. Stevens, 17 Wend. 483.

89 Compare Frees v. Ford, 6 N. Y. 176; Kundolf v. Thalheimer, 17 Barb. 506. Compare, also, Pringle v. Woolworth, 90 N. Y. 502; Stewart v. Stewart, 27 W. Va. 167; Specklemeyer v. Dailey, 23 Neb. 101, 8 Am. St. Rep. 119, 36 N. W. 356.

90 Gunn v. Peakes, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466.

91 Dore v. Thornburgh, 90 Cal. 64, 25 Am. St. Rep. 100, 27 Pac. 30.

92 Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

93 Id.

94 Dane v. Daniels, 28 Wash. 155, 68 Pac. 446.

When two assignments are made at the same time, they should both be admitted in evidence.[95] The recitals in a judgment pleaded in bar are sufficient evidence of the matters therein recited.[96] and where the judgment is rendered by a court of general jurisdiction, the recitals constitute evidence of their truth, and every intendment must be indulged in support of the judgment.[97] The record entry of a judgment is indispensable to prove the evidence of it in another court.[98]

§ 5607. **Appearance, how alleged.**—Alleging that defendant was duly notified, but not saying of what, or that he had personal notice of the commencement of the suit, without saying from whom, is bad.[99]

§ 5608. **Appearance without summons.**—In pleading the judgment of a court of general jurisdiction of another state, if the defendant therein was served or appeared, the facts upon which jurisdiction is founded need not be averred. Want of jurisdiction is matter of defense.[100]

§ 5609. **Exemplification of judgment.**—A certificate of exemplification of a judgment rendered in another state, attested by the clerk under the seal of the court, and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient to sustain an action in another state.[101] It is only necessary that the certificate should state the main facts which are made necessary by the act of Congress respecting the authentication of judgments. It is not necessary to aver jurisdiction.[102] A certificate of the proceeding of the surrogate's court of New York, which states that A. W. B. is surrogate of the city and county of New York, and acting clerk of the surrogate's court; that he has compared the transcript of the papers with the original records in the matter of the estate of W. Y., and finds the same to be correct, and a true copy of all the proceedings, and that the certificate is in due form of law, in testi-

95 Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785.

96 Cal. Code Civ. Proc., § 1905.

97 Page v. Garver, 5 Cal. App. 383, 90 Pac. 481.

98 Ex parte Stevenson, 20 Okla. 549, 94 Pac. 1071.

99 Long v. Long, 1 Hill, 597.

100 Wheeler v. Raymond, 8 Cow. 311. See Schenk v. Birdseye, 2 Idaho, 141, 6 Pac. 128; and cases cited in § 5605, ante.

101 Thompson v. Manrow, 1 Cal. 428.

102 Low v. Burrows, 12 Cal. 181.

mony whereof he sets his hand and affixes his seal of office—is sufficient;[103] as, also, the certificate of a clerk of a foreign court that he has compared the papers, including the summons and the return thereon, and that the same were true and correct copies and transcripts of such original papers, and the whole thereof, sufficiently specifies that the transcript of the return of summons was correct.[104]

§ 5610. **Designation of officer.**—It is necessary in California,[105] or in New York,[106] in pleading the determination of an officer of special jurisdiction, to designate the officer; an averment that such determination was duly made is sufficient.[107] If the judgment was rendered in a justice's court, "duly" must be inserted.[108] A complaint upon the judgment of a justice of the peace must allege that it was "duly given or made," or certain equivalent allegations.[109]

§ 5611. **Jurisdiction of person.**—Lack of jurisdiction of the defendant is a good defense in an action on a judgment.[110] To show that jurisdiction over the person had been acquired, it is necessary to aver either that the party appeared or that process was sued out and duly served on him.[111]

§ 5612. **Jurisdiction of justice.**—The authority under which the judgment was rendered should be set forth.[112] A general allegation that the justice had jurisdiction is not enough. The statute giving jurisdiction should be pleaded.[113] A judgment against the plaintiff for costs of a nonsuit only is an exception to this rule.[114] But such facts need not be alleged, as residence of defendant, that summons was returned, that return was made thereon, that time of day was specified in summons, nor that

103 Bean v. Loryea, 81 Cal. 151, 22 Pac. 513; Gunn v. Peakes, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466.

104 Casety v. Jamison, 35 Wash. 478, 77 Pac. 800.

105 Cal. Code Civ. Proc., § 456.

106 N. Y. Code, § 532.

107 Carter v. Kaezley, 14 Abb. Pr. 147.

108 Thomas v. Robinson, 3 Wend. 268; Keys v. Grannis, 3 Nev. 548.

109 Hopper v. Lucas, 86 Ind. 43.

110 Symes v. People, 17 Colo. App. 466, 69 Pac. 312.

111 Cornell v. Barnes, 7 Hill, 35; Quivey v. Baker, 37 Cal. 465.

112 Stiles v. Stewart, 12 Wend. 473, 27 Am. Dec. 142.

113 Sheldon v. Hopkins, 7 Wend. 435; Stiles v. Stewart, 12 Wend. 473, 27 Am. Dec. 142.

114 Turner v. Roby, 3 N. Y. 193.

court was held at the time and place specified.[115] After stating the facts on which jurisdiction depends, it is sufficient, without setting out the proceedings, to say, "such proceedings were had," that plaintiff recovered, etc.[116] In an action on a judgment rendered in a justice's court of another state, the judgment is conclusive against all defenses which might have been urged in that court.[117]

§ 5613. Judgment against garnishee—Complaint.—In an action upon a judgment rendered against a garnishee upon proceedings supplementary to execution against a judgment debtor, it is sufficient to aver in the complaint that the judgment sued upon was "duly given and made," and that no part of it has been paid, and it need not aver that no appeal was taken from the judgment, nor that the plaintiff was authorized by an order of court to institute the action.[118]

§ 5614. Force and effect of foreign judgment.—The judgment in one state is to be received, and have full force, effect, and virtue, in another state.[119] An action on a judgment of a court of competent jurisdiction in the state of New York may be maintained in California, notwithstanding an appeal from such judgment has been taken and is still pending in the court of appeals in that state.[120]

The provision of the United States constitution giving force and effect to the judgments of sister states has no reference to the manner of pleading, but only to their effect when offered in evidence.[121]

115 Barnes v. Harris, 4 N. Y. 375, 3 Barb. 603.

116 Turner v. Roby, 3 N. Y. 193.

117 Banister v. Campbell, 138 Cal. 455, 71 Pac. 504, 703.

118 Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254.

119 Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; Mayhew v. Thatcher, 6 Wheat. 129, 5 L. Ed. 223; Armstrong v. Carson's Exrs., 2 Dall. 302, 1 L. Ed. 391; Green v. Sarmiento, 3 Wash. C. C. 17, Fed. Cas. No. 5760, Pet. C. C. 74; Borden v. Fitch, 15 Johns. 121, 8 Am. Dec. 225; Shumway v. Stillman, 4 Cow. 293, 15 Am. Dec. 374; Teel v. Yost, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265; Ambler v. Whipple, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841. See Wright v. Chapin, 74 Hun, 521, 26 N. Y. Supp. 825, 31 Abb. N. C. 137.

120 Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478.

121 Gebhard v. Garnier, 12 Bush, 321, 23 Am. Rep. 721; Karns v. Kunkle, 2 Minn. 313.

§ 5615. **Allegation of jurisdiction.**—In actions on judgments obtained in another state, where the transcript shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction.[122] In Indiana, the record of the judgment or a transcript of it must be set forth.[123] In New York, it should not be.[124] If the judgment was recovered in Ohio against the company by an erroneous name, but the suit upon the judgment was brought in Indiana against the company, using its chartered name correctly, accompanied with an averment that it was the same company, this mistake is no ground of error; it could only be taken advantage of by a plea in abatement in the suit in which the first judgment was recovered.[125] In Ohio, it is held that a transcript of a record showing the recovery of a judgment is not "an instrument for the unconditional payment of money only," and cannot be made a part of the complaint by reference.[126] In an action in Kansas upon a judgment recovered in the court of common pleas of Pennsylvania, the petition need not aver that that court had jurisdiction either of the person or the cause of action.[127]

§ 5616. **Actions on foreign judgments.**—In an action on an English judgment, where the complaint alleged the value of the judgment in American money on the date of its rendition, and asked interest on that amount at the rate of seven per cent per annum from said date, and the court found the allegations of the complaint true, the judgment should be calculated from the figures and allegations of the complaint; and if the complaint alleged that the court had jurisdiction, and that the judgment was duly given, made, and entered in and by said court, a finding that the allegations of the complaint were true sufficiently shows the jurisdiction of the court by which the judgment was rendered.[128]

122 Low v. Burrows, 12 Cal. 181. How such a complaint should state the transcript, see Richardson v. Hickman, 22 Ind. 244, 5605, and cases cited. See, also, Crane v. Crane, 19 N. Y. Supp. 691. Compare Thomas v. Pendleton, 1 S. Dak. 150, 36 Am. St. Rep. 726, 46 N. W. 180; Cougill v. Farmers' Ins. Co., 25 Or. 360, 35 Pac. 975.

123 Brady v. Murphy, 19 Ind. 258; Adkins v. Hudson, 19 Ind. 392. That this is no longer required in Indiana, see Mull v. McKnight, 67 Ind. 525; Hopper v. Lucas, 86 Ind. 44.

124 Harlow v. Hamilton, 6 How. Pr. 475. As to same rule in Texas, see Hall v. Mackay, 78 Tex. 248, 14 S. W. 615.

125 Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451.

126 Memphis Medical College v. Newton, 2 Handy, 163.

127 Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446.

128 Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053.

Where a judgment orders defendant to pay a certain amount to a trustee to be named, the trustee will be regarded as a functionary of that court to maintain the action on the judgment.[129]

In an action on a judgment rendered in another state by confession, the eighteen months preceding the date that the judgment became operative under the laws of that state must be excluded in applying the statute of limitations.[130] In Oklahoma, an action on a foreign judgment must be brought within one year from the time the right of action accrues.[131]

§ 5617. **Foreign judgments—Pleading.**—In an action on an English judgment an allegation of the complaint of the value of the judgment in lawful money of the United States of America sufficiently alleges the value of the judgment, and an allegation that such judgment was duly given, made, and entered in and by a certain court, and that said court had jurisdiction of the subject-matter of said action and of the parties thereto, sufficiently alleges jurisdiction, in the absence of a demurrer.[132] Section 1922 of the California Code of Civil Procedure, provides that the jurisdiction of a justice of the peace of a sister state over an action tried before him and resulting in a judgment may be proved by the justice himself, "by a copy of the judgment and his oral examination as a witness." Thus depositions of the justice may be admitted to show the legal existence of the court, although they are not the "best" evidence.[133] Where the sheriff's return showing personal service is a part of the summons, and the clerk's certificate to the foreign judgment transcript shows a comparison with the original complaint, summons, notice, and judgment, and that they are full, true, and correct copies, the certificate is not objectionable for not specifying that the transcript of the return of the sheriff was correct.[134] In an action on a foreign judgment the only question to be tried is the validity of the proceedings of the foreign court, the question of liability on the original case not being involved.[135] In such

129 Poll v. Hicks, 67 Kan. 191, 72 Pac. 847.

130 Gaumer v. Terrel, 65 Kan. 15, 68 Pac. 1071.

131 Bank of Stockham v. Weins, 12 Okla. 502, 71 Pac. 1073.

132 Murphy v. Murphy, 145 Cal. 482, 78 Pac. 1053.

133 Banister v. Campbell, 138 Cal. 455, 71 Pac. 504.

134 Casety v. Jamison, 35 Wash. 478, 77 Pac. 800.

135 Foshier v. Narver, 24 Or. 441, 41 Am. St. Rep. 874, 34 Pac. 21. As to insufficient complaint in action on foreign judgment, see Cougill v.

action it is competent collaterally to impeach the judgment by extrinsic evidence, showing want of jurisdiction in the court pronouncing the judgment, notwithstanding a recital in the record of the judgment of the existence of jurisdictional facts.[136] A statute of another state prohibiting action on a judgment obtained in one of its courts, unless leave of court is first obtained, affects the remedy merely, and does not apply to an action on such judgment in a court of the state of Washington.[137]

§ 5618. **Defense of accord and satisfaction.**—A less sum than the whole amount may be paid and received in full payment and discharge of any indebtedness, if such agreement be clearly manifested by a receipt or instrument in writing signed by the judgment creditor.[138] Before the passage of section 1524 of the California Civil Code, a judgment could not be settled for less than its face value.[139] After judgment and execution, the plaintiff may settle for less than the full amount of the judgment and enter satisfaction, and the plaintiff's attorney cannot disturb such satisfaction as entered, even though he has an agreement with his client by which he was to receive a part of such judgment, unless his interest has been entered of record as a lien or assignment of interest.[140]

§ 5619. **Defense—Another action pending.**—The plea to an action on a judgment alleging that the plaintiff, at the time of commencing the suit, was seeking to enforce the collection of an execution issued on the same judgment is a good bar to the action.[141]

§ 5620. **Defense of assignment.**—Where a judgment against which a right to set off another judgment rendered in the same action exists is assigned, the assignee may be brought into the court upon a proceeding by petition and motion, and will be bound by an order therein directing a set-off.[142]

Farmers' etc. Ins. Co., 25 Or. 360, 35 Pac. 975. As to answer sufficiently alleging want of jurisdiction, see Aultman v. Mills, 9 Wash. 68, 36 Pac. 1046.

136 Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; Aultman v. Mills, 9 Wash. 68. See Ritchie v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380.

137 Weber v. Yancy, 7 Wash. 84, 34 Pac. 473.

138 Cal. Civ. Code, § 1524.

139 Deland v. Hiatt, 27 Cal. 611, 87 Am. Dec. 102.

140 Mansfield v. Dorland, 2 Cal. 507; Ex parte Kyle, 1 Cal. 331.

141 Yantis v. Burdett, 3 Mo. 457.

142 Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76.

§ 5621. **Denial of judgment.**—A debt cannot be denied without denying the instrument on which it is founded. Hence a plea of *nil debet* is a bad plea in an action founded on a judgment.[143] If it is desired to attack the judgment, the plea should be *nul tiel record.*[144] On a *nul tiel record,* an untrue statement of the circumstances descriptive of the record, though unnecessary to be stated at all, is fatal, as such a plea puts the identity of the record in question.[145] Such a plea brings before the court the validity of the judgment and the description of it as given in the declaration.[146] When the record set forth in a declaration is not the foundation of the action, but only matter of conveyance or inducement, *nul tiel record* is not a good plea, for it is no answer to the whole count.[147]

§ 5622. **Judgment for costs.**—A judgment in favor of a defendant for costs, based upon a finding of one of several issues in his favor by the jury, even if erroneous, is not void. While unreversed, it is to be treated, for the purpose of set-off, as a valid judgment.[148]

§ 5623. **On appeal.**—The pendency of a writ of error might be pleaded in abatement, but not in bar. The plea must state that the writ was brought prior to the present suit, and the requisite steps taken to render it a *supersedeas* to the execution.[149]

§ 5624. **Payment.**—A plea of payment to an action of debt founded on a judgment rendered in Kentucky, containing an averment that by the law of that state such a plea to such a declaration is good, puts in issue the law of Kentucky, and should be replied to.[150] A defendant who allows a judgment to be

143 Sneed v. Wister, 8 Wheat. 690, 5 L. Ed. 717; United States v. Spencer, 2 McLean, 405, Fed. Cas. No. 16368.

144 Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Bastable v. Wilson's Admr., 1 Cranch C. C. 124, Fed. Cas. No. 1097; Short v. Wilkinson, 2 Cranch C. C. 22, Fed. Cas. No. 12810; Armstrong v. Carson, 2 Dall. 302, 1 L. Ed. 391; Bergen v. Williams, 4 McLean, 125, Fed. Cas. No. 1340; French v. Lafayette Ins. Co., 5 McLean, 461, Fed. Cas No. 5102.

145 Lawes on Pleading, 370; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17526.

146 Jacquette v. Hugunon, 2 McLean, 129, Fed. Cas. No. 7169.

147 United States v. Litle's Exrs., 3 Cranch C. C. 251, Fed. Cas. No. 15608.

148 Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76.

149 Jenkins v. Pepoon, 2 Johns. Cas. 312.

150 Hutchinson v. Patrick, 3 Mo. 65.

taken against him for a debt, without showing its payment, cannot set off such payment against such judgment in a suit by the judgment creditor thereon.[151]

§ 5625. **Set-off.**—A person may receive the money due on a judgment rendered in favor of himself and several others, co-plaintiffs, but he cannot, without authority from his co-plaintiffs, set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against himself alone.[152] When judgments in different courts are to be set off, the moving party must go into the court in which the judgment against him was recovered.[153] A judgment assigned to a sheriff cannot be set off against another judgment against said sheriff for seizing certain exempt property under an execution issued upon the judgment so assigned. Such set-off would defeat the purpose of the exemption law.[154] Where in the same action two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum, it was held that defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that his right could not be defeated by any assignment by plaintiff of his judgment before application of the set-off.[155] It is not necessary that the demand sought to be used as a set-off should be in the form of a personal judgment.[156]

§ 5626. **Set-off in equity.**—The jurisdiction of a court of equity in relation to set-offs is more extensive than that of common-law courts; and when the defendant in one of the judgments is insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgment, a court of equity will decree a set-off. Where the parties to two judgments are not the same, a court of common-law jurisdiction cannot set off one against the other; but a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. A court of equity will not permit a *cestui que trust* who was

151 Ringelberg v. Peterson, 76 Mich. 107, 42 N. W. 1080; Brennan v. Tietsort, 49 Mich. 397, 13 N. W. 790.

152 Corwin v. Ward, 35 Cal. 195, 95 Am. Dec. 93.

153 Russell v. Conway, 11 Cal. 101.

154 Beckman v. Manlove, 18 Cal. 389.

155 Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76.

156 Hobbs v. Duff, 23 Cal. 596.

insolvent to enforce and collect, through his trustee, a judgment against a party who holds a just and valid demand against the *cestui que trust,* which he has no means of enforcing or collecting if a set-off is denied. An action brought in a court of equity to enforce a set-off of one judgment against another is "an action upon a judgment or decree," within the meaning of section 336 of the California Code of Civil Procedure, and may be brought at any time within five years of the date of the judgment or decree.[157]

§ 5627. **Several pleas.**—Where there are several pleas to the country, with the plea of *nul tiel record,* and the parties go to trial, generally it will be presumed that the issues were respectively decided by the proper tribunal.[158]

§ 5628. **Void judgment.**—Although the existence of a judgment relied upon for the relief sought is admitted by the answer, if the plaintiff proceeds to put it in evidence, and it is void upon its face, the court will treat it as forming no ground for the plaintiff's action.[159] So where by his answer in an action upon a judgment the defendant puts in issue the existence of a regular, valid, and legal judgment, any evidence tending to show the judgment illegal or void is competent. Hence, under such pleadings, after the plaintiff has produced a certified copy of the judgment record, the defendant may prove the statute, a rule of court (the judgment being a foreign judgment) showing the same to be irregular, and a certified copy of the record showing an order of that court vacating the judgment on the ground of such irregularity, although the vacation was made subsequent to the issue in the action. This is competent under a general denial, for it shows that no such judgment as the plaintiff has alleged in his complaint has in reality existed; that it never existed except in form, and was *ab initio* unlawful, irregular, and void.[160] An allegation of merits should be made in a complaint or answer denying the validity of a judgment as an earnest of good faith, but such allegation is not essential or traversable.[161]

157 Hobbs v. Duff, 23 Cal. 596.

158 Wall's Admrs. v. Fife, 37 Pa. St. 394.

159 Ely v. Cook, 2 Hilt. 406, 9 Abb. Pr. 366.

160 Kinsey v. Ford, 38 Barb. 195.

161 Wilson v. Hawthorne, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 548.

§ 5629. **Discharge of bankrupt.**—This defense may be pleaded to an action on a judgment, founded on a debt existing when the bankrupt filed his petition, but which judgment was recovered before the discharge was granted, so that the defendant had no opportunity of pleading such discharge in the prior suit.[162] Otherwise, if the discharge might have been pleaded, but was not in the original action.[163]

§ 5630. **Statutes, how pleaded.**—*Pleading a statute* is merely stating the facts which bring a case within it, without making mention or taking any notice of the statute itself. *Counting upon a statute* consists in making *express reference* to it, as by the words "against the form of the statute," or "by force of the statute in such case made and provided." *Reciting a statute* is quoting or stating its contents, and either form may be adopted by the pleader.[164] In pleading a private statute, or an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage, and performance of any conditions precedent under such statute or ordinance may be pleaded generally that such conditions were duly performed.[165] It is not necessary to specifically refer to or plead an act imposing a penalty upon a sheriff if the facts bringing the case within the statute are pleaded.[166] In defense, an allegation that a certain ordinance was "adjudged void" is sufficient, without alleging it to be actually void.[167] An averment that the statute *was passed* is sufficient.[168]

In pleading an act of the legislature, the title, being no part of an act, need not be recited;[169] but where a party refers to an act merely by the title, he thereby makes the title material, and must recite it correctly.[170] But when a pleader wishes to avail himself of a statutory privilege or right given by particular facts he must show the facts; and those facts which the statute requires

162 Dresser v. Brooks, 3 Barb. 429; Fox v. Woodruff, 9 Barb. 498; Johnson v. Fitzhugh, 3 Barb. Ch. 360; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290.

163 Steward v. Green, 11 Paige, 535.

164 Gould Pl. 46, note.

165 Cal. Code Civ. Proc., § 459; N. Y. Code Civ. Proc., § 530; Idaho Rev. Codes, § 4214; Nev. Comp. Laws, par. 3156, § 61; Ariz. Rev. Stats., § 837; Or. B. & C. Codes, § 89; 1 Van Santv. 270; Beman v. Tugnot, 5 Sandf. 153.

166 McConathy v. Deck, 34 Colo. 232, 82 Pac. 702.

167 Waldron v. City, 41 Wash. 566, 83 Pac. 1106.

168 Wolfe v. Supervisors, 11 Abb. Pr. 270.

169 Eckert v. Head, 1 Mo. 593.

170 Id.

as the foundation of the action must be stated in the complaint.[171] In a California case,[171a] the distinction is drawn between pleading the performance of conditions precedent under a contract and conditions prescribed by a statute, holding that the latter must be alleged specially.[172] It is safest to adopt and follow the very words of the law;[173] as the court takes judicial notice of the law, though the statute may be referred to in some cases to avoid ambiguity and create a certainty as to the relief demanded, as where the plaintiff has his election to sue for a penalty given by a statute, or to bring his action simply for the debt.[174]

With reference to acts regulated by the provisions of a statute, as of the statute of frauds, it is sufficient to use such certainty of allegation as was sufficient before the statute. So, on a promise to answer for the debt or default of another, it is not necessary in the complaint to aver that the promise was in writing;[175] or in an action on a contract relating to real estate.[176]

If a statute should contain exceptions in the enacting clause, the plaintiff must clearly show that the defendant is not within the exception;[177] unless it be matter of defense, in which case, the burden of proof being on the defendant, the plaintiff need not allege anything in anticipation.[178] Numerous violations of the same subdivision of a section of a statute may be alleged in one

171 Dye v. Dye, 11 Cal. 163; Denver etc. R. R. Co. v. DeGraff, 2 Colo. App. 42, 29 Pac. 664. But see Gimmy v. Doane, 22 Cal. 638, where the application of the rule laid down in Dye v. Dye is doubted.

171a Himmelman v. Danos, 35 Cal. 448.

172 See, also, Yertore v. Wiswall, 16 How. Pr. 8; Brown v. Harmon, 21 Barb. 508; Drowne v. Stimpson, 2 Mass. 444; Soper v. Harvard College, 1 Pick. 178, 11 Am. Dec. 159; Austin v. Goodrich, 49 N. Y. 266.

173 Ford v. Babcock, 2 Sandf. 523; Thomas v. People, 19 Wend. 480; Cole v. Jessup, 10 How. Pr. 515; overruling Fowler v. Hunt, 10 Johns. 464.

174 City of Utica v. Richardson, 6 Hill, 300.

175 Wakefield v. Greenhood, 29 Cal. 597; Stern v. Drinker, 2 E. D. Smith, 406; Hilliard v. Austin, 17 Barb. 141; Elting v. Vanderlyn, 4 Johns. 237.

176 Livingston v. Smith, 14 How. Pr. 492; Reynolds v. Dunkirk R. R. Co., 17 Barb. 617; Champlin v. Parish, 11 Paige, 408.

177 1 T. R. 144; 6 T. R. 559; 1 East, 646; 2 Chit. 522; Bennett v. Hurd, 3 Johns. 438; Teel v. Fonda, 4 Johns. 304; Hart v. Cleis. 8 Johns. 41; Sheldon v. Clark, 1 Johns. 513; Burr v. Van Buskirk, 3 Cow. 263; Foster v. Hazen, 12 Barb. 547; First Baptist Church v. Utica etc. R. R. Co., 6 Barb. 313; Williams v. Insurance Co. of North America, 9 How. Pr. 365; Harris v. White, 81 N. Y. 532; Burnett v. Markley, 23 Or. 436, 31 Pac. 1050. See Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398.

178 Canfield v. Tobias, 21 Cal. 349; Radcliffe v. Rowley, 2 Barb. Ch. 23;

count;[179] but separate counts must be used for violations of separate subdivisions.[180]

In penal actions founded on statutes, facts constituting the offense must be set out; and it must be stated as a substantive allegation that the offense was committed against the form of the statute.[181] As a general rule, a *scienter* need not be averred.[182] In remedial actions founded on statutes, such averments must be made as are necessary to bring the case within the statute,[183] as remedies in derogation of the common law must be strictly pursued.[184]

§ 5631. **Foreign statutes, how pleaded.**—Where the plaintiff relies on the statute laws of another state, he must aver those laws in his pleadings in the same manner as other facts.[185] Both the foreign law and the fact that it is relied on should be pleaded.[186] Thus, to plead that a contract is void by foreign usury laws, the laws should be stated; and the facts which render the contract void according to them should be alleged.[187] And the same rule applies to municipal laws and ordinances.[188] To show due diligence in suing on a foreign debt, the laws of such state regulating the contracts must be averred.[189] Pleading foreign statutes by their titles and dates, or statement of their

Bell v. Wallace, 81 Ala. 422, 1 South. 24.

179 Longworthy v. Knapp, 4 Abb. Pr. 115; People v. McFadden, 13 Wend. 396; Gaffney v. Colvill, 6 Hill, 567.

180 See cases cited in last note.

181 Levy v. Gowdy, 2 Allen, 321; Peabody v. Hayt, 10 Mass. 36; Nichols v. Squire, 5 Pick. 168; Haskell v. Moody, 9 Pick. 162; Reed v. Northfield, 13 Pick. 99, 23 Am. Dec. 662.

182 Bayard v. Smith, 17 Wend. 88; Gaffney v. Colvill, 6 Hill, 567.

183 Reed v. Northfield, 13 Pick. 94, 23 Am. Dec. 662; Worster v. Canal Bridge, 16 Pick. 541; Read v. Chelmsford, 16 Pick. 128; Mitchell v. Clapp, 12 Cush. 278.

184 Steel v. Steel, 1 Nev. 27.

185 Throop v. Hatch, 3 Abb. Pr. 25; Phinney v. Phinney, 17 How. Pr. 197; Thatcher v. Morris, 11 N. Y. 437; Monroe v. Douglass, 1 Seld. 447; Hutchison v. Patrick, 3 Mo. 65; Ruse v. Mutual Benefit Ins. Co., 23 N. Y. 516; Bean v. Briggs, 4 Iowa, 464; Walker v. Maxwell, 1 Mass. 104; Balfour v. Davis, 14 Or. 46, 12 Pac. 89; National Bank v. Lang, 2 N. Dak. 66, 49 N. W. 414; Williams v. Finlay, 40 Ohio St. 342; and see Andrews v. Herriot, 4 Cow. 510, note; McKnight v. Oregon etc. S. L. R. Co., 33 Mont. 40, 82 Pac. 661; Betz v. Wilson, 17 Okla. 383, 87 Pac. 844.

186 Ongaro v. Twohy, 49 Wash. 93, 94 Pac. 916.

187 Curtis v. Masten, 11 Paige, 15; Dunham v. Holloway, 3 Okla. 244, 41 Pac. 140.

188 Harker v. Mayor of New York, 17 Wend. 199; People v. Mayor of New York, 7 How. Pr. 81; Richter v. Harper, 95 Mich. 221, 54 N. W. 768.

189 Mendenhall v. Gately, 18 Ind. 149.

general provisions and requirements, is insufficient.[190] But in the courts of the United States, no averment need be made in pleading in respect to the laws of the several states which would not be necessary within the respective states.[191]

§ 5632. **Statute of limitations, how pleaded.**—Facts taking the case out of the statute of limitations must be specially set out in the complaint.[192] A failure to plead it is a waiver of the same.[193] For if it appear on the face of the complaint that the claim is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective, and demurrer lies.[194] So, if fraud be alleged as committed more than three years before the commencement of the action, that being the limitation prescribed by the California statute, plaintiff must allege discovery at a period bringing him within the exception. It is not, however, in general, necessary for plaintiff to allege in his complaint any facts or circumstances to avoid or anticipate the defense of the statute of limitations, unless the cause of action appear, upon the face of the complaint, to be barred.[195] When the defendant pleads the statute, matters upon which the plaintiff relies to relieve him from the bar are deemed to have been pleaded in reply to the answer.[196]

190 Throop v. Hatch, 3 Abb. Pr. 23; Phinney v. Phinney, 17 How. Pr. 197; Carey v. Cincinnati etc. R. R. Co., 5 Clarke (Iowa), 357; Minneapolis Harvester Works v. Smith, 36 Neb. 616, 54 N. W. 973.

191 Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847. That general acts of Congress need not be specially pleaded, see Murray v. City of Butte, 7 Mont. 61, 14 Pac. 656.

192 Wormouth v. Hatch, 33 Cal. 121.

193 People v. Broadway Wharf Co., 31 Cal. 33.

194 Sublette v. Tinney, 9 Cal. 423; Smith v. Richmond, 19 Cal. 476; Chabot v. Tucker, 39 Cal. 434; Curtiss v. Ætna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137; Davis v. Davis, 20 Or. 78, 25 Pac. 140; Douglas v. Corry, 46 Ohio St. 349, 15 Am. St. Rep. 604, 21 N. E. 440; Pleasant v. Samuels, 114 Cal. 34, 45 Pac. 998.

195 Chipman v. Emeric, 5 Cal. 239. See, also, Rees v. Emerick, 6 Serg. & R. 288; Newcomb v. Butterfield, 8 Johns. 342; Livingston v. Platner, 1 Cow. 176; Benton v. Dale, 1 Cow. 160.

196 Fox v. Tay, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

FORMS—ACTIONS ON JUDGMENTS AND STATUTES.

§ 5633. Complaint—General form.

Form No. 1600.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., in the superior court of the county of . . ., in this state, a judgment was duly given and made by said court in favor of this plaintiff, and against the defendant herein, in an action in said court last above named pending, wherein this plaintiff was plaintiff, and said defendant was defendant, for the sum of . . . dollars, [if the judgment provided for a special rate of interest, add:] which said judgment bears interest from the date thereof at . . . per cent per annum.

II. That said judgment remains wholly unpaid.

[DEMAND OF JUDGMENT.]

§ 5634. Complaint in action on judgment by leave of court.

Form No. 1601.

[TITLE.]

The plaintiff complains, and alleges:

I. That by leave of this court first had and obtained at the general term held at . . ., and on . . ., which order was made on due notice to the defendant, the said plaintiff brings this action.

II. [Allege recovery of judgment as in preceding form.]

[DEMAND OF JUDGMENT.]

§ 5635. Complaint in action on foreign judgment of court of general jurisdiction.

Form No. 1602.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the times hereinafter mentioned, the court of common pleas, in and for the county of . . ., in the state of [Ohio], was a court of general jurisdiction, duly created and organized by the laws of said state.

II. That on the . . . day of . . ., 19.., the plaintiff commenced an action in said court against the defendant by the issuance of summons [or other process, as the case may be], which

summons was duly and personally served upon said defendant [or, in which action the defendant appeared in person, or by attorney]. That thereupon such proceedings were had therein in said court, that on the . . . day of . . ., 19.., a judgment for the sum of . . . dollars was duly given and made by said court in favor of the plaintiff, and against the defendant.

III. That no part thereof has been paid [except, etc.]

[DEMAND OF JUDGMENT.]

§ 5636. The same—By an assignee.

Form No. 1603.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., in the superior court, in and for the county of . . ., in this state, a judgment was duly given and made by said court in favor of one C. D., and against E. F., the defendant herein, in an action in said court pending, wherein said C. D. was plaintiff, and the said E. F. was defendant, for the sum of . . . dollars.

II. That on the . . . day of . . ., 19.., at . . ., the said C. D. assigned said judgment to this plaintiff.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5637. Complaint in action on foreign judgment of inferior tribunal.

Form No. 1604.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, J. P. was a justice of the peace, in and for the town of . . ., in the county of . . ., and state of . . ., having authority under and by virtue of an act of said state, entitled [title of act], passed on the . . . day of . . ., 19.., to hold court, and having jurisdiction as such over actions of [state jurisdiction to include the cause of action].

II. That on the . . . day of . . ., 19.., at . . ., aforesaid, the plaintiff commenced an action against the defendant before the said justice, by filing his complaint, and causing summons to be duly issued by said justice, on that day, for the recovery

of [state what], which summons was duly and personally served on the defendant.

III. That on the . . . day of . . ., 19. . , in said action, the plaintiff recovered judgment, which was duly given by said justice against the defendant, for the sum of . . . dollars, to-wit, . . . dollars for said debt, with . . . dollars for interest from the said date, and . . . dollars costs.

IV. That defendant has not paid the same, nor any part thereof.

[Demand of Judgment.]

§ 5638. Complaint in action on foreign judgment for alimony in divorce action.

Form No. 1605.

[Title.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned the . . . court in and for the county of . . ., in the state of . . ., was a court of general jurisdiction over matters in equity and law, duly created and organized by the laws of that state.

II. That on the . . . day of . . ., 19. . , the plaintiff commenced an action for divorce in said court against the defendant; that said defendant was duly served with process therein, and on the . . . day of . . ., 19. . , appeared in said action, and submitted himself personally to the jurisdiction of the court.

III. That thereafter such proceedings were had therein in said court that on the . . . day of . . ., 19. . , a decree was duly made, entered, enrolled, and docketed in said court dissolving the bonds of matrimony between this plaintiff and said defendant, and thereafter, on the . . . day of . . ., 19. . , by the consideration and judgment of said court, the said decree was duly amended by adding thereto, and making a part thereof, a provision and clause that said defendant pay to this plaintiff alimony to the amount of . . . dollars, with . . . dollars in addition thereto as solicitor's fees, and that such money should be so paid within . . . days thereafter, and should stand when paid as a satisfaction in full for all claims for alimony and solicitor's fees on the part of this complainant. And the said plaintiff avers that no part of such sums of money have been paid.

IV. Complaining further, the said plaintiff avers: That under and by virtue of the provisions of the revised statutes of the

state of . . ., [etc.], such decree, as amended, so entered as aforesaid, has the force and effect of a judgment at law for the payment of money. That such is the construction thereof, and the force and effect to be given to the same, has been adjudicated and determined by the supreme court of said state, and such is the law of said state.

V. That by reason thereof this plaintiff is advised and believes that under and by virtue of the constitution of the United States, section 1, article IV, she hath a good right to maintain her cause of action aforesaid in the courts of the state of . . ., to have and recover of the said defendant the said sums of money so awarded to her as aforesaid, and that the said court will give the same force and effect to said decree so above stated as is given thereto in the state of . . .

[DEMAND OF JUDGMENT.]

§ 5639. Complaint on judgment of justice of the peace in action brought within five years after its rendition.

Form No. 1606.

[TITLE.]

The plaintiff complains, and alleges:

[Allege rendition of the judgment, etc., and then allege:]

That the said M. N., the justice of the peace by whom said judgment was rendered, died [or, resigned; or, removed from the said county of . . .] on or about the . . . day of . . ., 19.. [Or set forth the happening of any other fact named in the statutes which authorize the bringing of an action within five years after the rendition of the first judgment.]

[Add allegation of non-payment and demand of judgment.]

§ 5640. Denial of judgment.

Form No. 1607.

[TITLE.]

The defendant answers to the complaint, that there is no record of said judgment.

§ 5641. The same—Invalidity of a foreign judgment.

Form No. 1608.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That no summons and copy of the complaint, or either, was served upon him in the action mentioned in the complaint.

II. That he never appeared, in person or by attorney, in said action.

§ 5642. The same—Invalidity of judgment against non-resident.

Form No. 1609.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the action in which the supposed judgment against him was alleged to have been recovered arose upon an alleged contract.

II. That when the action was commenced this defendant was a non-resident of the state of California, and a resident of Illinois.

III. That he never appeared in that action, and never was personally served in the state of California, or elsewhere, with summons therein.

IV. That no order for publication of the summons in that action was ever made. [Or state other facts showing failure to obtain jurisdiction.]

§ 5643. The same—Fraud in obtaining judgment.

Form No. 1610.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That after the commencement of the action mentioned in the complaint, the said plaintiff came to this defendant, and with intent to deceive him and prevent him from defending it, falsely and fraudulently represented [here state the false representations, detailing the fraud fully and explicitly].

CHAPTER CXXXII.

BUILDERS' CONTRACTS.

§ 5644. Essential averments.—Under the rules of pleading established by the code, the party to a written contract for the erection of the building, who has performed his part of it by the erection of the same, cannot bring an action against the other party who failed to fulfill for work and labor done and performed; but the complaint must aver the execution of the contract, its terms, the performance of the same on the part of the plaintiff, and the non-performance by the other party, and the damages thereby sustained. The contract should be set forth in the complaint, together with the necessary allegations of deviations, performance, etc., which the plaintiff must prove, instead of the general allegation that the defendant is indebted for work and labor, etc.[1] The plaintiff may plead as follows: 1. He may set forth the contract according to its legal effect, as modified, and then allege that he has duly "performed all the considerations thereof on his part"; or, 2. He may set forth the contract *in hæc verba,* and then state that he has duly performed, etc., all the conditions thereof on his part, except that in certain points it was subsequently modified, and that in those points he fulfilled it according to the modifications.[2] A contractor is not bound, as a matter of pleading, to declare upon the contract, but may declare generally for the materials furnished and work performed, and on the trial the contract may be used to determine the rights of the parties.[3]

§ 5645. Abandonment of contract.—If the contract for the erection and completion of a building is entire, and the contractor abandons the work before it is completed, he loses the right which he would have had to the full compensation agreed

1 O'Connor v. Dingley, 26 Cal. 11.

2 Smith v. Brown, 17 Barb. 431. See, also, Hatch v. Peet, 23 Barb. 575; Weeks v. O'Brien, 141 N. Y. 199, 36 N. E. 185; Logan v. Berkshire Apartment Assoc., 18 N. Y. Supp. 164.

3 Hogan v. Laimbeer, 66 N. Y. 604; Hartley v. Murtha, 5 App. Div. 408, 39 N. Y. Supp. 212.

on.[4] In Washington,[5] a provision for liquidated damages in a building contract is binding on the parties.

§ 5646. **Acceptance by architect.**—Where a contract for alterations and repairs to a building was to be performed in a certain manner, particularly specified, "subject to acceptance or rejection by E. W., architect," and payment only to be made when the work was completely done and accepted, it was held that the provision for acceptance was only an additional safeguard against defects not discernible by an unskilled person, and the architect could not, by accepting a different class of work from that provided for, or inferior materials, bind the owner of the building to pay for them.[6] The architect's approval or disapproval must be based upon the requirements of the contract.[7]

§ 5647. **Acceptance of work.**—Where the work has been accepted and approved by the superintendent, under a contract for repairs of streets, it is a full performance of the contract; and if the parties are dissatisfied, they should have appealed to the board of supervisors; this was their only remedy.[8] That the defendants demanded possession, which the plaintiff delivered up to them, is not a sufficient averment of acceptance on the part of the plaintiff.[9] Where the work was to be done to the satisfaction of the defendant, it is not necessary to aver that it was done to his satisfaction, if it is shown to be according to the contract; but if the contract requires it to be done to the satisfaction of third persons, the plaintiff must aver that it was done to their satisfaction.[10]

§ 5648. **Payment—Terms of.**—When by the terms of the contract payment was to be made upon a certificate of the architect "that the work was fully and completely finished according

4 Blythe v. Poultney, 31 Cal. 233.

5 Drumheller v. Amer. Surety Co., 30 Wash. 530, 71 Pac. 25.

6 Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449.

7 Doyle v. Halpin, 33 N. Y. Sur. (1 J. & Sp.) 352. For cases depending on special facts, see Killip v. Metzen, 50 N. Y. 658; Shute v. Hamilton, 3 Daly, 462. See, also, Blethen v. Blake, 44 Cal. 117; Roy v. Boteler, 40 Mo. App. 213; Schencke v. Rowell, 3 Abb. N. C. 42; Wilcox v. Stephenson, 30 Fla. 377, 11 South. 659.

8 Emery v. Bradford, 29 Cal. 75; Taylor v. Palmer, 31 Cal. 248; Beaudry v. Valdez, 32 Cal. 278.

9 Smith v. Brown, 17 Barb. 431.

10 Butler v. Tucker, 24 Wend. 447.

to the specification," the giving of a certificate to that effect must be averred and proved.[11] But where payment was to be made upon a certificate of an officer, the complaint should allege that he had made such certificate. It need not be averred also that the work had been performed.[12] And on a written contract to build certain bridges for a railroad company, to be paid for, one fourth in cash, and the rest in stock, no time and place of payment stated, the payment could not be required until the terms of the contract were complied with, or at least that payment on any bridge was not due until such bridge was completed. And where no time or place is fixed by the agreement, express or implied, a demand is essential to base an action upon.[13] But after performance in such a contract, an action will lie without proof of the demand of the stock.[14]

§ 5649. Enlargement of time.—The time of performing a simple written contract may be enlarged by parol.[15] But not unless the parol contract be upon sufficient consideration.[16] And the extension is not an alteration necessarily material to the cause of action.[17] A change in the terms of a contract, made at the request of and in favor of the interests of the surety on the builder's contract, and acquiesced in by the agent of the owner of the premises, cannot be used as grounds for voiding the contract and releasing the surety, even though the agent did act beyond his authority.[18] But after a contract is modified, the declaration must not be upon the original contract alone.[19]

§ 5650. Performance—Averment of.—Building contracts need not be literally complied with in every punctilio as a condition to recovery.[20] Thus where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting

11 Smith v. Briggs, 3 Denio, 73; Wyckoff v. Meyers, 44 N. Y. 143.

12 Towsley v. Olds, 6 Clarke (Iowa), 526.

13 Boody v. Rutland & Burlington R. R. Co., 3 Blatchf. 25, Fed. Cas. No. 1635.

14 Hallihan v. Corporation of Washington, 4 Cranch C. C. 304, Fed. Cas. No. 5962.

15 Esmond v. Van Benschoten, 12 Barb. 366; Meehan v. Williams, 36 How. Pr. 73.

16 Tinker v. Geraghty, 1 E. D. Smith, 687.

17 Crane v. Maynard, 12 Wend. 408.

18 Sweeny v. Ætna Indemnity Co., 34 Wash. 126, 74 Pac. 1057.

19 Freeman v. Adams, 9 Johns. 115.

20 Smith v. Gugerty, 4 Barb. 614. As to sufficient averment of perform-

forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the appointed time with the knowledge and approbation of the defendant.[21] But in a contract for the erection of a building upon the land of another, if performance is to precede payment, and is the condition thereof, the builder, having substantially failed to perform according to the specification of the contract on his part, can recover nothing for his labor and materials, notwithstanding the owner has chosen to occupy and enjoy the erection.[22] The pleader may aver performance which he wishes to aver, and state excuses and causes for non-performance of other conditions.[23] If there has been any variation from the terms of the written contract in the progress of the work, by consent of the parties, that fact should also be averred, and the performance of the contract as varied.[24]

§ 5651. **Extra work.**—It is held that the contractor cannot recover for extra work merely upon the proof that such work was done at defendant's request, the presumption being that provision was made for extra work under the contract.[25] The employer is bound to pay the contractor for extra work and materials, in a deviation from the contract, upon an oral order.[26]

§ 5652. **Public works.**—Contracts for the construction of public works are not necessarily illegal because for an amount exceeding the sums appropriated by law.[27] So a contract for the performance of certain public work, not authorized by law, provided the legislature shall sanction it, is not void as against public

ance, see Davis v. Badders, 95 Ala. 348, 10 South. 422.

21 Dermott v. Jones, 23 How. 220, 16 L. Ed. 442.

22 Ellis v. Hanlen, 3 Taunt. 52; Pike v. Butler, 4 N. Y. 360; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442. Compare, to the contrary, Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 269; Smith v. Congregational Meeting-House, 8 Pick. 178; Britton v. Turner, 6 N. H. 487, 26 Am. Dec. 713, which were disapproved in the cases first cited.

23 Hatch v. Peet, 23 Barb. 575.

24 O'Connor v. Dingley, 26 Cal. 11.

25 Collyer v. Collins, 17 Abb. Pr. 469.

26 Smith v. Gugerty, 4 Barb. 614; Hottel v. Poudre Val. Reservoir Co., 41 Colo. 370, 92 Pac. 918. For a case where the contract provided for the contingency of extra work, see Alger v. Vanderpool, 34 N. Y. Super. Ct. Rep. (2 Jones & Sp.) 161. See, also, Gillison v. Wanamaker, 140 Pa. St. 358, 21 Atl. 361.

27 Cook v. Hamilton Co., 6 McLean, 112, Fed. Cas. No. 3157.

policy.[28] When a contract for the construction of a public work is silent as to time and manner of measurement, the law implies that the work is to be done of the ordinary kind, and the measurement made in the ordinary way.

§ 5653. **Separate counts.**—Where the complaint contained three counts—the first on a special contract for the erection of a warehouse, the second for extra work on the building, and the third for work and labor done, and materials furnished in its erection—and the answer denied the allegations of the first two counts, but failed to deny the allegations of the third, it was held that the third count should be considered as denied.[29]

§ 5654. **Performance by substitute.**—An agreement to find work and materials for building a house entitles the party to recover upon the completion of the work, although he procured it to be done by other parties.[30] If a new contract was substituted, the original should not be pleaded.[31]

§ 5655. **Terms of contract.**—Upon a compliance on the part of a subcontractor, laborer, or materialman with the terms of the statute, their right, which through the original contractor inures primarily to the benefit of such persons, must be determined by the terms of the original contract, and they are presumed to have notice of the existence and terms of such contract;[32] and in the absence of fraud or misrepresentations by the owner, this presumption is conclusive against them.[33] If by the terms of the contract the party who has failed to fulfill was to execute his note for the money due, payable at a future day, his failure to do so should be averred, for the ground of action against him is his failure to execute the note.[34]

§ 5656. **Alteration.**—An erasure in a building contract of words acknowledging receipt of payment of the first installment due thereunder is not material where the installment has not in

28 Cook v. Hamilton Co., 6 McLean, 112, Fed. Cas. No. 3157. See, also, to similar effect, Columbus R. R. Co. v. Indianapolis etc. R. R. Co., 5 McLean, 450, Fed. Cas. No. 3047.

29 Kalkman v. Baylis, 23 Cal. 303.

30 Blakeney v. Evans, 2 Cranch, 185, 2 L. Ed. 248.

31 Chesbrough v. New York etc. R. R. Co., 26 Barb. 9.

32 Shaver v. Murdock, 36 Cal. 293.

33 Henley v. Wadsworth, 38 Cal. 356.

34 O'Connor v. Dingley, 26 Cal. 11.

fact been paid.[35] Where the original terms of a street-grading contract provide for payment by property-owners in proportion to interest in the abutting property, an interlineation as follows: "Each party hereto to pay only such part of the total cost as his front footage bears to the total frontage improved in said street," is not sufficient alteration to avoid the contract.[36]

§ 5657. **Performance—Plans and specifications—Variation.**—The unqualified refusal of a contractor to perform a part of the work on a building in actual progress of erection is in itself a breach of the contract.[37] If a contract to do work provides that the work shall be done according to certain specifications, which are annexed to it, the specifications are a part of the contract.[38] If the contract is not annexed and made part of the complaint, the allegation should embody sufficient of the plan and specifications to show, in connection with the averment of the breach, in what particular the contract was broken.[39] An averment may be made sufficiently certain by introducing and referring to diagrams showing form and dimensions, etc.[40] Where the contract gives the employer the right to change the form and the material, the builder has not the right upon such a change to stop the work in an unfinished state, and thus arbitrarily annul the contract.[41] A written contract to furnish articles for a building, mentioning no time for performance, is to be performed in a reasonable time, and oral evidence that a certain time was agreed on by the parties is not admissible.[42]

§ 5658. **Breach of contract—Damages—Excusable delay.**—A covenant in a contract to erect and complete a building by a certain day, under a penalty of thirty dollars for every day it should remain unfinished, is not an absolute covenant to finish it on that day.[43] Where the plaintiff fails to perform by the day fixed, the defendant's consenting to his going on and completing the contract afterwards is no waiver of the right to recoup his damages for the delay;[44] and in such cases the architect is

35 Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767.

36 Young v. Borzone, 26 Wash. 4, 66 Pac. 135.

37 Thompson v. Laing, 8 Bosw. 482.

38 Taylor v. Palmer, 31 Cal. 241.

39 Cooney v. Winants, 19 Wend. 504.

40 Booker v. Ray, 17 Ind. 522.

41 Clark v. Mayor of New York, 4 N. Y. 338, 53 Am. Dec. 379.

42 Stange v. Wilson, 17 Mich. 342.

43 Farnham v. Ross, 2 Hall, 167.

44 Barber v. Rose, 5 Hill, 76.

the agent of the owner.[45] One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house, nor delivered it, when it is destroyed by fire, is liable in an action for money advanced upon the contract, and damages for its nonperformance.[46] If the delay on the part of the contractor to perform the work is caused by want of readiness in the work performed by another contractor under an independent contract, he cannot be held liable for a breach of his contract, nor forfeit his right to recover for what he has done.[47] Where a building contract contained a provision that the owner, on fifteen days' notice, might employ another to finish it, and pay therefor out of any money due the contractor, it was held that by failing to complete the contractor forfeited only so much as the owner was obliged to pay to finish the building.[48]

§ 5659. **Counterclaims.**—Plaintiff sues for balance due on a contract for erecting a building, and a small sum for extra work. Defendant seeks to offset a claim for two and one-third months' rent lost by him, because of the neglect of plaintiff to finish the building within the time specified in the contract, defendant having, at the date of the contract, leased the building to responsible tenants, the lease to take effect from the time named in the contract for its completion. It was held that defendant cannot offset his rents, because the circumstances show that the contract was modified by the parties as to the time for the completion of the building.[49] The architect's certificate is for the benefit of the owner, and may be waived by him at his option, and other proofs of the required fact accepted.[50] If a contract provides that the contractor shall not deviate from the written contract, nor receive pay for extra work, unless a written order for the same is signed by the engineer, the contractor cannot recover for extra work done on the verbal order of the engineer,

45 Huber v. St. Joseph's Hospital, 11 Idaho, 631, 83 Pac. 768.

46 Andrews v. Durant, 11 N. Y. 35, 62 Am. Dec. 55; Hefford v. Alger, 1 Taunt. 218; Merritt v. Johnson, 7 Johns. 473, 5 Am. Dec. 289; Adams v. Nichols, 19 Pick. 275, 279, 31 Am. Dec. 137; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; School District v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349.

47 Stewart v. Ketcltas, 9 Bosw. 261.

48 Foley v. Gough, 4 E. D. Smith, 724.

49 McGinley v. Hardy, 18 Cal. 115.

50 Blethen v. Blake, 44 Cal. 117.

even if the contract declares that the engineer may direct alterations in and additions to the work.[51] That the work was done in an unworkmanlike manner must be specially set up in the answer.[52] Money expended in defending a suit on a mechanic's lien and paying the judgment obtained therein, besides attorney fees, is a proper counterclaim against the contractor who suffered such liens to be filed.[53]

FORMS—ACTIONS ON BUILDERS' CONTRACTS.

§ 5660. Complaint by contractor, on special contract, modified, with claim for extra work.

Form No. 1611.

[TITLE.]

The plaintiff complains, and alleges:

First.—For a first cause of action:

I. That on the . . . day of . . ., 19.., at . . ., the defendant under his hand and seal made a contract in writing with the plaintiff, of which the following is a copy: [Copy of contract.]

II. That he has duly performed all the conditions thereof on his part, except that, at the request of the defendant, he finished the building with hard finish instead of cloth and paper, for which the defendant promised to pay a reasonable sum in addition to the price named in the contract. That by the consent of the defendant the time for completing said work was extended for one month beyond the time fixed for the contract, to-wit, to the . . . day of . . ., 19..

III. That the plaintiff on his part duly performed all the conditions of said contract as modified.

IV. That the sum of . . . dollars is a reasonable payment to be made in addition to the price named in said contract for finishing the building with hard finish instead of cloth and paper.

V. That on the . . . day of . . ., 19.., at . . ., the plaintiff demanded of the defendant payment of the sum of . . . dollars, the amount due on said contract as modified.

51 White v. San Rafael etc. R. R. Co., 50 Cal. 417. As to time, see Front St. etc. Co. v. Butler, 50 Cal. 574.

52 Kendall v. Vallejo, 1 Cal. 371; Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Laraway v. Perkins, 10 N. Y. 371.

53 Wyman v. Hooker, 2 Cal. App. 36, 83 Pac. 79.

VI. That he has not paid the same, nor any part thereof.

Second.—For a second cause of action:

I. That between the . . . day of . . ., 19. . , and the . . . day of . . ., 19. . , at . . ., the plaintiff rendered further services and furnished materials to the defendant, at his request, in [here state work and material], for which the defendant promised to pay.

II. That the same are reasonably worth . . . dollars.

III. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5661. Complaint against builder for defective workmanship.

Form No. 1612.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed. [Or state the terms of the contract.]

II. That the plaintiff duly performed all the conditions of the said agreement on his part.

III. That defendant built [the bridge] referred to, in a bad and unworkmanlike manner [specifying wherein the work was not properly done], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5662. Complaint against builder for not completing, with special damage for loss of rent.

Form No. 1613.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19. . , at . . ., the plaintiff and the defendant entered into an agreement, under their hands and seals, of which a copy is annexed as a part of this complaint, marked "Exhibit A."

II. That the plaintiff duly performed all the conditions thereof on his part.

III. That the defendant entered upon the performance of the work under said contract, but has neglected to finish the said contract [state what he has neglected]; and that although the

time for the completion of the said building expired before commencement of this action, he neglects and refuses to complete the same.

IV. That the plaintiff, on the . . . day of . . ., 19.., at . . ., made an agreement with one A. B., whereby he agreed to let, and said A. B. agreed to hire, the said building for . . . months, from the . . . day of . . ., 19.., to the . . . day of . . ., 19.., at the monthly rent of . . . dollars, of which the defendant had notice.

V. That by reason of the defendant's failure to complete the contract aforesaid on his part, the plaintiff has been unable to give said A. B. occupancy thereof, and has been thereby deprived of the profits of said lease, to his damage in the sum of . . . dollars, gold coin.

[DEMAND OF JUDGMENT.]

[Annex agreement marked "Exhibit A."]

§ 5663. Answer—Work not finished, and architect's certificate not obtained.

Form No. 1614.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the said work was not completed in a good and workmanlike manner on or before the day limited therefor, in the contract set forth in the complaint; but on the contrary, the said work on that day, and from thence to the commencement of this action, was, and still is, incomplete and unfinished.

II. That no certificate from the said architect that the said work had been completed to his satisfaction was obtained by the plaintiff before this action.

CHAPTER CXXXIII.

ON CHARTER-PARTIES.

§ 5664. Charter-party defined.—A charter-party is a contract by which the owner lets his vessel to another for freight.[1] Any contract founded on an illegal voyage partakes of the character of that voyage, and stands or falls with it.[2]

§ 5665. Measure of damages. — The measure of damages against a charterer who refuses to furnish a cargo according to his contract is the stipulated price, deducting the net earnings of the vessel during the time she has been occupied on the voyage, at an average passage, and including the lay days.[3] If the freighter only partially fulfills his contract, the owner may recover for the dead freight his contract price; but the owner is bound to take other freight if offered, though at a less price, and can recover only the difference in price.[4]

§ 5666. Demurrage, damages for.—Although demurrage, properly so called, is only payable when it has been stipulated, yet if a vessel is improperly detained, the owner may have a special action for the damage.[5] It is the duty of the charterers to restore the ship at the end of the period allowed for the demurrage, but they are not responsible for an unreasonable delay by the master.[6] And one who purchases goods arriving in bond is not liable for demurrage of the vessel for the detention occurring before the seller obtains a legal permit for the delivery.[7] No demurrage can be recovered by an owner for a detention occasioned either by the misconduct of the master, for which the owner alone was

1 Spring v. Gray's Exrs., 6 Pet. 151, 164, 8 L. Ed. 352.

2 Colquhoun v. New York Fireman's Ins. Co., 15 Johns. 352.

3 Ashburner v. Balchen, 7 N. Y. 262. See Watts v. Camors, 10 Fed. 145, 115 U. S. 353, 29 L. Ed. 406, 6 Sup. Ct. Rep. 91; Johnson v. Meeker, 96 N. Y. 93, 48 Am. Rep. 609.

4 Abbott on Shipping, 428; Heckscher v. McCrea, 24 Wend. 304.

5 Abbott on Shipping, 304; Clendaniel v. Tuckerman, 17 Barb. 184.

6 Robbins v. Codman, 4 E. D. Smith, 315.

7 Gillespie v. Durand, 3 E. D. Smith, 531.

answerable, or to avoid danger, and not by any misconduct or any breach of covenant by the charterer.[8]

§ 5667. **Distinction between contracts of hiring and affreightment.**—An agreement to hire a vessel in any legal trade for a specified period, with covenants for her seaworthiness, and that the hirer should pay by the time, and not by the carrying of goods on the voyage, is a hiring of the vessel, and not a contract of freight.[9]

§ 5668. **Duties of master.**—Where a charter-party allows a charterer a number of lay days, and neither the consignees nor other persons receive the cargo or pay the freight after arrival at the port of destination, the master, acting as sole agent on behalf of both charterer and owner, is bound to sell the cargo and pay the freight, on expiration of the lay days, but he is not bound to sell before the expiration of the lay days.[10]

§ 5669. **Interpretation of contract.**—Charter-parties are construed as other contracts. The true intention of the parties must prevail.[11] After having opportunity to learn the condition of a vessel, there being no misrepresentations, the charterer cannot contend that the vessel was not what he supposed it to be.[12] In the construction of charter-parties it must be remembered that they are often informal, and must have a liberal construction, in furtherance of the real intention of the parties and the usage of the trade.[13] And though the owner of a ship of which the charterer is freighter only has a lien upon the cargo for freight, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as waived, without express words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of the lien, or when it can fairly be

8 Hooe v. Groverman, 1 Cranch, 214, 2 L. Ed. 86.

9 Winter v. Simonton, 3 Cranch C. C. 104, Fed. Cas. No. 17894. See, also, Donahoe v. Kettell, 1 Cliff. 135, Fed. Cas. No. 3980; Husten v. Richards, 44 Me. 182.

10 Robbins v. Codman, 4 E. D. Smith, 315.

11 Grimberg v. Columbia Packer's Assoc., 47 Or. 257, 114 Am. St. Rep. 927, 83 Pac. 194.

12 Andrews v. San Juan Fish Co., 46 Wash. 481, 90 Pac. 643.

13 Abbott on Shipping (Story's ed.), 188; 3 Kent Com. 201 et seq.; Ruggles v. Bucknor, 1 Paine, 358, Fed. Cas. No. 12115; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16991; Certain Log of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2559; Gracie v. Palmer, 8 Wheat. 605, 634, 5 L. Ed. 696; Raymond v. Tyson, 17 How. 53, 15 L. Ed. 47; The Progreso, 50 Fed.

inferred that the owner meant to trust to the personal responsibility of the charterer.[14]

§ 5670. Mode of stowage.—Where no mode of stowage is prescribed in the charter-party, the usage of trade will obtain, and the owner will not be liable for damages resulting therefrom.[15]

§ 5671. Lay days.—Under a charter-party, the lay days of a vessel, by the general rule, commenced to run from the time the vessel enters the dock.[16] Where the delivery by the terms of the charter-party was to be made "alongside of the plaintiff's vessel, within reach of her tackles," it was held that if the master was directed to take the vessel to a certain dock, and did so, the lay days commenced to run from the day she was taken there, and was in readiness alongside the dock to receive her cargo. A charter-party provided for lay days as follows: To load twenty days from the twelfth instant, the owner guaranteeing to have the vessel ready by that time; and by a subsequent stipulation the charter-party was to commence when the vessel was to receive cargo, and notice thereof should be given to the charterer. The readiness of the vessel at the day named was a condition precedent to the charterer's liability to accept and employ her, and the charter-party commences on notice that the vessel is ready to receive the cargo.[17] Where no lay days are provided in the charter-party or bill of lading, and there is no express stipulation as to the time of unloading, the consignee is not liable for delays occurring without his fault.[18]

§ 5672. Liability of charterer.—Where by the terms of the charter-party the charterer was to return the boats "in as good

835, 2 C. C. A. 45; The B. F. Bruce, 50 Fed. 118.

14 Ruggles v. Bucknor, 1 Paine, 363, Fed. Cas. No. 12115; Chandler v. Belden, 18 Johns. 157, 162, 9 Am. Dec. 193; Abbott on Shipping, 178; Lucas v. Nackells, 4 Bing. 729; Cowell v. Simpson, 16 Ves. 275; Chase v. Westmore, 5 Mau. & Sel. 180; Crawshay v. Hamfray, 4 Barn. & Ald. 52; Raymond v. Tyson, 17 How. 53, 15 L. Ed. 47. As to the construction of charter-parties in peculiar cases, see Ogden v. Parsons, Fed. Cas. No. 10781, 37 Hunt's Merchant's Mag. (Dec. 1857), 710; Belmont v. Tyson, 3 Blatchf. 530, Fed. Cas. No. 1281; Freeman v. Cargo of Salt, 40 Hunt's Merchant's Mag. (April, 1859), 457, Fed. Cas. No. 2406.

15 Lamb v. Parkman, Sprague, 343, Fed. Cas. No. 8020.

16 1 Parsons on Maritime Law, 262; Rowe v. Smith, 10 Bosw. 268.

17 Weisser v. Maitland, 3 Sandf. 318.

18 The Glover, 1 Brown Adm. 166, Fed. Cas. No. 5488.

condition as they now are, with the exception of the ordinary use and wear," he is not liable as an insurer against the perils of the sea or risks of navigation.[19]

§ 5673. Negligence, liability for.—If persons charter a steamboat generally, they are owners, in respect to liability for negligence in running her. If the contract is one of affreightment merely, they are not such owners.[20]

§ 5674. Owner for voyage.—It is presumed that a charter-party is a contract of affreightment, unless its terms show a clear intention to make a demise to the charterer.[21] But if by the terms of the charter-party the charterers are to have exclusive possession, control, and management of the vessel, appoint the master, run the vessel, and receive the entire profits, they are the owners, and are alone responsible for damages and contracts.[22] Leaving the vessel in charge of a master employed by the owners, who furnish a full complement of men, provisions, and the expense of loading freight, is not a demise of the vessel, and the charterer is not liable for the acts of the officers and crew in the management of the vessel.[23] The charterers' right of possession may be lost by a voluntary surrender to the owners.[24]

§ 5675. Power of master.—The master of the vessel may make a charter-party, where the owner has no agent in a foreign port, for the benefit of the owner, but not to give a creditor of the owner a security of the debt due to him.[25]

19 Story on Bailments, § 35; Broom's Leg. Max. 217; Ames v. Belden, 17 Barb. 514.

20 Sherman v. Fream, 30 Barb. 478.

21 Grimberg v. Columbia Packer's Assoc., 47 Or. 257, 114 Am. St. Rep. 927, 83 Pac. 194.

22 Gracie v. Palmer, 8 Wheat. 632, 5 L. Ed. 696; Marcardier v. Chesapeake Ins. Co., 8 Cranch. 39, 3 L. Ed. 481; Abbott on Shipping (Eng. ed.) 57, note 1, 288, 289; The Volunteer, 1 Sumn. 566, 567, Fed. Cas. No. 16991; Kleine v. Catara, 2 Gall. 75, Fed. Cas. No. 7869; Hill v. The Golden Gate, 1 Newb. 308, Fed. Cas. No. 6492; Winter v. Simonton, 3 Cranch C. C. 104, Fed. Cas. No. 17894. As to a charter-party examined, and held not to have had the effect of transferring the ownership and possession from the general owners, see Clarkson v. Edes, 4 Cow. 470; Mactagger v. Henry, 3 E. D. Smith, 390; Holmes v. Pavenstedt, 5 Sandf. 97.

23 Multnomah County v. Willamette Towing Co., 49 Or. 204, 89 Pac. 389.

24 Bergen v. Tamined, 40 Hunt's Merchants' Mag. 708, Fed. Cas. No. 1339.

25 Hurry v. Hurry, 2 Wash. C. C. 145, Fed. Cas. No. 6922.

§ 5676. **Refusal to overload.**—Although the charter-party lets the entire capacity of the vessel, if the goods put on board are heavy articles, and before the ship is full, sink her as low as is usual and proper without extra danger, the owners or master of the vessel do not, by refusal to take more, violate the charter-party.[26]

§ 5677. **Repairs of vessel.**—A breach of a clause in the charter-party, binding the charterer to keep the vessel in repairs, should be alleged in the complaint in an action by owners of a vessel against the charterer.[27]

§ 5678. **Rescission.**—Where two persons chartered a vessel for six months, and after a part of the time had passed, the owner agreed with one of the charterers, in writing, that the charter-party was to be deemed to have expired, it was held a valid rescission of the contract.[28]

§ 5679. **Assignment of contract of charter-party.**—If the covenants of the charter and contract are such that another can perform them as well, the charter and contract are transferable without the consent of the owners of the vessel.[29]

§ 5680. **Running days.**—A provision in the charter-party for running days is in effect a positive stipulation by the freighter that he will load and unload within the time mentioned, and inevitable accident does not excuse him.[30]

§ 5681. **Assent of charterer.**—Where a chartered vessel met another vessel in distress in the course of her voyage, and one of the charterers, being on board, consented that a part of the crew might go on board the distressed vessel to assist in saving her, the assent of the charterer would not vary the contract respecting the freight.[31]

§ 5682. **Deviation.**—On a voyage from South America to Boston, stopping at New York may be such a deviation as would

26 Weston v. Minot, 3 Woodb. & M. 437, Fed. Cas. No. 17453.

27 Coster v. New York etc. R. R. Co., 3 Abb. Pr. 332.

28 Wheeler v. Curtis, 11 Wend. 653.

29 Frese v. Moore, 1 Cal. App. 587, 82 Pac. 542.

30 Field v. Chase, Hill & D. Supp. 50.

31 Mason v. Blaireau, 2 Cranch, 240, 2 L. Ed. 266.

render the charterer liable for damage it might occasion. Yet it is not such a change as will dissolve the charter-party and entitle the owner to possession at New York, and to retain cargo for freight, though the charterer has become insolvent.[32] Where defendant chartered a vessel for three trips between certain ports, and the charterer directed the vessel on one of the trips to discharge at an intermediate port without the owner's consent, the owner was entitled to recover the freight the vessel would have earned under the charter-party if she had sailed to the port designated therein.[33]

§ 5683. **Negative allegations.**—If there are exceptions in the charter-party, allegations tending to negative the same are not necessary.[34]

§ 5684. **Allegation of a charter.**—The plaintiffs alleged in their complaint that their assignors, having chartered a vessel, earned freight, which the defendants, the consignees of the vessel, had collected and refused to pay over. The defendants, in their answer, denied that the plaintiffs' assignor had chartered the vessel in any other way than by a charter-party, which provided that their right to any share of the freight should be contingent on the freight exceeding twenty-five thousand dollars. It was held that this put in issue plaintiffs' allegation of a charter, and that plaintiffs must prove either an unconditional charter or that under the charter alleged by defendants the freight had exceeded twenty-five thousand dollars.[35]

§ 5685. **Lien for freight.**—The right of lien for freight does not absolutely depend on any covenant to pay freight on the delivery of the cargo.[36] Nor can charterers, with the consent of the master abroad, make any agreement exonerating the goods from freight and defeating the lien of the owners.[37] Nor can the master enter into such agreement; and such agreements would

32 Lander v. Clark, 1 Hall, 394; Manha v. Union Fertilizer Co., 151 Cal. 581, 91 Pac. 393.

33 Johnson v. D. H. Bibb Lumber Co., 140 Cal. 95, 73 Pac. 730.

34 Wheeler v. Bavidge, 9 Exch. 668, 2 Com. L. R. 1077.

35 Patrick v. Metcalf, 9 Bosw. 483.

36 Abbott on Shipping, pt. 3, ch. 1, § 7, p. 177; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16991.

37 Gracie v. Palmer, 8 Wheat. 605, 5 L. Ed. 696; reversing Palmer v. Gracie, 4 Wash. C. C. 110, Fed. Cas. No. 10692.

give no rights to a person who entered into them with the knowledge of the charter-party.[38] But the master, notwithstanding the interference of the charterer, may retain the goods until his lien shall be satisfied, or may sue the consignee after delivery of the goods.[39]

§ 5686. **Sale of cargo.**—Where owners of a cargo did not appear, and the master put up at auction and sold the cargo on due notice, and became the purchaser, but retained the goods on the vessel awaiting a higher price, he had no right thus to constitute the ship a storehouse, and the charterer was not liable for demurrage beyond a reasonable time for discharging after the first sale.[40]

§ 5687. **Detention occasioned by misconduct.**—No demurrage can be recovered by an owner for a detention occasioned either by the misconduct of the master, for which the owner alone was answerable, or to avoid danger, and not by any misconduct or any breach of covenant by the charterer.[41]

§ 5688. **Mortgage of vessel.**—A mortgage of any vessel or part of any vessel under the flag of the United States is void as to innocent third parties, unless the mortgage is recorded in the office of the collector of customs where such vessel is registered or enrolled.[42] The owner of the ship may hypothecate it or its freightage, upon bottomry, for any lawful purpose, and at any time and place;[43] but the master of the ship may do so only for the purpose of securing repairs or supplies necessary to the voyage or safety of the ship.[44] The loan becomes due immediately upon termination of the risk.[45] Between two or more bottomry liens, the latter in date, created out of necessity, has priority, but all are subservient to the lien for seaman's wages, and subsequent mechanics', materialmen's, and salvage liens.[46]

38 The Salem's Cargo, 1 Sprague, 389, Fed. Cas. No. 12248.

39 Gracie v. Palmer, 8 Wheat. 605, 5 L. Ed. 696; 3 Kent (3d ed.), 138, 210, 220; Abbott on Shipping, 286-288; Smith on Mercantile Law, 187; Shaw v. Thompson, Olcott, 144, Fed. Cas. No. 12726.

40 Robbins v. Codman, 4 E. D. Smith, 315.

41 Hooe v. Groverman, 1 Cranch, 214, 2 L. Ed. 86.

42 Cal. Civ. Code, § 2958.

43 Cal. Civ. Code, § 3018.

44 Cal. Civ. Code, §§ 3019, 3021.

45 Cal. Civ. Code, § 3026.

46 Cal. Civ. Code, §§ 3028, 3029.

FORMS—ACTIONS ON CHARTER-PARTIES.

§ 5689. Complaint of owner against freighter for not loading.

Form No. 1615.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant entered into an agreement, a copy of which is hereto annexed, marked Exhibit A, and by this reference made a part hereof.

[Or, I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship "Flying Scud," at . . ., on the . . . day of . . ., 19.., four hundred and fifty tons of wheat which she should carry to London, England, and there deliver on payment of four thousand dollars freight; and that the defendant should have ten days for loading, five days for discharge, and three days for demurrage, if required, at fifty dollars per day.]

II. That at the time fixed by the said agreement the plaintiff was ready and willing and offered to receive the said merchandise [or, the merchandise mentioned in the said agreement] from the defendant.

III. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

Wherefore, the plaintiff demands judgment for . . . dollars for demurrage, and . . . dollars additional for damages.

§ 5690. Demurrage, allegation for.

Form No. 1616.

That the defendant detained the ship . . . days beyond the periods so agreed on for loading, discharging, demurrage, as aforesaid, whereby the plaintiff, during all that time, was deprived of the use of the ship, and incurred . . . dollars expense in keeping the same and maintaining the crew thereof.

§ 5691. Complaint of charterer against owner, for deviation from contract, and abandonment of voyage.

Form No. 1617.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant agreed, by charter-party, that the defendant's ship, called the . . ., then at . . ., should sail to . . ., or so near there as she could safely get, with all convenient speed, and there load a full cargo of . . ., or other lawful merchandise, from the factors of the plaintiff, and carry the same to . . ., and there deliver the same, on payment of freight.

II. That the plaintiff duly performed all the conditions of the contract on his part.

III. That the said ship, the . . ., did not, with all convenient speed, sail to . . ., or so near thereto as she could safely get; but that the defendant caused the said ship to deviate from her said voyage, and abandon the same, to the plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5692. Complaint of shipowner against charterer for freight.

Form No. 1618.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., the plaintiff and defendant agreed, by charter-party, that the plaintiff's ship, called . . ., should, with all convenient speed, sail to . . ., and that the defendant should there load her with a full cargo of . . ., or other lawful merchandise, to be carried to . . ., and there delivered, on payment by the defendant to the plaintiff of freight, at . . . dollars per ton.

II. That the said ship accordingly sailed to . . ., aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to . . . aforesaid, and there delivered the same to the defendant, and otherwise performed all the conditions of said contract on his part.

III. That said freight amounted in the whole to the sum of . . . dollars.

IV. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 5693. Allegation against assignee of cargo.

Form No. 1619.

That thereafter the said A. B. assigned the cargo to the defendant, who thereupon became the owner thereof and entitled to receive the same.

CHAPTER CXXXIV.

PROMISE OF MARRIAGE.

§ 5694. When action lies—Necessary averments.—Marriage is a consideration as valuable as money, if *bona fide*.[1] And the action on the promise to marry is sustainable only when the contract is mutual.[2] And though one of the parties be an infant, the contract is binding on the other.[3] But an executor cannot sue.[4] A man may maintain an action for breach of promise to marry.[5] But an action for breach of promise of marriage will not be made to survive by proof that the promisee had a child, born out of wedlock, now living, and that the defendant is the father of said child.[6] Deceit and injury are presumed from the breach, and need not be alleged.[7] Where the promise is special, as "after the death of the defendant's father," it should be so declared on, with proper averments.[8] But it is not necessary that the time of marriage should be specified.[9] But if the promise was to marry on a particular day, it should be so stated.[10] A positive refusal to marry is such a breach of the contract as will sustain an action, although made before the time fixed for performance.[11] The complaint in an action for breach of promise, alleging that defendant on a certain day refused to marry plaintiff, and that up to and including that day plaintiff was ready and willing to marry him, and he continued to refuse up to the time of filing the complaint, is sufficient, though not alleging plain-

1 Magniac v. Thompson, 1 Baldw. 344, Fed. Cas. No. 8956.

2 1 Roll. Abr. 2215; Wells v. Padgett, 8 Barb. 323; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130.

3 Holt v. Clareucieux, 2 Stra. 937; Bac. Abr., Infant; Willard v. Stone, 7 Cow. 22, 17 Am. Dec. 496. See Leichtweiss v. Treskow, 21 Hun, 487; Frost v. Vought, 37 Mich. 65.

4 Chamberlain's Admr. v. Williamson, 2 Mau. & Sel. 408. That an action will not lie against the personal representative of the promisor, see Grubb v. Sult, 32 Gratt. 203, 34 Am. Rep. 765.

5 Harrison v. Cage, 1 Ld. Raym. 386.

6 Hovey v. Page, 55 Me. 142.

7 Leopold v. Poppenheimer, 3 Code Rep. 39.

8 2 Peake, 103; 2 Chitty on Contracts, (11th Am. ed.) 791.

9 Carth. 467.

10 Hoppe v. Symonds, 2 Chit. 324. See Phillips v. Crutchley, 7 id. 409; The King v. Woolf, 1 Moo. & P. 239.

11 Kennedy v. Rogers, 2 Kan. App. 764, 44 Pac. 47.

tiff was ready and willing to marry defendant up to the filing of the complaint.[12]

§ 5695. **Evidence of promise.**—Positive proof of request and refusal is never required; but they may be inferred from circumstances, and the request may be made by the father or other friend, whose authority may be inferred from existing relations.[13] The plaintiff must, however, aver a special request or an offer to perform. A bare allegation of readiness and willingness is not sufficient.[14] In action for breach of contract to marry, evidence in corroboration of direct testimony of an express contract is admissible, including a previous contract of marriage.[15] In an action for breach of promise of marriage, the declarations of the defendant that he would make a good home for the plaintiff, made at the time, and as part of his conversations with the plaintiff, which are declared on as establishing the promise of marriage, are admissible in connection with the other conversations, as tending to prove the contract.[16]

§ 5696. **Evidence of promise—Continued.**—In an action for breach of marriage promise, evidence that after the action was begun defendant offered to marry plaintiff was inadmissible.[17] In an action for breach of marriage promise, evidence that plaintiff maintained her home with her mother and stepfather, that her stepfather was a drunkard, and when under the influence of liquor abused her; that her home surroundings, for that reason, were not agreeable, and that defendant knew such facts at the time of the contract of marriage, was admissible.[18]

§ 5697. **Promise, when void.**—An agreement by a man to marry when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy, and void.[19] No action can be maintained for a breach of promise of

12 Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466.

13 Prescott v. Guyler, 32 Ill. 312; Hotchkins v. Hodge, 38 Barb. 117; Cole v. Holliday, 4 Mo. App. 94; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130.

14 Martin v. Patton, 1 Littell (Ky.) 234; Greenup v. Stoker, 3 Gilm. (Ill.) 212.

15 Parrish v. Parrish, 67 Kan. 323, 72 Pac. 844.

16 Button v. McCauley, 5 Abb. Pr. (N. S.) 29.

17 Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769.

18 Id.

19 Leaman v. Thompson, 43 Wash. 579, 86 Pac. 926; Noice v. Brown, 38 N. J. L. 228, 20 Am. Rep. 388, 39 N. J. L. 133, 23 Am. Rep. 213.

marriage made in consideration of illicit sexual intercourse between the parties.[20] Where there are statutes for the prevention of the spread of consumption, a promise of marriage to a consumptive may be avoided upon the grounds that the contract is contrary to public policy.[21]

§ 5698. **Promise after seduction.**—A promise of marriage made after seduction has been effected, and in consequence thereof, is not thereby rendered invalid. It is not liable to the objection that it encourages immorality, because the wrong has been already perpetrated;[22] and where a seduction is accomplished by means of a promise of marriage on the part of the seducer, a consent of the female to marry the seducer, amounting to a mutual promise on her part to marry, may be implied.[23]

§ 5699. **Damages.**—Damages for pecuniary loss may be recovered, as for loss of time in preparing for marriage;[24] as well as for suffering and injury to prospects in life;[25] and seduction will aggravate the breach.[26] Special damages for impaired health may be alleged and proved, if resulting from the breach.[27] Whatever damages the plaintiff may have suffered in consequence of the defendant's refusal to marry her, she is legitimately entitled to recover; and these damages are to be estimated from the circumstances of the parties, and the situation in which the plaintiff is left by the defendant's refusal to perform his contract.[28] Seduction under promise of marriage may be proved in aggravation of the damages sustained,[29] or as an element of punitive damages,[30] even though she have a separate action for

20 Steinfeld v. Levy, 16 Abb. Pr. (N. S.) 26; Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Boigneres v. Boulon, 54 Cal. 146; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Burke v. Shaver, 92 Va. 345, 23 S. E. 749.

21 Grover v. Zook, 44 Wash. 489, 120 Am. St. Rep. 1012, 87 Pac. 638, 7 L. R. A. (N. S.) 582.

22 Hotchkins v. Hodge, 38 Barb. 117.

23 People v. Kenyon, 5 Park. Cr. 254.

24 Smith v. Sherman, 4 Cush. 408.

25 1 Parsons on Contracts, 543.

26 Wells v. Padgett, 8 Barb. 323; Leavitt v. Cutler, 37 Wis. 46.

27 Bedell v. Powell, 13 Barb. 183.

28 Tubbs v. Van Kleek, 12 Ill. 449. See, also, Mabin v. Webster, 129 Ind. 430, 28 Am. St. Rep. 199, 28 N. E. 863; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788.

29 Sramek v. Sklenar, 73 Kan. 450, 85 Pac. 566.

30 Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441.

her seduction.[31] The interposition of the defense that the character of the plaintiff is unchaste, even if unsuccessful, ought not, *per se,* to aggravate the damages, unless it is interposed in bad faith, from malice, wantonness, or recklessness.[32]

§ 5700. **Married man liable.**—A single woman to whom a man in fact married represents that he is single, and promises marriage, may maintain an action against him for his breach of promise.[33]

§ 5701. **Request.**—In case of the marriage of defendant, a request need not be alleged.[34] The averment of marriage dispenses with request.[35]

§ 5702. **Statute of frauds.**—A parol contract of marriage that may be performed at any time within three years, and consequently within one year, is not within the Indiana statute of frauds; but if not to be performed within one year, it is within the statute.[36]

§ 5703. **Statute of limitations.**—Limitations run against an action for breach of promise from the time of the breach, not from the time of the contract.[37] The objection that, under section 61 of the California Civil Code, making a marriage illegal and void when contracted by one within a year after divorce, plaintiff in an action for breach of promise was incapable of entering into the contract within a year after her divorce, is untenable, there being no contract to marry within the year, the engagement lasting till after expiration of the year, and so being ratified after expiration of the year, and the breach being after that.[38]

31 Cal. Code Civ. Proc., § 374.

32 Powers v. Wheatley, 45 Cal. 113. See Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Dunlap v. Clark, 25 Ill. App. 573.

33 Wild v. Harris, 7 C. B. 999, 1 E. L. & E. 408; Blattmacher v. Saal, 29 Barb. 22, 7 Abb. Pr. 409.

34 1 Parsons on Contracts, 544; Short v. Stone, 8 Q. B. 358; Stevenson v. Pettis, 12 Phila. 468; Cammerer v. Muller, 14 N. Y. Supp. 511; Caines v. Smith, 15 Mees. & W. 189. Compare Lovelock v. Franklyn, 8 Q. B. 371; Turner v. Baskin, 2 West. Law Month. 98.

35 Short v. Stone, supra; Kerns v. Hagenbuchle, 17 N. Y. Supp. 367.

36 Paris v. Strong, 51 Ind. 339.

37 Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466.

38 Id.

§ 5704. **Defense—Misconduct.**—A special misconduct on the part of the plaintiff, when relied upon as a defense, must be pleaded.[39] Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of chastity.[40] But if this defense is not established by proof upon the trial, it should be considered by the jury in aggravation of damages.[41] Proof of plaintiff's unchastity is admissible under a general denial.[42] Seduction, if alleged in the complaint, may be shown to enhance damages, but not otherwise.[43]

§ 5705. **Other defenses.**—An agreement by a man to marry when a divorce should be decreed between himself and his wife in a suit then pending is contrary to public policy and void.[44] A man may show in defense to a suit for breach of promise of marriage that he was afflicted with an incurable disease.[45] The rescission of the contract is a proper defense to be pleaded to the action.[46] And infancy, when pleaded, is a valid defense to the action.[47]

FORMS—BREACH OF PROMISE OF MARRIAGE.

§ 5706. Complaint for refusal to marry.

Form No. 1620.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore, to-wit, on the . . . day of . . ., 19.., at . . ., in consideration that the plaintiff, being then sole and unmarried, at the request of the said defendant, had then promised the said defendant to marry him, the said defendant, on request, the defendant promised to marry the plaintiff within a

39 Button v. McAuley, 38 Barb. 413.

40 Cal. Civ. Code, § 62.

41 Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561. See, also, as to this defense, Von Storch v. Griffin, 77 Pa. St. 505.

42 Smith v. Braun, 37 La. Ann. 225.

43 Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768.

44 Noice v. Brown, 38 N. J. L. 228, 20 Am. Rep. 388.

45 Sprague v. Craig, 51 Ill. 288; Shackleford v. Hamilton, 93 Ky. 80, 40 Am. St. Rep. 166, 19 S. W. 5, 15 L. R. A. 531; Gulick v. Gulick, 41 N. J. L. 13.

46 Mabin v. Webster, 129 Ind. 430, 28 Am. St. Rep. 199, 28 N. E. 863.

47 Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

reasonable time [or if a time certain was agreed upon, state the time].

II. That the plaintiff, confiding in said promise, has always since remained and continued, and still is, sole and unmarried, and has been for and during the time aforesaid, and now is, ready and willing to marry the defendant.

III. That the defendant refuses to marry the plaintiff, although a reasonable time elapsed before this action [or, although she, on the . . . day of . . ., 19.., requested him so to do] to her damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5707. Complaint for marriage with another.

Form No. 1621.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [Same as preceding form].

III. That the defendant afterwards married a certain other person, to-wit, one A. B., contrary to his said promise to the plaintiff.

[Or, III, That at the time of making said promise the defendant represented to the plaintiff that he was unmarried, whereas, in fact, he was then married to another person, of which fact the plaintiff had no notice.]

[DEMAND OF JUDGMENT.]

§ 5708. Denial of promise.

Form No. 1622.

[TITLE.]

The defendant answers to the complaint, and alleges:

That he never promised to marry the plaintiff.

§ 5709. Denial of plaintiff's readiness and offer to marry.

Form No. 1623.

[TITLE.]

The defendant answers to the complaint, and denies:

That the plaintiff has been ready or willing to marry the defendant, or that she ever did offer to marry him as alleged, or at all.

§ 5710. Denial of breach.

Form No. 1624.

[TITLE.]

The defendant answers to the complaint, and denies:

That the defendant has refused to marry the plaintiff, but avers that on the . . . day of . . ., 19.., and ever since, he has been ready and willing to marry her, but at the date above mentioned, and at all times since then, the plaintiff has refused to marry this defendant.

§ 5711. Allegation that plaintiff was of bad character.

Form No. 1625.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time mentioned as the time of said supposed promise the plaintiff was unchaste.

II. That defendant was ignorant thereof at that time.

III. That upon being informed thereof, he refused to marry the plaintiff.

§ 5712. The same—Another form.

Form No. 1626.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time mentioned as the time of said supposed promise, and on the . . . day of . . ., 19.., at . . ., the plaintiff, without the connivance of the defendant, had carnal connection with one C. D.

II. That upon being informed thereof, he refused to marry the plaintiff.

JUN 23 1953

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